

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

**M. CHRISTINE SHAFFER,
AS EXECUTRIX OF THE ESTATE
OF ADELAIDE CHUCKROW**

v.

COMMISSIONER OF REVENUE

Docket No. C327773

Promulgated:
April 29, 2019

This is an appeal under the formal procedure pursuant to G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee") to abate estate tax assessed to M. Christine Shaffer as Executrix of the Estate of Adelaide Chuckrow ("appellant" or "estate") under G.L. c. 65C, § 2A(a) ("§ 2A(a)").

Commissioner Good heard the appeal and was joined in the decision for the appellee by Chairman Hammond and Commissioners Rose and Chmielinski. Commissioner Scharaffa dissented.

These findings of fact and report are made pursuant to a request by the appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

Leo J. Cushing, Esq. and *Luke C. Bean, Esq.* for the appellant.

John J. Connors, Jr., Esq. for the appellee.

FINDINGS OF FACT AND REPORT

The facts of this appeal, which was submitted on a statement of agreed facts and exhibits along with briefs and oral argument, are not in dispute. The sole issue presented for consideration by the Appellate Tax Board ("Board") was whether assets that were part of a Qualified Terminable Interest Property ("QTIP") trust and included in the Federal gross estate of Adelaide Chuckrow ("Mrs. Chuckrow" or "decedent") were properly included in the calculation of her Massachusetts estate tax pursuant to § 2A(a). The relevant facts as stipulated by the parties are summarized below.

Mrs. Chuckrow died on August 14, 2011. At the time of her death, Mrs. Chuckrow was a Massachusetts resident. Mrs. Chuckrow had previously resided in Chappaqua, New York, but moved to Williamstown, Massachusetts in her later years to be cared for by her daughter.

Mrs. Chuckrow's late husband, Robert Chuckrow ("Mr. Chuckrow"), died on July 11, 1993, while domiciled in New York. His Last Will and Testament established a QTIP trust ("Trust") for the benefit of Mrs. Chuckrow under Internal Revenue Code ("Code") § 2056(b)(7) ("Code § 2056 (b)(7)") and the corollary provisions of New York law. The assets of the Trust ("QTIP assets") consisted entirely of intangible property, and had a value of \$844,101.27 at the time of Mr. Chuckrow's death.

Under the terms of the Trust, as required by Code § 2056(b)(7), Mrs. Chuckrow was entitled to all of the income from the Trust as long as she lived as well as distributions from the principal of the Trust, at the sole discretion of the trustees. The trustees of the Trust were the couple's adult daughters, who were entitled to the remainder interest in the Trust.

As will be discussed in greater detail below, the effect of a QTIP trust is to defer the collection of estate taxes from the time of the death of the first-to-die spouse to the time of the death of the second-to-die spouse, while still allowing the first-to-die spouse to control the ultimate disposition of the assets. The deferral is accomplished by allowing the first-to-die spouse to claim a marital deduction for the value of the assets in the QTIP trust; absent the QTIP provisions in Code § 2056(b)(7), the marital deduction would not be available for the transfer of a terminable interest in property. The trade-off is that the estate of the second-to-die spouse must report and pay taxes on the full value of the assets in a QTIP trust at the time of that spouse's death.

Accordingly, following Robert Chuckrow's death, his estate filed both Federal and New York estate tax returns claiming a marital deduction in the full amount of the QTIP assets and reporting no tax due. No Massachusetts estate tax return was

filed because Mr. Chuckrow was not domiciled in Massachusetts at the time of his death and owned no property in Massachusetts.

There is no dispute, however, that Mrs. Chuckrow was a Massachusetts resident at the time of her death on August 14, 2011. Accordingly, on May 14, 2012, the appellant filed on behalf of the estate of Mrs. Chuckrow a Massachusetts estate tax return reporting a tax due of \$100,997, based on a total estate of \$2,382,148. The tax was paid in full. The appellant did not include the value of the QTIP assets when computing Mrs. Chuckrow's Massachusetts estate tax.

The appellant likewise filed a Federal estate tax return, which reported a total gross estate of \$15,633,617. The appellant included the value of the QTIP assets in Mrs. Chuckrow's Federal gross estate and paid the appropriate Federal estate tax. The appellant did not file an estate tax return in New York or pay a New York estate tax because Mrs. Chuckrow was a Massachusetts resident at the time of her death and owned no property in New York. Accordingly, because Mr. Chuckrow's estate had taken a marital deduction for the full value of the QTIP assets at the time of his death and the appellant did not include the QTIP assets in Mrs. Chuckrow's Massachusetts estate, the appellant did not pay estate tax on the QTIP assets in any State.

The Commissioner selected Mrs. Chuckrow's Massachusetts estate tax return for audit and sent the appellant a Notice of Intent to Assess ("NIA") dated September 27, 2013. The NIA proposed an additional assessment of tax in the amount of \$1,809,141.99. The additional assessment was based on increasing her total estate by \$13,251,469, consistent with the total gross estate reported on the Federal estate tax return, which included the value of the QTIP assets.

The Commissioner assessed the tax as proposed and sent the appellant a Notice of Assessment dated March 18, 2014, which included the additional tax proposed along with interest in the amount of \$143,890, for a total balance due of \$1,953,032. The appellant paid that amount in full.

On April 11, 2014, the appellant filed an Application for Abatement with the Commissioner, seeking an abatement of the additional tax assessed. By Notice of Abatement Determination dated May 19, 2015, the Commissioner denied the appellant's Application for Abatement. The appellant timely filed her appeal with the Board on June 25, 2015. On the basis of the foregoing facts, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

As described more fully below, on the date of Mrs. Chuckrow's death, § 2A(a) imposed a tax on "the transfer of the estate of each person dying on or after January 1, 1997 who, at

the time of death, was a resident of the commonwealth." There was no dispute in the present appeal that Mrs. Chuckrow was a resident of Massachusetts at the time of her death, and the Board so found. To the extent it is a finding of fact, and as will be discussed further below, the Board found that a transfer of the QTIP assets occurred upon the death of Mrs. Chuckrow, within the meaning of § 2A(a).

Accordingly, the Board ruled that the QTIP assets, which were properly included in the Federal gross estate of Mrs. Chuckrow, were also properly includable in her Massachusetts estate subject to tax under § 2A(a). The Board therefore found and ruled that the appellant failed to demonstrate her entitlement to an abatement of the tax and issued a decision for the appellee in this appeal.

OPINION

Resolution of the issue of whether Massachusetts may properly impose an estate tax on the value of the QTIP assets requires an analysis of both Federal and Massachusetts estate tax provisions and the interplay between them. These provisions have evolved considerably over the years and a review of the history of these taxing regimes is necessary to resolve the issue raised in this appeal.

The Federal estate tax has been in effect for more than a century. First enacted as temporary measures to fund wars, Congress enacted a permanent estate tax in 1916. See Revenue Act of 1916, ch. 463, 39 Stat. 756. In 1948, in order to reconcile anomalies in the estate taxation of community-property and common-law property States, Congress created the marital deduction. See Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110. Under that legislation, the decedent spouse's estate received a deduction for one-half of the property that passed to the surviving spouse, with an exception relevant here: ineligible for the marital deduction were "terminable interests" in property, that is, an interest in property that terminated at the surviving spouse's death.

In 1981, Congress enacted sweeping changes to its estate tax regime under the Economic Recovery Tax Act, including an increase in the marital deduction from one-half of the value of property passing to a spouse to an unlimited deduction. See Pub. L. No. 97-34, § 403(a) 95 Stat. 301. In addition, Congress created an exception to the aforementioned "terminable interest" exclusion by enacting § 2056(b)(7), which created the concept of a "qualified terminable interest" in property that qualified for the marital deduction and gave rise to the estate planning device known as the QTIP trust.

For a terminable interest to be a qualified terminable interest under Code § 2056(b)(7): (1) the surviving spouse must receive all of the income from the QTIP property for life, payable at least annually; (2) no person can have a power to appoint any part of the QTIP property to any person other than the surviving spouse; and (3) an irrevocable QTIP election must be made by the executor of the first-to-die spouse. The first-to-die spouse's estate gets the benefit of an unlimited marital deduction for the value of property for which a QTIP election is made; however, the QTIP property will be included in the Federal estate of the surviving spouse and is treated as property passing from the surviving spouse under Code § 2044(c).

From a practical perspective, the use of a QTIP trust allows the first-to-die spouse to control the disposition of the assets upon the death of his or her spouse. From a tax perspective, it allows for a deferral of the Federal estate tax on the QTIP assets until the death of the surviving spouse.

Massachusetts, meanwhile, has had its own estate tax in one form or another for nearly a century. See St. 1926, c. 355. Originally implemented as what is commonly referred to as a "sponge-tax," that is, a tax equal to the credit allowable under Federal law for State death taxes, Massachusetts created a stand-alone estate tax in 1975 by enacting G.L. c. 65C.

In response to the 1981 Federal change that ushered in the QTIP trust, Massachusetts added a QTIP provision to its estate tax regime in 1985 that was substantially similar to the provisions of Code § 2056(b)(7). See G.L. c. 65C, § 3A. The Massachusetts statute required a separate QTIP election and, although similar in most respects to the Federal QTIP provisions, Massachusetts did not permit an unlimited marital deduction until July 1, 1994.

Beginning in 1992, when the Legislature enacted G.L. c. 65C, § 2A, the stand-alone tax was phased out and Massachusetts reverted back to a sponge-tax based on the Federal credit. For decedents dying on or after January 1, 1997, § 2A provided that the Massachusetts estate tax was to be determined under the provisions of the Code as in effect at the time of a decedent's death.

In 2001, Congress enacted legislation slowly phasing out the Federal estate tax over a period of years, including an elimination of the State death tax credit. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38. Concerned by the potential loss of revenue, Massachusetts and many other States amended their estate tax legislation to preserve the sponge effect by adhering to the provisions of the Code as in effect on December 31, 2000, prior to the phase-out of the Federal estate tax, rather than the

date-of-death version of the Code. See St. 2002, c. 186, § 28; St. 2002, c. 364, § 10.

Accordingly, at the time of Mrs. Chuckrow's death in Massachusetts on August 14, 2011, § 2A(a) imposed a sponge tax on "the transfer of the estate of each person dying on or after January 1, 1997 who, at the time of death, was a resident of the commonwealth." The sponge tax was based on the Code provisions in effect on December 31, 2000.

At the time of Mrs. Chuckrow's death in 2011, § 2A(a) provided in pertinent part that:

The amount of the tax shall be the sum equal to the amount by which ***the credit for state death taxes that would have been allowable to a decedent's estate as computed under Code section 2011, as in effect on December 31, 2000***, hereinafter referred to as the "credit", exceeds the lesser of:

(i) the aggregate amount of all estate, inheritance, legacy and succession taxes actually paid to the several states of the United States, other than the commonwealth, in respect to any property owned by that decedent or subject to those taxes as part of or in connection with his estate; or

(ii) an amount equal to the proportion of such allowable credit as the value of properties taxable by other states bears to the value of the entire federal gross estate wherever situated.

(emphasis added). Because the appellant paid no State tax to any jurisdiction other than Massachusetts, sub-paragraph (i) is zero. Therefore, the Massachusetts estate tax due from Mrs. Chuckrow's estate is equal to the State tax credit that would

have been allowable to the appellant for Federal estate tax purposes under the provisions of the Code in effect on December 31, 2000. See also G.L. c. 65C, § 2A(e) ("all references and provisions in this chapter to the Internal Revenue Code . . . shall be to the Code as in effect on December 31, 2000.").

The calculation of the State tax credit allowable under the Code in effect on December 31, 2000 begins with the determination of the Federal gross estate. The applicable version of Code § 2031 provided that the gross estate includes the value at the time of the decedent's death of "all property, real or personal, tangible or intangible, wherever situated." Regarding the value of property in which a decedent, such as Mrs. Chuckrow, had a qualified terminable interest, the applicable version of Code § 2044 provided that the value of such property is includable in the decedent's estate if a marital deduction had been allowed with respect to such property when it was transferred to the decedent by the first-to-die spouse.

There is no dispute that Mr. Chuckrow's estate was allowed a marital deduction on the QTIP property that was transferred from his estate to Mrs. Chuckrow and that the value of the QTIP assets would have been properly includable in Mrs. Chuckrow's

estate for Federal estate tax purposes under the December 31, 2000 version of the Code.¹

Calculation of the State tax credit is then a mechanical exercise of subtracting various deductions and referring to a tax table under Code § 2011(b). The appellant does not dispute the accuracy of the Commissioner's State tax credit calculation.

Applying the unambiguous language of § 2A(a) and the cited Code provisions, the Massachusetts estate tax due from the appellant was equal to the State tax credit calculated under the Code provisions applicable as of December 31, 2000; therefore, the Board found and ruled that the subject assessment was proper. See, e.g., **Massachusetts Broken Stone Co. v. Weston**, 430 Mass. 637, 640 (2000) ("Where the language of a statute is clear, courts must give effect to its plain and ordinary meaning and the courts need not look beyond the words of the statute itself."); **Commissioner of Revenue v. Franchi**, 423 Mass. 817, 822 (1996).

In an effort to avoid this straightforward result, the appellant advanced two principal arguments: (1) there is no constitutional basis for Massachusetts to impose a tax on the value of the QTIP assets because the only transfer of the QTIP assets occurred when Mr. Chuckrow died in New York; and (2) the

¹ There is also no dispute that the value of the QTIP assets was properly included in Mrs. Chuckrow's Federal gross estate under the version of the Code applicable for Federal purposes as of the date of her death.

QTIP assets are not includable in Mrs. Chuckrow's estate because the definition of "Massachusetts gross estate" in G.L. c. 65C, § 1(f) excludes QTIP property for which a Federal, but not a Massachusetts, QTIP election was made. For the reasons that follow, the Board rejected both of these arguments.

I. APPELLANT'S CONSTITUTIONAL ARGUMENT

The appellant argued that the subject assessment violates the Fourteenth Amendment of the U.S. Constitution and Article 10 of the Massachusetts Declaration of Rights because Massachusetts is attempting to tax a transfer of assets that took place outside of Massachusetts.

Although the U.S. Constitution prohibits direct taxes unless they are apportioned among the States (U.S. Const. Art. I, § 9, cl. 4), it has long been held that estate taxes are not a direct tax on the value of the property but an excise on the privilege of transferring the property, *Knowlton v. Moore*, 178 U.S. 41 (1900). Somewhat less settled is the question of what constitutes a transfer for estate tax purposes. See *Coolidge v. Long*, 282 U.S. 582 (1931); *Fernandez v. Wiener*, 326 U.S. 340 (1945); *Morgens v. Commissioner of Internal Revenue*, 678 F.3d 769, 776, n.7 (9th Cir. 2012); *In re Estate of Bracken*, 175 Wash. 2d 549 (2012).

In *Fernandez*, the U.S. Supreme Court rejected a restrictive interpretation of the term transfer and instead embraced a

broader construction. In that case, a decedent's heirs challenged the inclusion in the estate of the first-to-die spouse of the full value of marital community property, including the value of the one-half share that was owned by a surviving spouse prior to the death of the first-to-die spouse. *Id.* at 346-47. The heirs argued that the surviving spouse "acquire[d] no new or different interest in the property," as a result of the decedent's death, and as such there was no transfer. *Id.* The Court rejected this position and upheld the imposition of the tax, after noting that the surviving spouse enjoyed greater rights in the property at issue following the death of the first-to-die spouse. *Id.* at 355-56. In so holding, the Court noted

A proper excise or estate tax, however, is levied not only upon literal transfers at death. Rather, any 'creation, exercise, acquisition, or relinquishment of any power or legal privilege which is incident to the ownership of property' at the death of the decedent is subject to tax as a transfer at death. In other words, a sovereign may tax the transmutation of legal rights in property occasioned by death.

Id. at 352.

This view of the term "transfer" has recently been applied in a case involving facts nearly identical to the present appeal. In *Estate of Brooks v. Sullivan*, 325 Conn. 705 (2017), *cert. denied*, 583 U.S. 608 (2018), Connecticut assessed an estate tax on the value of assets in a QTIP trust upon the death

of the surviving spouse, who was a resident of Connecticut at the time of her death. The QTIP trust at issue in that case had been created by the surviving spouse's late husband when he was a domiciliary of Florida. *Id.* at 707-09. Her estate claimed that Connecticut could not constitutionally tax the trust's QTIP assets following her death, as the only transfer of those assets had occurred in Florida. *Id.* at 726.

Though the underlying facts of ***Fernandez*** were different, the Connecticut Supreme Court observed that the rationale of ***Fernandez*** "fit[s] comfortably" within the context of the change in relationships to QTIP property effectuated by the death of a second-to-die spouse. *Id.* at 730. Taking a "more practical approach" that gave weight to "the economic and legal shifts occasioned by death rather than a reliance on formalistic property law distinctions in determining whether a properly taxable transfer has occurred," the Connecticut Supreme Court concluded that a transfer of the QTIP assets had occurred upon the death of the surviving spouse, such that Connecticut could constitutionally impose an estate tax on those assets. *Id.* at 733.

The Board in this appeal agreed with the reasoning espoused in ***Brooks***. A QTIP election brings about more than just a deferral of tax. It creates new relationships between the trust assets, the surviving spouse, and the beneficiaries, and it is

precisely the type of "transmutation of legal rights in property" that constitutes a "transfer" for purposes of § 2A(a). **Fernandez**, 362 U.S. at 352. A broad construction of the term transfer is particularly warranted in consideration of the underlying premise of the QTIP regime, which is

that the entire QTIP property, rather than just the income interest, is deemed to pass to, and then from, the surviving spouse. Thus, the two spouses are treated as a single economic unit with respect to the QTIP property while still allowing the first-to-die spouse to control the eventual disposition of the property.

Morgens, 678 F.3d at 776, n.7.

Accordingly, for estate tax purposes, there are two transfers of QTIP property: (1) a transfer from the estate of the first-to-die spouse to the surviving spouse when the QTIP election is made; and (2) a transfer from the estate of the surviving spouse to the designated beneficiaries when the surviving spouse dies.

The Board therefore rejected the appellant's argument that the only transfer of QTIP property occurred when Mr. Chuckrow died in New York. Moreover, many of the cases cited by the appellant in support of its position were decided

long before the evolution of state and federal tax schemes that employ complex fictions designed to effectuate certain public policy - such as treating a married couple as a single economic unit - while ensuring that tax schemes do not form apertures through which it would be possible to avoid taxation.

Brooks, 325 Conn. at 733.

These cases could not and did not consider the various dispositive fictions created under the estate tax statutes; indeed, contrary to the appellant's argument, these fictions provide that the surviving spouse is treated as the transferor of QTIP property.

First and foremost, Code § 2044(c) provides that once the estate of the first-to-die spouse elects QTIP treatment, the QTIP property is included in surviving spouse's estate and "shall be treated as property passing from" the surviving spouse. Because the QTIP property is treated as passing from the surviving spouse, Code § 1014(b)(10) provides that the remainder beneficiaries receive a stepped-up basis in the QTIP assets to the value of the assets as of the date of the surviving spouse's death. The surviving spouse is also treated as the transferor of the full value of the QTIP property -- not just the value of the income interest -- for gift tax and generation-skipping tax purposes. See Code §§ 2519 and 2652(a).

Further, although the treatment of Mrs. Chuckrow as the transferor of the QTIP property may have resulted from certain fictions under the Code, there was nothing fictional about the benefit of the complete deferral of State and Federal estate tax upon Mr. Chuckrow's death that resulted from the application of the relevant fictions. Having received the benefit of these

fictions, the appellant cannot now disavow the consequence of associated relevant fictions upon Mrs. Chuckrow's death. See *Morgens*, 678 F.3d at 776, n.7. ("The Estate cannot first use that favorable tax deferral (the § 2056 marital deduction) and then claim that the property never actually passed to [the surviving spouse.]"). See also *General Mills, Inc. v. Commissioner of Revenue*, 440 Mass. 154, 170 (2003) (holding that a taxpayer who chose to accept the benefit of a "fictional" treatment of a sale of stock as a deemed sale of assets under Code § 338(h)(10) for Federal tax purposes could not re-characterize the transaction as a stock sale for Massachusetts tax purposes, noting that "[t]here was nothing 'fictional' about the effect of the election for Federal tax purposes.").

The Board therefore found and ruled that Mrs. Chuckrow is properly treated as the transferor of the QTIP property. Accordingly, the Board rejected the appellant's constitutional argument that was based on the assertion that the sole transfer of the QTIP assets took place outside of Massachusetts and ruled that Massachusetts has the power to exact an estate tax on the appellant's transfer of the QTIP assets.

II. APPELLANT'S STATUTORY ARGUMENT

The appellant's statutory argument is based on its reading of G.L. c. 65C, § 1(f) ("§ 1(f)"). The appellant maintained that the definition of "Massachusetts gross estate" under § 1(f)

excludes from Mrs. Chuckrow's estate the value of the QTIP assets because Mr. Chuckrow's estate made a Federal, but not a Massachusetts, QTIP election. The operative language of § 1(f) defines the "Massachusetts gross estate" as:

the federal gross estate . . . plus the value of any property (i) in which the decedent had at death a qualifying income interest for life described in subsection (c) of section three A . . . and (ii) for which a deduction was allowed for Massachusetts estate tax purposes with respect to the transfer of such property to the decedent . . . The Massachusetts gross estate shall not include the value of any property in which the decedent had a qualifying income interest for life which is not otherwise includible in the Massachusetts gross estate under the first sentence of this paragraph, notwithstanding the right of the executor of the decedent's estate to recover federal or Massachusetts estate taxes from such property.

In the appellant's view, this language requires that only QTIP property "for which a deduction was allowed for Massachusetts estate tax purposes" may be included in the Massachusetts gross estate of the surviving spouse. Because Mr. Chuchrow's estate did not make a Massachusetts QTIP election, no deduction was allowed to it for Massachusetts estate tax purposes and, therefore, the appellant maintained that the QTIP assets were not includable in Mrs. Chuckrow's Massachusetts gross estate.

In the appellant's view, § 1(f) was enacted to prevent the double taxation of QTIP assets in the Massachusetts estates of both the first-to-die spouse and the surviving spouse. Because,

it reasoned, the estate of the first-to-die spouse could make a Federal election in an amount greater than its Massachusetts QTIP election - particularly during the time that Massachusetts allowed only a 50 percent marital deduction in contrast to the unlimited Federal deduction - the Massachusetts estate of the first-to-die spouse could include assets that were not included in its Federal gross estate, *i.e.*, assets for which a Federal but not a Massachusetts QTIP election was made. When the surviving spouse dies, all of the QTIP assets for which the estate of the first-to-die spouse made a Federal QTIP election would be included in the Federal gross estate of the surviving spouse. If the Massachusetts gross estate of the surviving spouse was equal to its Federal gross estate, the QTIP assets for which a Federal but not a Massachusetts QTIP election had been made would be includible in the surviving spouse's estate and subject to a second estate tax. Therefore, the appellant reasoned, § 1(f) provides that only those QTIP assets for which a Massachusetts deduction was allowed in the estate of the first-to-die spouse are includible in the Massachusetts gross estate of the surviving spouse.

The fatal flaw with the appellant's analysis is that § 1(f) defines a term - "Massachusetts gross estate" - that is not found in the operative taxing statute, § 2A. As detailed previously, because Mrs. Chuckrow was a Massachusetts resident

who died on or after January 1, 1997, her estate is subject to tax under § 2A. There is no reference to "Massachusetts gross estate" in § 2A; rather, the § 2A tax is equal to the State tax credit that would have been allowable to the appellant under the provisions of the Code as in effect on December 31, 2000.

The term "Massachusetts gross estate" is, however, used in G.L. c. 65C, § 3A, which deals with the Massachusetts election of QTIP treatment by the first-to-die spouse. Both § 1(f) and § 3A were enacted simultaneously in 1985 in response to the Federal legislation in 1981 creating the QTIP concept. See St. 1985, c. 711, §§ 5 and 11. These provisions work in tandem: § 3A describes the requirements for a Massachusetts QTIP election by the first-to-die spouse and § 1(f) provides for the Massachusetts estate tax consequences to the surviving spouse of a Massachusetts QTIP election.

More specifically, in order for property to be considered "qualified terminable interest property" for Massachusetts estate tax purposes, § 3A requires, *inter alia*, that the first-to-die spouse elect Massachusetts QTIP treatment and that such property must be "included in the Massachusetts gross estate" of the first-to-die spouse and pass to the surviving spouse. See § 3A(b). When the surviving spouse dies, § 1(f) provides that if the spouse had a qualifying income interest for life as described in § 3A, then only property for which a Massachusetts

deduction had been allowed will be taxable in the surviving spouse's estate.

Therefore, the § 1(f) definition of Massachusetts gross estate is applicable only where the first-to-die spouse makes a Massachusetts QTIP election for property that is included in the Massachusetts gross estate of the first-to-die spouse under § 3A. Where, as here, there was no Massachusetts QTIP election by the first-to-die spouse and no Massachusetts QTIP property as defined in § 3A, neither § 1(f) nor § 3A has any bearing on the appellant's Massachusetts estate tax obligation under § 2A.

Moreover, the double taxation of QTIP assets that the appellant claimed § 1(f) was meant to address is not a possibility under the facts of this appeal.² The QTIP assets were not included in Mr. Chuckrow's estate and were not subject to Massachusetts tax prior to Mrs. Chuckrow's death. The appellant offered no reasoned basis to interpret a statute that prevents double taxation of Massachusetts QTIP property under limited circumstances in a manner that prevents taxation of the QTIP assets where no double taxation is possible and the assets are explicitly and exclusively taxable under § 2A.

² The appellant's analysis of § 1(f) does not account for situations like the present one where no part of the QTIP assets were subject to Massachusetts estate tax on the death of the first-to-die spouse.

Accordingly, the Board found and ruled that the appellant is taxable under the unambiguous terms of § 2A(a) and there is no constitutional or statutory impediment to the imposition of the subject assessment. Therefore, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

Commissioner Scharaffa Dissenting.

As noted by the majority, the facts of this appeal are not in dispute. Briefly, when the decedent, Mrs. Chuckrow, died on August 14, 2011, she was a resident of Massachusetts. Mrs. Chuckrow had resided in Chappaqua, New York, with her late husband, Mr. Chuckrow, who died on July 11, 1993. In his will, Mr. Chuckrow established a QTIP trust for the benefit of Mrs. Chuckrow that held intangible assets ("Trust" and "QTIP assets," as defined above). The Trust was established federally under the Code and in New York under applicable law.

Pursuant to the Trust, Mrs. Chuckrow was entitled to all of the income from the Trust while she lived, and distributions from the Trust's principal, the latter at the sole discretion of the Trust's trustees. The trustees, the Chuckrows' adult daughters, were entitled to the remainder interest in the Trust.

Following Mr. Chuckrow's death, his estate filed both Federal and New York estate tax returns, claiming a marital deduction in the full amount of the QTIP assets. The estate did not file a Massachusetts estate tax return because Mr. Chuckrow was not domiciled in Massachusetts at the time of his death and owned no property in Massachusetts. When Mrs. Chuckrow died, her

estate filed Federal and Massachusetts estate tax returns, including the value of the QTIP assets in her Federal gross estate, but excluding that value from her "Total gross estate" on Massachusetts Form M-706. Following an audit, the Commissioner of Revenue issued an additional assessment based on a calculation of estate tax that incorporated the value of the QTIP assets.

Given the preceding facts, the Board found and ruled that upon Mrs. Chuckrow's death, the QTIP assets were properly included in the calculation of Mrs. Chuckrow's Massachusetts estate tax pursuant to G.L. c. 65C, § 2A(a). In reaching their conclusion, the Board rejected the appellant's two principal arguments, one of which was based on statutory construction, and the other, constitutional principles that the appellant asserted undermine the disputed assessment. My concern lies primarily with the appellant's constitutional argument, which I believe is dispositive and precludes inclusion of the QTIP assets in Mrs. Chuckrow's Massachusetts estate.

The majority correctly observes that estate taxes are not a direct tax on the value of property but an excise on the privilege of transferring property. *Knowlton v. Moore*, 178 U.S. 41 (1900); see also *Estate of Ackerley*, 389 P.3d 583 (2017). The parties to this appeal also agree that for estate tax purposes, a transfer of the QTIP assets occurred upon Mr. Chuckrow's

death, tax on which was deferred by virtue of a qualifying QTIP election. There is a dispute, however, as to whether a taxable transfer of the QTIP assets also occurred upon Mrs. Chuckrow's death. Unlike the majority, I believe that the sole transfer occurred at the time of Mr. Chuckrow's death, a conclusion that for constitutional reasons fatally undermines the Commissioner of Revenue's assessment.

Although Mrs. Chuckrow was entitled to the Trust's income while she lived, as well as distributions from the Trust's principal at the sole discretion of the Trust's trustees, she had no power or control whatsoever over the QTIP assets. Lacking such power or control, there was nothing for Mrs. Chuckrow to transfer with respect to the QTIP assets upon her death. The true and only transfer, and thus the only relevant taxable event, occurred on the death of Mr. Chuckrow.

The Supreme Court of the State of Washington addressed the question of when a taxable transfer occurs in *In re Estate of Bracken*, 175 Wn.2d 549 (2012). In *Bracken*, the court considered the Washington Department of Revenue's attempt to impose a tax on the estates of second-to-die spouses attributable to QTIP trusts that had been established by their spouses who had died first. In 2006, the Washington legislature enacted a stand-alone estate tax and authorized the creation of a Washington QTIP election. The first-to die spouses died, and their executors

made Federal QTIP elections, before the enactment of the statute. The court found that Washington could not impose a tax on the Federal QTIP trusts upon the deaths of the second-to-die spouses in part because no taxable transfer occurred upon their deaths. *Id.* at 575-76. More particularly, the estate tax requires a transfer of property to impose a tax; the transfer of assets of a QTIP trust occurs when the first spouse dies; and because no taxable transfer occurs at the surviving spouse's death, the state could not impose an estate tax. See *Id.* The present appeal involves a similar lack of a taxable transfer, but in the context of impermissible extraterritorial taxation.

The due process clause of the Fourteenth Amendment prohibits a state from imposing a tax on a transaction that occurs entirely outside its borders. "[T]he exaction by a State of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment." *Frick v. Pennsylvania*, 268 U.S. 473, 488-89 (1925). *Frick* hews to *McCulloch v. Maryland*, 17 U.S. 316, 429 (1819), in which the Court held that the power to tax "is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced

self-evident." *Id.* at 429. Absent a finding that a second transfer of the QTIP assets occurred upon Mrs. Chuckrow's death, the sole transfer of the property at issue in this appeal occurred outside of and was unrelated to Massachusetts, and the disputed assessment does not pass constitutional muster.

In sum, for estate tax purposes, a transfer of the QTIP assets occurred entirely outside of Massachusetts upon the death of Mr. Chuckrow, a New York resident who created a New York Trust. Further, no additional transfer occurred upon Mrs. Chuckrow's death. Under these circumstances, the Commissioner of Revenue's assessment cannot be upheld because it depends on Massachusetts reaching beyond its sovereign powers in violation of fundamental constitutional principles. Accordingly, a decision should have been issued in favor of the appellant.

By: _____
Frank J. Scharaffa, Commissioner

A true copy,

Attest: _____
Clerk of the Board