JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **2000-10-17-021 / NOT PRECEDENTIAL**
ID: **P9900286**
DATE: **10-17-00**
DISPOSITION: **DENIED**
TAX TYPE: **ESTATE**
APPEAL: **OK SUP CT 95,500 / REVERSED AND REMANDED**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. ("Decedent") died May 24, 1998, a resident of AN ANONYMOUS County, State of Oklahoma.

2. An Oklahoma Estate Tax return was filed by Protestant on November 10, 1998.

3. On August 20, 1999, the Division issued an assessment of additional estate tax and interest in the aggregate amount of $23,046.00.

4. The assessment resulted from the Division's inclusion in the net taxable estate, the omitted value of the DECEDENT Trust ("Trust").

5. Protestant paid the amount due, under protest, and an order releasing taxable estate was issued on September 10, 1999.

6. On August 30, 1993, Decedent executed the Trust. Pursuant to the terms of the Trust:

a. The Trust was irrevocable.
b. The trustor was: DECEDENT
c. The trustees were: DECEDENT, HEIR "1", and HEIR "2".
d. The heirs at law of the trustor were: HEIR "1" and HEIR "2".
e. The Trust terminated on the death of Decedent.
f. Paragraph 6 of the Trust provides:

> The Trustor directs that the Trustees pay to the Trustor, or the heirs at law of the Trustor, during the life of this Trust such amounts from both the income and the principal of the trust estate that are in the sole discretion of the Trustees necessary for the maintenance of health, comfort, and welfare of the Trustor, and the heirs at law of the Trustor.

Pursuant to paragraph 6, the following were income beneficiaries:

Decedent
HEIR "1"
HEIR "2"

Pursuant to paragraph 6, the following were principal beneficiaries:

Decedent
HEIR "1"
HEIR "2"

g. Pursuant to Exhibit "A" of the Trust, the following were vested remaindermen, subject to being divested, receiving property from the Trust if they were alive at the time of distribution:

HEIR "1"
HEIR "2"

h. If HEIR "1" or HEIR "2" had died prior to the distribution, pursuant to Exhibit "A" of the Trust, the following were contingent remaindermen receiving property by right of representation:

The heirs of HEIR "1"
The heirs of HEIR "2"

i. If HEIR "1" and HEIR "2" had died prior to the distribution and neither left heirs, pursuant to Exhibit "A" of the Trust, no one would receive distribution of property. By operation of law, the following was a contingent remainderman:

The Estate of DECEDENT

7. Decedent filed a Federal Gift Tax return for calendar year 1994. The value of the assets, $260,400.00, transferred to the Trust was included on this return. Seventy-four Thousand Three Hundred Thirty-six Dollars ($74,336.00) of the unified credit was used.

8. The Federal Estate Tax return filed by Protestant listed total assets of $1,477,632.00, total allowable deductions of $123,550.00 and a taxable estate of $1,354,082.00. Gifts made by the Decedent after December 31, 1976, in the amount of $312,400.00, were added to the taxable estate, and Federal estate taxes of $373,606.00 were paid on the net taxable estate of $1,666,482.00.

9. The Division stipulates that the Trust is irrevocable.

ISSUES AND CONTENTIONS

Two issues are presented for decision. The first issue is whether the inclusion of the value of the Trust in the net taxable estate is erroneous. The second issue is whether the Division may advance a theory different from that advance at the time of the assessment for purposes of including the value of the Trust in the net taxable estate.

Protestant contends that the Trust is irrevocable under Oklahoma law and, therefore,

the inclusion of the value of the Trust in the net taxable estate is erroneous. Protestant further contends that the Division should be precluded from advancing an alternative theory for the taxation of the Trust. In support of this contention, Protestant argues that the alternative theory was untimely offered and to allow such practice is unfair.

The Division contends that notwithstanding whether the Trust is revocable or irrevocable, two (2) provisions of the Oklahoma Estate Tax Code permit the inclusion of the value of the Trust in the net taxable estate; namely, general powers of appointment, 68 O.S. 1991, §807(A)(9); and contingent interests, 68 O.S. 1991, §807(A)(1).

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. The value of any interest in property over which the decedent at the time of his death had possessed a general power of appointment is includable in the gross estate of the decedent. 68 O.S. 1991, § 807(A)(9).

3. A general power of appointment is one which is exercisable in favor of the decedent, the estate of the decedent, creditors of the decedent, and creditors of the estate of the decedent. *Id.*

4. Here, Decedent at the time of his death possessed a general power of appointment over the income and principal of the Trust. Therefore, the value of the Trust is includable in Decedent's gross estate.

5. An assessment of tax shall be sustained as long as there is statutory authority therefor and substantial evidence in support thereof. ***Dugger v. Oklahoma Tax Commission***, 1992 OK 105, 834 P.2d 964; ***El Paso Natural Gas Co. v. Oklahoma Tax Commission***, 1996 OK CIV APP 69, 929 P.2d 1002.

6. Protestant's protest should be denied.

DISPOSITION

Based on the above and foregoing, it WAS DETERMINED that the protest of Protestant, Estate of DECEDENT, be denied.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was **NOT** deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.