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Law Review Staff

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CASE COMMENTS

Federal Estate Tax–Losses Arising From Sale of Property to a Corporation by an Estate Not Disallowed by Section 267

Decedent died testate in 1955, leaving 2,500 shares of stock of the Leader Building Company in her gross estate. Her three sisters were the legatees in equal shares of the estate, and they were also beneficiaries of separate trusts which owned the remaining 7,500 shares of the company.[1] In order to raise enough funds to pay the Federal Estate Tax, the estate, petitioner herein, had to sell[2] some of the stock.[3] Accordingly, the corporation redeemed about half of the shares held by the estate, which thereby sustained a net capital

1. At the time of decedent's death the Leader Building Company had 10,000 shares outstanding, the ownership of which was as follows:

Ruth Hanna, the decedent	2,500 shares
National City Bank as Trustee for Natalie Hanna Marvin	2,605 "
National City Bank as Trustee for Charlotte Hanna Royce	2,180 "
National City Bank as Trustee for Mary Hanna Ross	2,715 "
Total	10,000 shares

Estate of Hanna v. Comm'r, 320 F.2d 54, 55 (6th Cir. 1963).

2. INT. REV. CODE OF 1954, § 303 [hereinafter cited as CODE].

3. "On April 12, 1945, the decedent and her three sisters had entered into a buy-sell agreement under which they had the option to purchase shares to be sold by a party to the agreement at a price determined pursuant to a described formula. Each of the decedent's three sisters declined to exercise their option to purchase the stock under the buy-sell agreement." Estate of Hanna v. Comm'r, *supra* note 1, at 55. Since the sisters elected not to buy the shares tendered, the estate, pursuant to the agreement, offered the shares during 1956, 1957, and 1958 to the Leader Building Company. The shares were redeemed by the company at the formula price specified in the agreement, based on net earnings over a five-year period. The result was an aggregate loss of $97,000.05. See note 4 *infra*.

There is no dispute here concerning (1) the amount of the loss, (2) the qualification of the redemptions under section 303 of the Internal Revenue Code as having been made to pay death taxes, (3) the classification of the losses as arising from sales or exchanges of property, or (4) the applicability on the 1958 tax return of the losses, if otherwise allowable, as carryovers pursuant to sections 1212 and 1222(4) of the Code.

Thus the sole ground for disallowance is that the losses arose from transactions between related parties within the meaning of section 267 of the Internal Revenue Code of 1954. Brief for Petitioner, pp. 3-4, Estate of Hanna v. Comm'r, *supra* note 1.

loss.[4] Petitioner sought a deduction of this loss, in order to offset capital gains realized when the company liquidated. The Commissioner disallowed the deduction on the ground that the loss arose from the sale of property from an individual to a corporation more than fifty per cent of the stock of which was owned by or for such individual. Such losses are disallowed by section 267 of the Internal Revenue Code of 1954.[5] The Tax Court sustained the proposed deficiency,[6] holding that under section 267(c)(1) the stock owned and sold by the estate is considered as owned and sold by the beneficiaries of the estate. By the same section, the three sisters are deemed to own the shares held by the trusts of which they are the beneficiaries. Section 267(c)(2) adds that an individual is deemed to own stock owned by or for[7] his family which, by section 267(c)(4), includes his sisters. Thus, by the Tax Court's reasoning, the stock is

4.

Redemption Date	No. of Shares Redeemed	Redemption Price per Share	Total Am't. Rec'd on Redemption	Losses Claimed by Petitioner	Losses Carried Over or Applied to 1958 Return
Sept. 27, 1956	450	$227.33	$102,298.50	$43,951.50	$42,951.50
Mar. 14, 1957	250	227.33	56,817.50	53,335.25	53,335.25
Nov. 15, 1957	343	258.25	111,822.25		
Feb. 3, 1958	20	289.30	5,786.00	713.30	713.30
Totals	1153	—	$276,724.25	$98,000.05	$97,000.05

5. "Losses, Expenses, and Interest with Respect to Transactions Between Related Taxpayers.

(a) Deductions Disallowed.—No deduction shall be allowed—

(1) Losses.—In respect of losses from sales or exchanges of property . . . directly or indirectly, between persons specified within any one of the paragraphs of subsection (b). . . .

(b) Relationships.—The persons referred to in subsection (a) are:

(1) Members of a family, as defined in subsection (c) (4);

(2) An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, directly or indirectly, by or for such individual; . . .

(c) Constructive Ownership of Stock.—For purposes of determining, in applying subsection (b), the ownership of stock—

(1) Stock owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries;

(2) An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family; . . .

(4) The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancesters, and lineal descendants . . . ." CODE § 267.

6. Estate of Hanna, 37 T.C. 63 (1961).

7. *I.e.*, held in trust for such individual as here. See note 1 *supra*.

considered as having been sold by a sister (*i.e.*, any sister), who is an individual, not an estate. Further, such "individual," who is considered as owning the shares of the other sisters and those of the estate, is thereby deemed to be the owner of more than fifty per cent of the stock of the corporation to which the sale was made. Therefore, the losses were held to have arisen from transactions between related parties, and as such were not deductible. On appeal to United States Court of Appeals for the Sixth Circuit, *held*, reversed and remanded. Deductions for losses arising from the sale of property to a corporation by an estate, the beneficiaries of which are related and own more than fifty per cent of the stock of such corporation, are not disallowed by section 267 of the Internal Revenue Code of 1954. *Estate of Hanna v. Commissioner*, 320 F.2d 54 (6th Cir. 1963).

Originally, the purpose of what is now section 267 of the 1954 Code was to limit "the practice of creating losses through transactions between members of a family and close corporations."[8] This purpose was effected by the disallowance of deductions for losses from sales or exchanges of property between such persons.[9] However, the statute was not originally intended to bar losses incurred in *all* transactions between entities which have an identity of economic interests.[10] The House Ways and Means Committee specifical-

8. H.R. Rep. No. 704, 73d Cong., 2d Sess. 23 (1934), 1939-1 Cum. Bull. (Part 2) 554.

These losses have been described in more particular terms, and in relation to the purposes of the tax law. "A loss as to particular property is usually realized by a sale thereof for less than it costs. However, where such sale is made as part of a plan whereby substantially identical property is to be reacquired and that plan is carried out, the realization of loss is not genuine and substantial; it is not real. This is true because the taxpayer has not actually changed his position and is no poorer than before the sale. The particular sale may be real, but the entire transaction prevents the loss from being actually suffered. Taxation is concerned with realities, and no loss is deductible which is not real." Shoenberg v. Commissioner, 77 F.2d 446, 449 (8th Cir.), *cert. denied*, 296 U.S. 586 (1935).

9. "Section 24(b) [predecessor of section 267 of the 1954 Code] states an absolute prohibition—not a presumption—against the allowance of losses on any sales between the members of certain designated groups. The one common characteristic of these groups is that their members, although distinct legal entities, generally have a near-identity of economic interests. It is a fair inference that even legally genuine intra-group transfers were not thought to result, usually, in economically genuine realizations of loss, and accordingly that Congress did not deem them to be appropriate occasions for the allowance of deductions." McWilliams v. Commissioner, 331 U.S. 694, 699 (1947).

10. Thus note that the original 1934 Act covered only *certain* transactions, H.R. Rep. No. 704, 73d Cong., 2d Sess. 23 (1934); and that a 1937 amendment was intended "to provide *certain additional* restrictions," H.R. Rep. No. 1546, 75th Cong., 1st Sess. (1937), 1939-1 Cum. Bull. (Part 2) 704, 723; and that the 1954 amendment *expanded* the previous concept of related taxpayers by adding new categories of barred transactions, "between *certain* related taxpayers," H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954). (Emphasis added.)

ly stated, "the amendments . . . do not reach all possible situations in which due to family relationships or friendly control, artificial losses might be created for tax purposes."[11] Nor does any other legislative material[12] suggest that Congress intended to reach all transactions in the general area of related taxpayers or to disallow any losses except those between the parties expressly enumerated in the statute. Specifically, the House Ways and Means Committee demonstrated in 1939 that upstream attribution[13] of stock ownership was not intended by the statute; nor was an artificial change in the basic quality of the transaction by an indiscriminate interchange of parties under the guise of attribution of ownership intended by section 267(c).[14] Thus this section provides for constructive *ownership* (by its own words), and not for constructive transactions; it merely determines stock ownership for the purpose of section 267(b), *i.e.*, it determines whether a party described in one of the nine paragraphs of section 267(b) will be deemed to hold more stock than he actually owns individually. It is not its purpose to define transactions subject to the disallowance of 267(b), nor to change a transaction to one which will be subject to the bar. Although no case has specifically held that a loss from a transaction between a corporation and an estate whose beneficiaries are related and own more than fifty per cent of the stock of the corporation is excluded from the bar of section 267, there is little support from the decided cases[15] for the argument in favor of disallowance. The case that

11. H.R. REP. No. 1546, 75th Cong., 1st Sess. (1937), 1939-1 CUM. BULL. (Part 2) 704, 724.

12. See the Senate Finance Committee Reports which copied, in each instance, the language used by the House Ways and Means Committee on each of the points mentioned.

13. By Section 267(c) the ownership of the stock can undoubtedly be attributed to each of the sisters individually. This downstream attribution, however, does not solve the problem in this case. It was the estate that was the party to the transaction, not any one individual sister, and, unless the stock owned by each sister can be attributed back upstream to the estate, the transaction cannot come within the bar of the statute.

14. The Committee demonstrated its intent to bar the losses only from certain transactions by stating, "the present law and the proposed bill provide that an individual shall be considered as owning the stock held by the members of his family. (This rule, carried into the section as rewritten by the bill, does not, of course, operate to disallow a loss on a sale by wife to her brother-in-law of stock in a corporation. Although for the purpose of applying paragraph (1) (B) and (C) the stock owned by the wife may be considered as owned by the husband, *it is the wife and not the husband* who made the sale and sustained the loss.)" H.R. REP. No. 1546, 75th Cong., 1st Sess. (1937), 1939-1 CUM. BULL. (Part 2) 704, 723. (Emphasis added.) Thus paraphrased to fit the facts in the reported case, *the estate and not the sisters* made the sale, even though the stock held by the estate could be attributed to the sisters.

15. Although the particular issue at hand is one that has not been treated directly by the courts, there have been four classes of cases which bear on it indirectly:

(1) Cases in which the taxpayer's admitted object was the creation of tax losses.

comes closest to supporting the position taken by the Commissioner

McWilliams v. Commissioner, 331 U.S. 694 (1947), held that losses created through a sale by a husband of stock in his wife's account, and the simultaneous purchase of similar shares for his own account, were barred by section 24(b) of the 1939 Internal Revenue Code. (This section is the predecessor of section 267 of the 1954 CODE.) In *McWilliams* there was no problem of attribution of stock ownership. Also in Commissioner v. Kohn, 158 F.2d 32 (4th Cir. 1946), losses admittedly created for tax purposes by the husband who, acting both for himself and for his wife, sold stock for one account and bought similar shares for the other, were disallowed. No attribution problem existed here either. These cases have little bearing on the instant situation, except to show the real purpose for which the statute was enacted.

(2) Cases in which a deduction was allowed for the loss suffered by the taxpayer. John A. Snively, Sr., 20 T.C. 136 (1953), held deductible a loss arising from the sale of property to a family trust, the father of the trustee and beneficiaries of which owned more than 50% of the stock of the selling corporation. The court said that section 24(b)(2)(B) and (D) (predecessor of section 267 (c)(2) and (4) of the 1954 CODE) did not operate to impute the petitioner's stock to his family by the rules of attribution, and that therefore the bar of section 24(b) was not effective as to this loss. "If Congress had intended that section 24(b) [of the 1939 Code] should apply to transactions between a trust and a corporation, we think it would have made specific provision therefor . . . ." *Id.* at 149. The Commissioner acquiesced in the decision, which seems quite clearly to have been correct under the Code as it was then. 1955-1 CUM. BULL. 6. Note, however, that Congress specifically overruled this decision by adding paragraph (8) to section 267(b) of the 1954 Code. Lexmont Corp., 20 T.C. 185 (1953), involved transactions between a corporation and a trust which owned all of the stock thereof. It was held that interest accrued and unpaid on sums due to the trust by the corporation were deductible, on the basis of the *Snively* decision. The Commissioner acquiesced in this decision also, 1955-1 CUM. BULL. 5, but paragraph (8) of Section 267(b) of the 1954 Code specifically reversed it along with *Snively*. A third case in which the deduction was allowed is Estate of Ingalls, 45 B.T.A. 787 (1941), *aff'd*, 132 F.2d 862 (6th Cir. 1943). This case was relied upon quite extensively in the arguments of both the Commissioner and the taxpayer in the instant ease. This is not surprising, since the court in *Ingalls* specifically refused to decide the precise point here at issue. In that case an estate which had four distributees sold certain corporate stock to a corporation more than 50% of the outstanding stock of which it owned, and by such sale it sustained a long-term capital loss. The court held: "The vendor here being an estate, section 24(b)(2)(A) [predecessor of present section 267(c)(1)] is applied to determine the indirect owners of the stock sold and it is found that the owners were the beneficiaries of the estate, were four in number, and owned the stock proportionately. Accordingly the stock was sold not by 'an individual,' but by a group of individuals, and further, no 'such individual' owned 'more than 50 percentum in value of the outstanding stock' of the purchasing corporation. Section 24(b)(1) does not therefore prohibit the deduction of the loss in question . . . ." *Id.* at 793. In discussing the problem there decided in relation to the situation which eventually did arise and was presented for solution in the reported case, the court used very guarded language: "The respondent makes no claim that the stock in question was owned or sold by a family or any member thereof, nor does he suggest or claim that the distributees of the estate were or may have been members of a family within the meaning of the statute. We do not therefore consider or decide whether the statute would require a different result in a case where there is a claim that a family relationship does or may exist between the beneficiaries of the estate making the sale." *Ibid.* Note that even though Congress amended the statute to bring transactions by a trust within it, it did not at the same time amend it to cover transactions by an estate, which it easily could have done at the same time. This is at least one indication of a lack of intent to bring estates under the bar of the statute.

(3) Cases in which the Code was strictly applied when the facts were clearly

is *Estate of Ingalls.*[16] There a loss was incurred on a sale of stock to a corporation by an estate which itself owned more than fifty per cent of the stock of the buying corporation. By section 24(b)(2)(A) of the 1939 Code (which is substantially the same as the present section 267(c)(1)), the stock was considered to have been owned and sold by the individual beneficiaries of the estate. However, since the beneficiaries were not related, and since none owned more than fifty per cent of the stock of the buying corporation, the sale was not between an individual and a corporation more than fifty per cent of which was owned by such individual. Thus the loss was not barred by section 24(b)(1)(B) of the 1939 Code (which is substantially the same as the present section 267(b)(2)). Although the *Ingalls* court held that the sale must be considered as made by the individual beneficiaries of the trust, it refused to consider the problem that would have resulted had the beneficiaries been related. This, of course, is the precise issue at hand in the reported case,[17] and analogy to the previous cases taken in conjunction with the legislative intent is all that could be relied upon to resolve it.

In the instant case, the Commissioner and the Tax Court disallowed the loss under section 267(b)(2), which disallows a loss resulting from a sale or exchange of property between a corporation

within its provision, despite harsh results. In Radom & Neidorff v. United States, 281 F.2d 461 (Ct. Cl. 1960), because of a dispute between the equal owners of a corporation, the corporation was unable to pay one of them his salary within the period specified by the statute. The court noted that even though it imposed an unintended hardship, the plain and unambiguons working of section 24(b) of the 1939 Code compelled the disallowance of a deduction for constructive receipt of the salary. Also, Bennett v. Uuited States, 293 F.2d 323 (9th Cir. 1961), held that a bonus was not constructively paid within the time specified by section 267(a), and that therefore it could not be dedncted by the corporation even in the absence of any fault of the taxpayer. It seems that if section 267 must be literally interpreted to create an unintended hardship to a taxpayer, there should be a persuasive argument that it should be interpreted literally to avoid such hardship.

(4) Cases in which the Code was applied when the facts simply fell clearly within its provisions, and no undue hardship resulted. Boehm v. Commissioner, 255 F.2d 684 (2d Cir. 1958), is a typical case coming directly under the statute. There, the taxpayer was not allowed to deduct losses she incurred by selling stock to wholly-owned corporations by the indirect method of passing the stock through a relative who, on the same day, for the same price, transferred the stock to the corporation. The recent case of McCarthy v. Conley, CCH 1964 STAND. FED. TAX REP. (64-1 U.S. Tax Cas.) ¶ 9321 (D. Conn. Feb. 26, 1964), held that a taxpayer whose brothers and sisters owned 3,664 shares of a corporation of which she directly owned 1,000 shares, constructively owned all 4,664 shares by the attribution rule of section 267(c), so that she engaged in a transaction between herself and a corporation in which she owned indirectly more than 50% of the stock, and the loss she incurred by this sale is barred by section 267(a), because the loss did not occur in connection with a distribution in corporate liquidation or partial liquidation.

16. 45 B.T.A. 787 (1941), *aff'd.*, 132 F.2d 862 (6th Cir. 1943), discussed in note 15 *supra.*

17. See note 15 *supra.*

and an *individual* who owns directly or indirectly more than fifty per cent of the outstanding stock of such corporation. Although the sale here was between an *estate* and a corporation, rather than between an *individual* and a corporation, as specified by section 267(b)(2), the Commissioner contended, and the Tax Court held,[18] that under section 267(c)(1) the stock owned by the estate is considered as being owned proportionately by each of the three sisters and that the stock owned by each trust is considered as owned by each beneficiary; that under section 267(c)(5) stock constructively owned by a person as a result of the application of paragraph (1) shall for the purpose of applying paragraph (2) be treated as actually owned by such person; that by sections 267(c)(2) and (4) the stock thus treated as actually owned by one sister is deemed constructively owned by each of the other sisters; and thus effectively, that each surviving sister "owned" the stock owned by her other two surviving sisters, as well as all of the decedent's stock, and that therefore the loss incurred by the transaction was barred by section 267(b). The Sixth Circuit Court of Appeals, however, found one major fallacy in this reasoning. Section 267(b), it was said, bars losses resulting from sales or exchanges *only* in the nine types of transactions specified, and the transactions in this case do not fall under the precise terms of any one of these nine types. The Commissioner claimed that section 267(b)(2), dealing with a sale or exchange between an individual and a corporation, is applicable to bar the loss. However, the court said, "the sale or exchange in the present case was between an *estate* and a corporation. Clearly, an individual and an estate are not the same."[19] The court then shows why an estate cannot be deemed an individual, and, in rebuttal to the Commissioner's contention, why no one of the sisters can be deemed to have made the sale of the stock "owned" by her sisters so that she can be considered as the individual specified in the statute. The taxpayer argued[20] that since the statute defines the term "person" "to mean and include an individual, a trust, estate, partnership, association, company or corporation,"[21] then manifestly the term "individual" does not include the term "estate;" the two can not be the same. It may be inferred that since the court cited this section as a basis for its holding in favor of the taxpayer, it agreed with this reasoning.[22] The more important basis of the decision, however, was the court's application of the attribution rules of

18. 37 T.C. 63 (1961).

19. 320 F.2d at 57.

20. Brief for Petitioner, p. 14, Estate of Hanna v. Comm'r, *supra* note 1.

21. CODE § 7701(a)(1).

22. Thus, this reasoning was not spelled out. 320 F.2d at 57.

section 267(c). That section, said the court, deals only with the constructive ownership of stock; "it does not say that a sale by an estate is to be considered as a sale by an individual, thus enlarging the transactions barred by section 267(c)."[23] As Judge Drennan said in his concurring opinion in the Tax Court, upon which the court of appeals relies, the fallacy in the reasoning of the Tax Court is that section 267(c) is "not for the purpose of determining whether the other party to the transaction, the seller-estate here, qualifies as an individual under section 267(b)(2)."[24] Rather, the rules of section 267(c) determine how much stock is owned (directly or indirectly) by the parties (*i.e.*, the actual parties) to the transaction *as they are;* the rules provide only for attribution of *ownership* of stock, not of *identity* of transacting parties. Thus under section 267(b)(2) the ownership of stock must be determined because an individual selling to a corporation will lose the deduction for a loss if such individual owns, directly or indirectly, more than fifty per cent in value of the outstanding stock. In determining the ownership, that same individual is constructively charged with the ownership of others' stock under section 267(c). Thus, although by section 267(c)(1) the ownership of the stock can be attributed to each of the sisters in turn, since such downstream attribution of ownership is expressly provided for, and although the shares held for each sister in trust can be attributed to the other by sections 267(c)(2) and (4), the statute does *not* justify reverse or upstream attribution of the shares held by the beneficiaries back to the estate. The court added that since Congress could easily have specifically disallowed losses from sales by an estate in addition to losses from sales by an individual, and did not do so, the court did not think it would be justified in so enlarging section 267(b)(2) on the basis of only an implication drawn from section 267(c). In deciding for the taxpayer, the court said that even though the *Ingalls* decision[25] resulted from a distinguishable factual situation, the rationale, if followed, would yield an opposite result in the instant case. It was therefore forced to say that the *Ingalls* rationale would not be followed here.

The precise holding in the instant case is that while stock may be attributed downstream from an estate to its beneficiaries according to their proportionate shares in the estate by section 267, stock held by the beneficiaries may *not* be attributed back upstream to the estate. Thus even though one beneficiary of an estate is deemed the owner of all of the shares of a corporation by the attribution rules, if the estate itself sells its shares to the corporation at a loss, section

23. *Ibid.*
24. 37 T.C. at 70.
25. *Supra* note 16.

267 will not disallow a deduction. This decision is of considerable importance to estates in the same position as petitioner herein. It is questionable, though, how it would affect an estate which itself directly owned more than fifty per cent of the stock of the corporation to which it made a sale.[26] However, since the Commissioner will not file a petition for certiorari in the Supreme Court,[27] the deductions allowed to an estate holding a minority of the shares of a buying corporation could well be for very substantial losses. The individual beneficiaries, on the other hand, will not be given this advantage if the stock is passed through the estate and then sold to the corporation by them.[28] This decision, then, gives to estate planners a very important tool by which large amounts of money in the form of deductions may be saved.

The decision raises, in addition to the problem of pure application of the attribution rules of section 267(c), the interesting problem of the lack of uniformity as among this and the other sets of attribution rules in the Code.[29] In the case of family attribution,

26. The estate here owned only 25% of the outstanding shares of the corporation. Because the estate did not own more than 50% of this stock, it is difficult to tell exactly what the basis for the decision was. The court expresses two grounds: the first is that, "clearly, an individual and an estate are not the same." 320 F.2d at 57. The second is that attribution from the beneficiaries upstream to the estate is not provided for by section 267. Thus even if an estate were considered an individual, such individual would not own or be deemed to own over 50% of the corporation's stock because of the prohibition of upstream attribution. On the other hand, if upstream attribution had been allowed, the holding that an estate is not an individual would still prevent the disallowance. Thus a question arises how the courts in the future will treat an estate which itself directly owns over 50% of the stock of a corporation, and attempts to take a deduction for losses sustained from a transaction with that corporation. Upstream attribution would not have to be sought by the Commissioner, and the sole question would be whether the estate is an individual. The instant case is persuasive, but not controlling, authority for a negative answer. There is a corollary, but far less likely, situation which may also arise. Assume Congress amends section 267(b) by adding a tenth relationship (*i.e.*, an estate and a corporation more than 50% of the stock of which is owned by such estate). Now an estate which owns 25% of the stock of a corporation sells to that corporation and takes a loss. If the beneficiaries of the estate own the remaining 75% of the stock, the sole question would be whether upstream attribution is allowed by section 267. The instant case doesn't leave much doubt as to what the answer would be, but the question nevertheless is there.

27. P-H FED. TAXES CITATOR, p. 10,297; CCH 1963 STAND. FED. TAX REP. (case table) p. 70,823.

28. This, of course, is because if the beneficiary makes the sale, then the loss would result from a transaction between an *individual* and a corporation.

29. The Internal Revenue Code contains three major sets of attribution rules—those of sections 267, 318, and 544. The attribution rules of section 1239 apply only to that section, and provide that an individual shall be treated as owning stock owned by his spouse, minor children, and minor grandchildren. The rules of section 421 also apply only to that section, which deals with restricted stock options. For an excellent detailed discussion of all the attribution rules under the Code, see Ringel, Surrey & Warren, *Attribution of Stock Ownership in the Internal Revenue Code*, 72 HARV. L. REV. 209 (1958).

section 544(a)(1)[30] sets out provisions identical to those in sections 267(c)(2) and (4). In these sections, an individual is deemed to own all stock owned by or for his brothers and sisters (whether by whole or by half blood), spouse, ancestors, and lineal descendants. By section 318(a)(1),[31] however, the concept of family is more limited; an individual is considered as owning only the stock owned by or for his spouse, children, grandchildren, and parents. Also attribution from one spouse to the other under section 318 occurs only if they are not separated by a decree of divorce or separate maintenance. Neither section 267 nor 544 contains this limitation. It does appear, however, that all of these sections will treat a legally adopted child the same as a child by blood.[32] As to the attribution of stock owned by an estate, sections 267(c)(1), 318(a)(2)(A), and 544(a)(1) all provide for downward attribution;[33] that is, stock owned by an estate shall be considered as owned proportionately by its beneficiaries.[34] Section 318, however, is the only one of the three which provides that stock owned by the beneficiaries will be attributed back upstream to an estate.[35] Although, sections 267 and 544 do not provide, at least directly, for upstream attribution, the rules of section 267 do bring about the same result

30. This section gives rules for determining whether or not corporate income is personal holding company income, and whether there is the required percentage of ownership by the shareholders to result in personal holding company treatment.

31. This section sets out attribution rules to be applied in Subchapter C, dealing with corporate distributions.

32. CODE § 318(a)(1(B); Treas. Reg. § 1.267(c)-1(a)(4) (1958). Although there is no provision either in section 544 or in the regulations for that section, it appears natural that this rule should apply in its application. At least there seems to be no reason that it should not.

33. Under the rule of Steuben Sec. Corp., 1 T.C. 395 (1943), beneficiaries, for the purposes of section 318 attribution, are taken to be only those persons having a present interest in an estate and not those having a vested remainder or other remote interest whether vested or contingent. Treas. Reg. § 1.318-3(a), example (1) (1960). Also, by Treas. Reg. § 1.318-3(a), example (2) (1960), stock owned by an estate will be attributed to *all* present beneficiaries of the estate, even though it has been specifically bequeathed to one individual, and not just to that individual. There is nothing in the regulations for sections 267 or 544 covering these points, but it is presumed that the same ruling would apply in their application.

34. Sections 267, 318, and 544 all also provide that stock owned by a corporation will be attributed to its shareholders, CODE §§ 267(c)(1), 318(a)(2)(C)(i), 544(a)(1); that stock owned by a partnership will be considered as owned by its partners, CODE §§ 267(c)(1), 318(a)(2)(A), 544(a) (1); and that stock owned by a trust is treated as owned by its beneficiaries, CODE §§ 267(c)(1), 318(a)(2)(B), 544(a)(1). In all of these relationships, as in that of an estate and its beneficiaries, the ownership attributed is proportionate to the attributee's interest in the corporation, partnership or trust, rather than 100%, as in attribution among family members.

35. CODE § 318(a)(2)(A). Section 318 also provides for attribution of stock owned by shareholders back upstream to corporations, CODE § 318(a)(2)(C)(ii); from partners back to partnerships, CODE § 318(a)(2)(A); and from beneficiaries back to trusts, CODE § 318(a)(2)(B). Note that back, or upstream attribution is 100% rather than proportionate to the owner's interest.

to a limited extent. Thus, as an example, although there is no back attribution from an individual to a corporation in which he owns stock, a loss is disallowed on a sale to the corporation by such an individual if he owns more than fifty per cent in value of the outstanding stock.[36] This achieves the same result that would be accomplished by upstream attribution in this instance. However, there are many instances where losses are not disallowed, whereas if back attribution were provided for, they would be.[37] The three sections also provide, in one form or another, for sidewise attribution, or reattribution.[38] The provisions are not consistent, however, and are needlessly intricate. This is true, moreover, for all of the attribution provisions of the Code. There are many variations in the definitions and application of each section, and there are even more variations within the same set of rules. This seems unnecessary at the least.[39] There appears to be no good reason why all of these rules cannot be eliminated and substituted by a single set,[40] with perhaps a few minor variations where deemed necessary. It is doubtful whether any new loopholes would be opened up, and even if they were, they could be closed for all sections at the same time by an amendment or court decision pertaining to such a new set of unified rules. Further, the needless wasting of time by law students, attorneys, clients, and tax officials, which results in very real economic loss brought about by these complex internal inconsistencies, could be eliminated.

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36. CODE § 267(b)(2).

37. Thus there is no problem for disallowance of losses on sales between trusts having the same beneficiary, or between a fifty-per-cent-owned corporation and a fifty-per-cent-owned partnership. Were back attribution provided for, these losses would be disallowed.

38. Reattribution, or sidewise attribution is the attribution of stock owned by a shareholder, partner, or beneficiary to his fellow shareholders, partners, or beneficiaries. This may be done either by directly providing for it, as is done in sections 267(c)(3) and 544(a)(2) in the case of partners (and only in this case), or indirectly by providing first for back attribution to the corporation, partnership, estate, or trust and then reattributing it to the stockholders, partners and beneficiaries as is done by section 318(a)(2) and (4)(A). Neither the results nor the application of these methods are identical as among these three sections.

39. Nor is the situation relieved by the enactment of the 1964 Act. Section 225(e), amending section 554, only applies the rules of section 544 to foreign personal holding companies. And section 235(a), adding section 1563 to the 1954 CODE (which gives definitions and special rules to be used in part II (dealing with multiple surtax exemptions for controlled corporations) of subchapter B of chapter 6 (giving related rules for consolidated returns)), adds an entirely new and different set of rules.

40. It is not within the scope of this article to propose a new set of attribution rules. The purpose, rather, is only to point out that these inconsistencies exist, and that a remedy to the senseless proliferation of intricacies is needed. See Ringel, Surrey & Warren, *supra* note 29.