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Exploring Some of the Conceptual Changes behind the Estate and Gift Tax Provisions of the Tax Reform Act of 1976

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EXPLORING SOME OF THE CONCEPTUAL CHANGES BEHIND THE ESTATE AND GIFT TAX PROVISIONS OF THE TAX REFORM ACT OF 1976

*by Ronald S. Senzaki**

I. INTRODUCTION

The Tax Reform Act of 1976 (the Act)[1] is appropriately titled, at least with respect to the federal estate and gift tax laws, and has been described as "without doubt, the most sweeping tax measure to clear Congress since the Internal Revenue Code of 1954."[2]

The many substantive changes contained in the Act will have a profound effect upon estate planning by individuals. There will undoubtedly be much written concerning both the overall effect of the Act and about specific provisions thereof.[3] In the process of attempting to understand and cope with these substantive changes, it might be possible to overlook the fact that there were major conceptual changes underlying the substantive provisions of the Act. Some of these doctrinal changes were the result of much debate and selected from many alternate changes. It has been said that the Act was the first major revision of the estate and gift tax laws since 1942,[4] and the adoption of new conceptual underpinnings contributed much toward this end. Whether further major reform will await the passing of another thirty-four years cannot be predicted with any degree of certainty. However,

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1. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520.

2. CCH EDITORIAL STAFF, *preface to* TAX REFORM ACT OF 1976: LAW AND EXPLANATION (1976).

3. This task has already begun. *See, e.g.*, Abbin, Daskal & Carlsum, *Robin Hood Rides Again—Estate Planners Beware of 1976 Tax Reform Act*, 54 TAXES 732 (1976); Johnson, *The Effect of the 1976 Federal Estate and Gift Tax Changes on Estate Planning Objectives*, 1976 S. ILL. U.L.J. 299; Polisher, Kapustin & Aaron, *Federal Estate and Gift Tax Reform Act of 1976 and Estate Planning Implications*, 81 DICK. L. REV. 417 (1977).

4. 122 CONG. REC. H10,273 (daily ed. Sept. 16, 1976) (remarks of Rep. Sebelius), *reprinted in* 2 TAX MNGM'T (BNA) (ser. II) §1023 [1976] at 34 [hereinafter cited as TAX MNGM'T].

examination and review of the Act in relation to the goals and failings of the conceptual changes embodied or rejected by it will almost certainly be made from time to time. This article examines the rationale and development of some of these conceptual changes and does not, except as incidentally necessary to the discussion of these changes, concern itself with the substantive details of the Act.

The estate and gift tax components of the Act, as implemented by the Legislature, were the product of a curious mixture of long debated reform proposals and political compromise. On the one hand, major estate and gift tax reform has been actively discussed for many years.[5] There have been many excellent studies of reform and resulting recommendations for differing approaches and revisions to the estate and gift tax law.[6] Several major bills proposing changes in the law had been before Congress prior to the 1976 consideration of the Act.[7] Thus, many may contend that the changes made by the Act were long overdue.

On the other hand, some of the circumstances under which the estate and gift tax provisions found their way into the Act were the result of competition among pressure groups and reflect quick legislative action. The moving force behind the enactment of estate and gift tax reform was pressure from farming interests for a higher estate tax exemption and this in turn triggered revisions in a number of other areas to counter the effects of the lost revenue accompanying an increased exemption.[8] The resulting estate and gift tax provisions were for the most part incorporated from a separate tax bill.[9] On August 5, 1976,

5. *See, e.g.*, Covey, *Estate and Gift Tax Revision* (pt. 1), 4 TAX ADVISOR 218 (1973); Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986 (1970).

6. *See, e.g.*, HOUSE COMM. ON WAYS AND MEANS & SENATE COMM. ON FINANCE, TAX REFORM STUDIES AND PROPOSALS U.S. TREASURY DEPARTMENT, 91ST CONG., 1ST SESS. 28-32, 42-45, 104-24, 329-409 (Comm. Print 1969) [hereinafter cited as TAX REFORM STUDIES]; ALI, FEDERAL ESTATE AND GIFT TAXATION—RECOMMENDATIONS AND REPORTERS' STUDIES (J. Casner rptr. 1969); American Bankers Ass'n, Commentary on Proposed Tax Reform Affecting Estates and Trusts (rev. ed. 1976) [hereinafter cited as American Bankers Ass'n Commentary].

7. *See, e.g.*, H.R. 14844 (a revision of H.R. 14115, which had revised H.R. 13966), H.R. 1040, H.R. 1793, H.R. 13776, H.R. 13840, S. 3478, 94th Cong. 2d Sess. (1976).

8. Surrey, *Reflections on the Tax Reform Act of 1976*, 25 CLEV. ST. L. REV. 303, 319-20 (1976). Professor Surrey, who was intimate with the legislative process behind the enactment of the Act, came to this interesting conclusion as to the forces responsible for the new changes in the estate and gift tax law: "Everything done is inexplicable without a recognition of the influence of the farm vote. . . . [F]arm politics—benefiting perhaps 3,000 families—brought about far-reaching revision in the estate and gift taxes, taxes which had resisted change for over a quarter century." *Id.* at 321.

9. H.R. 14844, 94th Cong., 2d Sess. (1976).

the House conferees agreed to consider estate and gift tax revisions along with the income tax provisions of the Act. Thus, the estate and gift tax revisions were not really considered separately, leading one senator to describe the result as "the Ways and Means Committee's end run and successful effort [to] circumvent the will of this body . . . ."[10] These circumstances no doubt influenced the new conceptual underpinnings for the estate and gift tax statutes which were adopted by the Congress.

II. TREATMENT OF UNREALIZED APPRECIATION AT DEATH—CARRYOVER BASIS

Perhaps the most controversial change in the Act is not properly characterized as an estate or gift tax provision at all, but rather as an income tax provision. This change is the establishment of a carryover basis for property acquired from a decedent instead of the rule formerly contained in the Internal Revenue Code.[11] Although these provisions relate to the basis for recognizing gain or loss for income tax purposes, the basis provisions of pre-Act law were a cornerstone of estate planning.[12] Debate concerning the establishment of the carryover basis centered on its effect upon estate planning as well as its relationship to other proposed estate and gift tax revisions. Therefore, this article will discuss the new carryover basis provisions of the Act with the estate and gift tax provisions.

Under pre-Act law, the basis of property acquired from a decedent was generally the fair market value of the property at the date of the decedent's death, or the alternative valuation date, as provided by stat-

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10. 122 CONG. REC. H10,269 (daily ed. Sept. 16, 1976) (remarks of Rep. Skubitz), *reprinted in* TAX MNGM'T, *supra* note 4, at 30.

11. I.R.C. § 1014. Subsection (d) was added by the Act and states: "In the case of a decedent dying after December 31, 1976, this section shall not apply to any property for which a carryover basis is provided by section 1023."

Although the carryover basis means that the basis of the property acquired from the decedent will be the same as the decedent's basis immediately before death, property which was originally acquired by the decedent before 1977 is not entirely subject to the new carryover basis rule. Rather, the Act provides that the basis will be stepped-up to the fair market value of the property when held by the decedent on December 31, 1976, so that only the appreciation occurring after that date is subject to the carryover basis rule. The Act further provides a formula for apportioning the appreciation and computing the new basis for property acquired before 1977. *Id.* § 1023(h).

12. *See generally*, W. BARTON, ESTATE PLANNING UNDER THE CODE OF 1954, at 106-28 (1959); W. BOWE, ESTATE PLANNING AND TAXATION 11-14, 195-237 (3d ed. 1972); J. K. LASSER TAX INSTITUTE, 53 NEW PLANS FOR SAVING ESTATE AND GIFT TAXES 5-6, 16-18, 66-67 (rev. ed. 1959).

ute, if the latter was elected for estate tax purposes.[13] If the property had appreciated while held by the decedent, the basis was increased and this increase was referred to as the "stepped-up" basis. In addition, any unrealized appreciation on assets held by the decedent at the time of his death was not generally subject to income taxation either to the decedent or his estate. The escape of the appreciation from income tax coupled with the stepped-up basis rules resulted in the property acquiring a higher basis without the appreciation ever being taxed. This provided a powerful incentive, especially among elderly persons, to hold appreciated property until death. In contrast, there was a carryover basis for property acquired by gift.[14] Thus, property with unrealized appreciation received more favorable treatment if held until death rather than being gifted during life, and was therefore not as suited for a gifting program.

Over the years, criticism mounted with respect to the stepped-up basis rules with the following being the most commonly offered reasons for its abolishment.[15]

(1) The stepped-up basis provisions favored wealth accumulated by holding property which appreciated in value over wealth accumulated from taxable sources.[16] A "simple example" of this inequity was examined in the Treasury Department's tax reform proposals which comprised a substantial portion of the material employed by the House Committee on Ways and Means in 1976:

> Assume Taxpayer A earns $200,000 and pays tax of 50 percent or $100,000. For simplicity, it is assumed that he intends to save half of his income and to consume half. This means that he will have $50,000 for consumption and $50,000 that he can invest in, say, common stock.
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> Taxpayer B earns $100,000 on which we will say he pays 50 percent in tax and he uses this entirely for consumption. Taxpayer B, however, differs from A in that when the year started he already owned common stock worth $200,000; and during this period it rose in value by 50 percent or by $100,000.
>
> Clearly Taxpayer A tried to increase his wealth by $100,000. He wanted to save half of his income, but the tax cut it down. He only

13. I.R.C. § 1014(a).

14. I.R.C. § 1015.

15. *See, e.g.*, TAX REFORM STUDIES, *supra* note 6, at 28, 107-10, 331-34; American Bankers Ass'n Commentary, *supra* note 6, at 3-4, 15-18.

16. *See* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 94TH CONG., 2D. SESS., BACKGROUND MATERIALS ON FEDERAL ESTATE AND GIFT TAXATION 231 (Comm. Print 1976), *reprinted in* TAX MGM'T, *supra* note 4, at 11.

increased his wealth $50,000 after tax. B finds that his wealth has increased; and since our present tax law does not count unrealized appreciation in value as taxable income, he is able to add the whole increase in value to his wealth.

The fact is that the two taxpayers have paid quite different rates. A has paid $100,000 of tax, and B has paid only $50,000. But it cannot be said that A really has more ability to pay than B. They both paid the same tax on the $100,000 of the before-tax income that they used for consumption. They both spend the same on consumption, so it could even be assumed that they lived in the same kind of houses, ate the same food, and took the same vacations. The extra ability to pay that A has is really the extra income that he used to increase the value of his holdings in securities. But B increased the value of his holding in securities by twice as much as A did.

For administrative reasons the tax system does not every year make B calculate how much his holdings have appreciated in value. The law permits B to postpone including this appreciation until he sells his assets. But more often than not appreciation is not sold; it is used for estate building and at the time of death the gain is not subject to income tax. The heir treats as his "cost" the value of the property at the time of death.

The estate tax will fall on both A and B so it is not relevant to say that B ought not to pay any income tax on his accumulation of wealth "because he pays an estate tax." A has paid income tax on the money that he earned to build an estate *and* an estate tax. B avoided income tax on his wealth increase and *only* an estate tax was paid on it.[17]

(2) The tax advantages created by the stepped-up basis provisions so affected persons holding appreciated property that the normal economic considerations with respect to whether to sell or hold property were materially distorted. The motivation to hold such property until death was commonly referred to as the "lock-in" effect.[18] The takers of the property could in turn dispose of it while enjoying the benefit of a stepped-up basis.

17. *Id.* at 231-32, *reprinted in* TAX MNGM'T, *supra* note 4, at 11-12.

18. The general explanation of this problem has been stated as follows:

> When a tax is imposed on the gain from the sale or exchange of an asset, investors are deterred from selling the asset. As the asset appreciates in value, the investor becomes even less willing to sell and is "locked-in" to his investment. This lock-in effect has a serious impact on capital formation and serious consequences with respect to the vitality of our national economy. Simply stated, capital levies deprive the private sector of necessary investment—investment which is critical for economic growth and the creation of jobs.

H. R. REP. No. 1380, 94th Cong., 2d Sess. 179, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3356, 3433-34.

(3) The failure to ever tax appreciation of property held until death resulted in significant revenue loss from the income tax.

There were several proposed revisions to the stepped-up basis rules. Some of these required the introduction of new concepts into the taxing system. The three approaches which gained the most support were proposals for death time income tax on capital gain,[19] additional estate taxes on the appreciation,[20] and establishment of carryover basis provisions for the property.[21]

A. *Capital Gains Tax*

One approach to the inequities of the stepped-up basis rules did not seek to alter the basis rule at all, but instead sought to place an income tax upon the unrealized appreciation of the asset. Death was to be treated as giving rise to a "constructive sale" of one's assets, thereby subjecting the "transaction" to a capital gains tax. The leading proposal utilizing this concept was the Treasury Department proposal formulated during the Johnson Administration.[22] There were several other proposals utilizing the taxation of capital gains,[23] and all of these proposals shared a common thesis: since the unrealized appreciation of property held by a decedent at his death had not been subject to income tax during the owner's life, such appreciation should be taxed as income at his death. Thus, all accumulations of wealth, whether from unrealized appreciation or other forms of taxable income, would be subject to an income and an estate tax. In order for there to be

19. There were several proposals of this basic character. However, this discussion will center on those recommendations set forth in TAX REFORM STUDIES, *supra* note 6, at 28-29, 43, 331-51, since those were the ones which gained the most support.

20. American Bankers Ass'n Commentary, *supra* note 6, at 3-4, 17-18.

21. There have been other proposals which could probably be described as more radical than those which ultimately prevailed. It has been suggested that appreciated property be taxed on an accrual basis. Thus, accumulations of wealth might be taxed annually via the income tax regardless of whether a realization event has occurred. *See, e.g.*, TWENTIETH CENTURY FUND, INC., FACING THE TAX PROBLEM (1937). An "accession tax" has also been studied and proposed as a solution to the problems in the traditional estate and gift tax system. Such an approach simply shifts the burden from the transferor to the transferee so that the ultimate recipient pays the tax instead of the donor or the decedent's estate. Andrews, *The Accessions Tax Proposal*, 22 TAX L. REV. 589 (1967). These proposals were supported by fine tax scholars but never received significant legislative support. However, difficulties in the working of the present system might spur increased interest in such proposals.

22. TAX REFORM STUDIES, *supra* note 6, at 28-29.

23. *See, e.g.*, *The Tax Recommendations of the President Contained in his Message Transmitted to the Congress January 24, 1963, Hearings Before the House Comm. on Ways and Means*, 88th Cong., 1st Sess. 54-60 (1963) (statement of C. Douglas Dillon).

equality of treatment between wealth previously subject to an income tax and property whose unrealized appreciation was taxed at death, most of the proposals permitted the resultant capital gains tax to be deducted from the gross estate, thereby reducing its value for estate tax purposes.

The capital gains tax proposals were defeated during the discussions preceding the drafting of the Act. One criticism of this approach was that placing a capital gains tax upon the asset as if the asset had been sold at death was unrealistic and that death should not be treated as a tax realization transaction.[24] However, the concept of capital gains tax at death is not necessarily dependent upon equating death and the voluntary tax realization events which occur during life. For instance, the rules applying to income in respect of a decedent do not necessarily require the equating of death with income realizing transactions during life.[25] Moreover, death is always a factor to consider when one is making investment decisions during one's life.

Another criticism of the capital gains tax proposals was that allowing the deductibility of the capital gains tax against the gross estate would be regressive because the large estates would receive a greater tax savings from each dollar of capital gains tax paid. This is because the deduction of each dollar of tax paid would result in a larger tax dollar saving for estates in the higher estate tax brackets. This regressive effect in part arises because the capital gains tax proposals conceptually treated the income taxation of the unrealized appreciation separately from the estate tax upon the value of the property. But a similar problem with gift taxes paid on gifts during the three years prior to death was remedied by adding the amount of any gift taxes paid on these gifts back to the gross estate.[26]

Another consideration which influenced Congress against creating any additional taxes due at the time of death was the desire to relieve estates from the necessity of having to liquidate estate assets in order

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24. The argument carried an equitable tone in that it was contended that death, unlike other taxable events, was obviously not a voluntary decision to dispose of an asset. *Public Hearings and Panel Discussions on the General Subject of Federal Estate and Gift Taxes Before the House Comm. on Ways and Means,* 94th Cong., 2d Sess. pt. 2 at 1188 (1976) (statement of William E. Simon), *reprinted in* TAX MNGM'T, *supra* note 4, at 14.

25. Certain items, such as compensation to which a decedent had no enforceable right at the time of his death, may be taxed as income in respect of a decedent even though such items would not be reportable as income of a living taxpayer. I.R.C. § 691.

26. I.R.C. § 2035(c).

to pay estate taxes and its wish to relieve the burden on the smaller and medium estates.[27] The capital gains tax, by adding an immediate income tax to the estate tax, would only have defeated these desires.

Despite the criticisms and the failure of the capital gains tax proponents to prevail in pushing their system through the legislative process, the capital gains tax proposals would have at least partially cured some of the difficulties inherent in a stepped-up basis system. First, although some inequities caused by increases in net worth resulting in greater tax burdens for a given year (the so-called "bunching" effect) are apparent,[28] the proposals would at least have subjected almost all appreciation on assets to an income and capital gains tax.[29] The tax would have generated additional revenues and the "lock-in" effect would have been significantly reduced.

B. *Additional Estate Tax*

Another proposed solution to the stepped-up basis inequities was the concept of taxing the unrealized appreciation at death in the form of an additional estate tax. One of the leading proposals of this type was the Additional Estate Tax, or AET, developed by the American Bankers Association.[30] Under the AET proposal, a flat rate of 14% would have been added to the normal estate tax rates for unrealized appreciation. Other proposals would have graduated this tax depending upon the amount of appreciation.

The AET, like the capital gains tax, sought to place a tax upon unrealized appreciation at the time of the death of the decedent. The flat rate was proposed partially for simplicity of administration and partially as an attempt to reach a fair rate by equating the tax with the tax a decedent whose estate was in the highest estate tax brackets would have paid under the capital gains tax proposal. The AET, as an estate tax, would not have been deductible from the taxable estate. Thus, the tax would not have been regressive in the sense that a tax deductible from the estate is. It was also contended that adding the

27. *See* Surrey, *supra* note 8, at 319.

28. One rationale offered for not attempting to alleviate this problem is that the income averaging provisions, I.R.C. §§ 1301-1305, are available to minimize the effect and that undue complexities, such as are encountered in I.R.C. § 691, would be created by any attempt to alleviate the "bunching" problem.

29. Note the similarity to I.R.C. § 691 (the income in respect of a decedent provision).

30. American Bankers Ass'n Commentary, *supra* note 6, at 3-4, 15-18.

additional tax to the graduated estate tax rates would make the system progressive.

What the AET essentially did was to place a non-deductible income tax of 14% upon unrealized appreciation. It was argued that a flat tax does not become progressive because it is added to another progressive system. The AET tax was also subject to many of the criticisms aimed at the capital gains tax, especially with respect to the increased tax burden upon smaller and medium estates and the inappropriateness of treating death as the proper time to recognize income.[31]

C. *Carryover Basis*

For whatever reasons, the above proposals were rejected in favor of establishing the more complicated carryover basis rules for property passing from a decedent.[32] The carryover basis provisions do not seek to tax individuals alike in the sense that all income, whether acquired through taxable sources or through unrealized appreciation, would be subject to an income tax and an estate tax to the individual or his estate. Rather, the carryover basis functions to insure that all income is subject to an income tax and estate tax, although not necessarily to one individual. The additional tax is not necessarily imposed at the time of death, but, rather, upon the occurrence of a taxable event after the property has passed.

Although the concept of the carryover basis prevailed over other conceptual approaches to the old stepped-up basis problems, the provisions did not have an easy time in Congress.[33] Many of the criticisms of the carryover basis provisions had been set forth in previous studies of proposed estate and gift tax reform.[34] It might be instructive to review some of these criticisms and monitor whether the criticisms are borne out as we operate under the new carryover basis rules.

Although the carryover basis provisions do not treat the time of death as the time for taxation of unrealized appreciation, this fact does not insulate the provisions from the charge that an unfair death-time tax

31. *See* notes 24-27 *supra* and accompanying text.

32. The carryover basis rule is now set forth in I.R.C. § 1023.

33. It is interesting to note that although the carryover basis received much opposition, debate for the most part did not center upon whether a carryover basis rule was inequitable or another solution superior, but rather, whether the carryover basis would actually offset the estate and gift tax relief which other portions of the Act were intended to provide. *See* 122 CONG. REC. H10,264-75 (daily ed. Sept. 16, 1976).

34. *See, e.g.*, Hoffman, *Stepped-Up Basis at Death: The Defense*, 4 TAX ADVISER 466, 470-73 (1973).

burden will be placed upon many estates. This is because estates which, for one reason or another, sell assets in order to pay estate taxes would pay additional income taxes because of the carryover basis. It was contended that this was contrary to the desire to ease the estate tax burden for most estates. The tax burden would fall on estates which might be forced to sell such property; this in turn requiring the estate to sell additional assets to pay the income tax. This has been described as the "mushroom" effect.[35] As yet there are no special provisions for deferment of income taxes from this appreciation as there are for payment of estate taxes due under certain circumstances.[36]

One of the most hotly debated issues and often mentioned criticisms was the effect of the carryover basis on the "lock-in" problem. At one extreme the critics contended that the carryover basis would cancel the relief provided in other portions of the Act. This argument took several tacks. One criticism was that the "lock-in" effect would be perpetuated indefinitely. That is, the carryover basis would provide a motivation for not selling appreciated property which would continue over many generations.[37] But other persons were of the opinion that the carryover basis provisions would have just the opposite effect since, without the stepped-up basis, there would be fewer income tax incentives for holding property until death.[38]

It will remain to be seen whether the aversion to recognizing income in the form of capital gains will be strong enough to deter persons from selling appreciated property before death. It should be noted that income averaging and installment sales treatment, as well as the ability to time such a sale, are all available to alleviate the recognition of income. With respect to persons who hold property at an elderly age, the fact that the income tax on capital gains would be effectively removed from the estate may cause a new phenomenon, that of the "deathbed sale." This is even more possible since the gift tax on gifts

35. *Id.* at 473.

36. *See* I.R.C. § 6161.

37. Hoffman, *supra* note 34, at 473; H. R. REP. No. 1380, 94th Cong., 2d Sess. 179, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS. 3356, 3434. It has been suggested that the tax consequences of the carryover basis could turn such commodities as I.B.M. stock into family heirlooms. *See* Surrey, *supra* note 8, at 327. This effect would be increased if current proposals to eliminate the favorable taxation of long term capital gains are enacted or if the minimum tax for tax preference items under I.R.C. § 56 is increased.

38. 122 CONG. REC. H10,162 (daily ed. Sept. 15, 1976) (remarks of Rep. Mills). *See* note 18 *supra* and accompanying text.

made within the last three years of death are no longer excluded from the gross estate.[39]

One interesting problem which has not generally been considered is the additional burden and potential for liability the carryover basis places on estate administrators. For example, estate fiduciaries might be confronted with the decision of whether to distribute appreciated assets equally among the beneficiaries or allocate greater amounts of this type of property to those beneficiaries in lower tax brackets.

As noted, the criticisms basically centered upon whether there was too much of a tax burden upon individuals, as opposed to whether the carryover basis provisions treated one individual unfairly as compared to another. It will be interesting to note what the effect of the new carryover basis will have on the investment patterns of individuals and whether future debate, if any, focuses upon whether the taxpayer is paying his "fair" share of taxes or upon fairness among taxpayers who acquire property in different ways.

III. UNIFICATION OF ESTATE AND GIFT TAX SYSTEMS

The largest conceptual change contained in the Act was probably the unification of the estate and gift taxes. The unification was intended to correct inequities between taxpayers with equivalent accumulations of wealth. The idea of a federal estate tax was originally conceived as a revenue raising device and was initially enacted and repealed from time to time as specific need for raising additional revenue arose. The pre-Act estate tax traces its origins to 1916 with the initiation of a tax based upon the value of the entire estate of a decedent rather than an inheritance tax based upon the amount received by each beneficiary.[40]

The first gift tax was enacted in 1924 and was rescinded two years later because there were numerous administrative difficulties, the revenue return was small, and it was easily evaded.[41] The tax was reenacted in 1932, perhaps partly in response to a decision by the Supreme Court in *Heiner v. Donnan*.[42] *Heiner* held unconstitutional the provisions of the estate tax laws which established a conclusive presumption that gifts made within two years of the date of death were

39. I.R.C. § 2035(c).

40. For a summary analysis of the federal estate tax see 1 H. HARRIS, HANDLING FEDERAL ESTATE AND GIFT TAXES § 2 (2d rev. ed. J. Rasch 1972).

41. *Id.* § 396.

42. 285 U.S. 312 (1932).

in contemplation of death and therefore includable in the gross estate.[43] The gift tax law was therefore enacted primarily not to correct any inequities in the income tax system, but rather to prevent easy avoidance of the estate tax.

Claims of inequities in the estate and gift tax provisions arose from two basic characteristics. Transfers made during life by gift were taxed separately without regard to estate taxes payable upon death. Therefore, persons who were able to enter into a well planned gifting program could not only remove the value of gifts and gift taxes paid upon these gifts from the estate, but were also able to have both their lifetime gifts and their estates taxed at the lowest rates for each type of transfer. In addition, since the gift tax rates were three-quarters of the estate tax rates, gifts during life were even more beneficial since an equal amount of taxable gifts resulted in a lower tax than a like amount of taxable estate. There were certain other annual and lifetime exemptions from the gift tax.[44] In addition, income generated from the gift property subsequent to the transaction was taxable as income to the donee, who was generally in a lower income tax bracket than the donor.

There appears to be a surprisingly small amount of published dissent to the idea of unifying or equalizing the estate and gift taxes, although there is evidence that support for such a unification was far from unanimous.[45] The concept of a uniform tax was not a new one, however.[46] The proposal had received a great deal of consideration in the early 1950's[47] but was rejected by the Congress. At that time, much of the criticism centered upon whether a unified tax would unduly discourage lifetime gifts,[48] but that issue did not give rise to much pub-

43. *Id.* at 324.

44. The annual gift tax exemption is contained in I.R.C. § 2503(b) and the lifetime exemption was formerly set forth in Int. Rev. Code of 1954, ch. 736 § 2521, 68A Stat. 410 (repealed 1976).

45. *See, e.g., Report of the Committee on Estate and Gift Taxes*, 29 TAX LAW. 755, 756 (1976).

46. As early as 1947 a study under the authority of the U.S. Treasury strongly recommended that the estate and gift taxes be integrated into a single transfer tax. ADVISORY COMMITTEE TO THE TREASURY DEPARTMENT & OFFICE OF THE TAX LEGISLATIVE COUNSEL, FEDERAL ESTATE AND GIFT TAXES—A PROPOSAL FOR INTEGRATION AND FOR CORRELATION WITH THE INCOME TAX (1947). The concept received a second wind at the end of the 1960s. *See, e.g.,* G. GOLDSTEIN, READINGS IN DEATH AND GIFT TAX REFORM 77-111 (1971) and authorities cited therein.

47. *See, e.g.,* Surrey, *An Introduction to Revision of the Federal Estate and Gift Taxes*, 38 CALIF. L. REV. 1 (1950).

48. Kurtz & Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1364, 1389 (1970), *reprinted in* G. GOLDSTEIN, *supra* note 46, at 109.

lished discussion in the legislative record. Again, more radical proposals such as the accessions tax apparently were not given serious consideration.[49]

The new unified rate schedule takes a large step towards taxing all transfers, both lifetime gifts and transfers at death, under one tax rather than two. There are still, however, significant differences in gifts made during life and transfers made at the time of death. A few of these differences include the following. Gifts are taxed upon their value at the time of the gift rather than at the time of death,[50] except when the gift is made within three years of the date of death.[51] The amount of tax paid upon the gift is removed from the taxable estate,[52] again subject to the three year exception.[53] Income produced by the gift is taxed to the donee rather than the donor,[54] and the $3,000 annual exclusion for gifts is retained by the Act.[55] It remains to be seen whether these differences in transfers during life and at death will be thought to require future remedial legislation.

The unified estate and gift tax rates are graduated on the premise that it is more equitable to tax transfers at a higher marginal rate the greater the amount of the accumulated transfer. Under a system of deductions, each dollar of deduction results in a greater tax savings the higher the marginal bracket. It might be thought that this is equitable since the amount of the deduction would be included in determining the size of the gift or gross estate, thereby raising the bracket at which the gift or estate would eventually be taxed. It can be argued, however, that it is inequitable to allow a taxpayer to receive a greater tax benefit than another taxpayer from an equal amount of deductions. This looks to the tax reduction itself rather than the determination of the taxable amount.

For this reason, the concept of an estate and gift tax credit was substituted in place of a system of deductions.[56] A credit results in an equal dollar of tax savings to all taxpayers regardless of their marginal bracket. This concept of equality between taxpayers has seen the increased use of tax credits in lieu of deductions not only in the Act, but

49. *See* note 21 *supra*.
50. I.R.C. § 2512(a).
51. *Id.* § 2035(c).
52. *Id.* § 2012(a).
53. *Id.* § 2035(c).
54. *Id.* § 102(b).
55. *Id.* § 2503(b).
56. *Id.* §§ 2010, 2505.

also with respect to income tax laws.[57] The result of the new unified tax credit is that tax reductions will be distributed with greater benefit to the smaller taxable estates and gifts than would be the case if there were a standard deduction. The graduated estate tax becomes even more graduated since the new credit, in effect, eliminates tax on the lowest marginal transfers. There are still many adjustments to the unified estate and gift taxes which are based upon a system of deductions.[58] It will remain to be seen whether certain of these current deductions from the gross estate will ultimately be replaced by a system of credits.

IV. CONCLUSION

The Act made major changes in the federal estate and gift tax laws. Some of these changes had been discussed for many years with several alternative proposals being debated. Some of the changes, such as the carryover basis provisions, were enacted with dire predictions of their consequences. Persons favoring further reform as well as those favoring a return to the former scheme of taxation are certain to monitor the effect of the Act upon the behavior of individuals, the revenue derived by the federal government and the resultant allocation of the tax burden among estates and their beneficiaries.

57. *See, e.g.*, I.R.C. §§ 37 (credit for the elderly); 41 (limited credit for political contributions); 44A (credit for child care expenses).

58. *See, e.g.*, I.R.C. §§ 2056 (marital deduction from gross estate); 2057 (deduction for bequests to certain minor children); 2522 (deduction for charitable gifts); 2523 (deduction for gifts to spouse).