

# INDIVIDUAL RETIREMENT ACCOUNTS: REFLECTIONS ON SOME UNANSWERED QUESTIONS

Jeffrey G. Sherman\*

The individual retirement account (IRA) entered the language of tax practitioners (and the arsenal of taxpayers) in 1974 with the enactment of ERISA.<sup>1</sup> When Congress debated ERISA, it was acknowledged<sup>2</sup> that some sort of tax-deferred retirement saving device was needed for persons not covered by a qualified retirement plan<sup>3</sup> or other employer-sponsored pension program. The IRA emerged as the vehicle for offering such persons the advantages of tax-deferred saving.<sup>4</sup> An IRA is a trust account, held by a bank or similar institution,<sup>5</sup> that meets the requirements set forth in Internal Revenue Code section 408(a).<sup>6</sup> If these requirements are met, the account is exempt from in-

---

\* Associate Professor of Law, IIT/Chicago Kent College of Law. A.B., 1968, Harvard College; J.D., 1972, Harvard University.

1. ERISA is the acronym for the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974).

2. See S. REP. NO. 93-383, 93d Cong., 2d Sess. 130, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4890, 5013.

3. A retirement plan is typically an employer-sponsored arrangement whereby the employer makes periodic contributions to a fund, and the administrator of the fund makes distributions from the fund to retired employees. A plan is said to be "qualified" if it meets the requirements set forth in I.R.C. § 401(a), 403, or 405. Numerous tax advantages flow from a plan being qualified, among these: (1) The funds of the plan are exempt from income taxation, *id.* § 501(a); (2) the employer may deduct any contributions he makes to the plan, even if none of his employees has a vested right at that time to any portion of the contributions, *id.* § 404(a); and (3) the employee is taxed only upon actual or constructive receipt of a pension payment, even if he had long before acquired vested rights in the fund. *Id.* § 402(a)(1). See generally M. CANAN, QUALIFIED RETIREMENT PLANS §§ 1.6, 3.1 (1977).

4. ERISA § 2002 added to the Internal Revenue Code the various IRA provisions. ERISA § 2002(j)(1) provided that the deduction for IRA contributions pursuant to I.R.C. § 219 was to be available for taxable years beginning after December 31, 1974.

5. For a discussion of the kinds of institutions that may serve as IRA trustees, see Treas. Reg. § 1.408-2(b)(2) (1980).

6. I.R.C. § 408(a) requires that an IRA be represented by a written trust instrument that expressly prohibits: (1) the acceptance by the trustee of a noncash contribution or a contribution in excess of \$1,500 for a taxable year on behalf of any individual, except for certain rollover contributions; (2) the investment of any trust funds in life insurance contracts; (3) the forfeiture

come taxation,<sup>7</sup> and individuals who have not yet reached age 70½ and are not covered by other plans<sup>8</sup> are permitted to deduct contributions in limited amounts pursuant to I.R.C. section 219 or 220.<sup>9</sup> ERISA also added to the Code certain penalty tax provisions designed to ensure that the deductible limits are not exceeded<sup>10</sup> and that IRAs are maintained only for retirement saving.<sup>11</sup>

The creation of the IRA device naturally brought with it a host of questions. With the recent publication by the Internal Revenue Service of the final regulations dealing with IRAs,<sup>12</sup> many of these questions have been answered, and some new ones have been raised. This article does not pretend to be an exhaustive study of IRAs. Rather, it is a discussion of eleven arbitrarily selected issues that are left unclear or in need of elaboration by existing law.

While this article was being prepared for publication, Congress passed the Economic Recovery Tax Act of 1981 (ERTA),<sup>13</sup> which made substantial changes in the law relating to IRAs. These changes will not become effective immediately, however. The pre-ERTA rules will continue to apply for some time beyond the publication date of this article.<sup>14</sup> For this reason, and because the recent changes cannot be clearly understood except in the context of prior law, each of the eleven issues

---

of any assets in the trust for any reason; and (4) the commingling of the assets of the trust with other property, except in a common trust fund or common investment fund. The trust instrument must also contain certain prescribed provisions relating to the prompt distribution of trust assets to the individual for whom the trust was established when he reaches retirement age and the prompt distribution to the individual's beneficiary of any trust assets remaining at the individual's death.

A discussion of rollover contributions is beyond the scope of this article. For a general treatment of the subject, see generally M. CANAN, *supra* note 3, at § 15.8.

7. I.R.C. § 408(e).

8. If, for a given taxable year, an individual is an "active participant" in (1) a qualified retirement plan; (2) a plan (whether or not qualified) established for its employees by the United States, by a State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing; or (3) a tax-sheltered annuity program described in I.R.C. § 403(b), then the individual may not make deductible contributions to an IRA for that year. *Id.* §§ 219(b)(2), 220(b)(3).

9. Instead of a trust account, an individual can employ an individual retirement annuity, see *id.* § 408(b), or a retirement bond, see *id.* § 409, to take advantage of the § 219 or 220 deduction and § 408 or 409 tax exemption. But since the rules relating to individual retirement annuities and retirement bonds are essentially the same as those relating to IRAs, and because IRAs are likely to be the most commonly employed of these three retirement savings vehicles, this article will use terminology specifically applicable to IRAs.

10. See *id.* § 4973, which was added to the Code by ERISA § 2002(d) (1974).

11. See I.R.C. §§ 408(f) and 4974, which were added to the Code by ERISA §§ 2002(b) and 2002(e) (1974), respectively.

12. The regulations interpreting I.R.C. §§ 219, 408, 409, and 4974 were issued as T.D. 7714, 45 Fed. Reg. 52,782 (1980). The regulations interpreting I.R.C. § 2039(e) were issued as T.D. 7761, 46 Fed. Reg. 7298 (1981). (I.R.C. § 2039(e) deals with the estate tax treatment of IRAs. It was added to the Code by § 2009(c) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1894 (1976)). Proposed Regulations interpreting I.R.C. §§ 220 and 4973 were published at 46 Fed. Reg. 36,198 (1981).

13. Pub. L. No. 97—, — Stat. — (1981), reprinted in [1981] U.S. CODE CONG. & AD. NEWS (Supp. 6, Aug. 1981). Most of the statutory amendments affecting IRAs are found in ERTA § 311(a) (1981).

14. The changes made by ERTA § 311(a) are effective for taxable years beginning after December 31, 1981. ERTA § 311(i)(1) (1981).

will first be discussed as if ERTA had not been enacted, and then an analysis of the relevant changes made by ERTA.

### ISSUES RELATING TO CONTRIBUTIONS TO IRAS

#### A. *Active Participation in a Profit-Sharing or Stock Bonus Plan*

Profit-sharing plans and stock bonus plans are two types of qualified<sup>15</sup> plans. The income tax regulations define and describe these plans in detail.<sup>16</sup> For purposes of this discussion, however, it is enough simply to note that under both types of plans the employer (and sometimes each participating employee as well) makes periodic contributions to a trust fund in which each employee has a separate account. The employer's contributions are allocated among these accounts. The funds in the trust are invested by the trustee, and earnings and losses are allocated proportionately among the employees' accounts. When an employee retires, he receives whatever his account balance is worth, rather than predetermined dollar amount.

I.R.C. sections 219 and 220 provide that an individual may not claim a deduction for contributions to an IRA for any year for which he is an active participant in a qualified plan. The regulations state that an individual is considered to be an active participant in a profit-sharing or stock bonus plan for a particular year if an employer contribution is allocated to his account under the plan in that year.<sup>17</sup> This rule seems simple enough until one recalls that an employer may make "retroactive" plan contributions. I.R.C. section 404(a)(6) provides that for purposes of deducting his contribution to a qualified plan, an employer "shall be deemed to have made a [contribution] on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof)."<sup>18</sup> In other words, if a calendar-year basis corporation wishes to deduct a contribution to a plan on its 1978 return, it need not actually make the contribution until March 15, 1979.<sup>19</sup>

Suppose an individual is covered by a profit-sharing plan main-

---

15. See note 3 *supra*.

16. Profit-sharing plans are described in Treas. Reg. § 1.401-1(b)(1)(ii) (1976). Stock bonus plans are described in *id.* § 1.401-1(b)(1)(iii).

17. *Id.* § 1.219-2(d)(1) (1980).

18. I.R.C. § 404(a)(6).

19. *Id.* § 6072(b) provides that most corporations that report their income and file their income tax returns on the basis of the calendar year must file such returns on or before the 15th day of March following the close of the calendar year. That due date may be postponed by applying for an extension of time for filing pursuant to I.R.C. § 6081. Throughout this article, it will be assumed that all corporate and individual taxpayers file their income tax returns on a calendar year basis.

tained by a calendar-year corporation. The corporation wishes to claim a 1980 tax deduction pursuant to I.R.C. section 404 for a contribution that it actually made to the plan on March 10, 1981. Section 404 requires, in order for the deduction to be allowable retroactively, that the profit-sharing plan administer the contribution as if it had been received no later than December 31, 1980. That is, the contribution must be deemed to have been allocated to the employees' accounts as of some date in 1980. The question therefore arises: If the contribution is actually made in 1981 but is allocated to the employees' accounts as of 1980, in which year—1980 or 1981—is the individual an active participant in the plan by virtue of that contribution? The regulations provide this answer: "A contribution is added to a participant's account as of the later of the following two dates: the date the contribution is made or the date as of which it is allocated."<sup>20</sup>

Because of this rule, the timing of contributions to a qualified plan may be manipulated in such a way as to allow IRA contribution deductions in alternate years along with qualified plan participation for all years. Suppose an individual participates in a qualified profit-sharing plan. His employer does not make his 1978 contribution to the plan until March, 1979. He makes his 1979 contribution in December, 1979. He makes his 1980 contribution in March, 1981, and his 1981 contribution in December, 1981. According to the regulations, no employer contribution was allocated to the individual's account under the plan in 1978 or 1980. Therefore, the individual would be permitted to claim a deduction for IRA contributions made for 1978 and 1980, even though as a practical matter there was never any interruption in his participation in the profit-sharing plan.

*ERTA Changes:* The restriction of the IRA deduction to individuals who are not active plan participants has been eliminated. Under I.R.C. section 219, as amended by ERTA,<sup>21</sup> an individual who is an active plan participant may deduct IRA contributions to the same extent as an individual who is not an active plan participant.<sup>22</sup>

Beginning in 1982, an individual covered by a qualified plan may be permitted to make deductible voluntary contributions to the plan, but any such contributions will reduce the amount of deductible contributions that he might otherwise make to an IRA. For the remainder of

---

20. Treas. Reg. § 1.219-2(d)(1) (1980). There is an exception to this rule, see *id.* § 1.219-2(d), that does not affect the specific examples that follow in the text and will not be discussed here. The exception is illustrated in *id.* § 1.219-2(h), example (2).

21. ERTA § 311(a) (1981).

22. The elimination of the active participation restriction is effective for taxable years beginning after December 31, 1981. *Id.* § 311(i)(1).

this article, it will be assumed that no deductible voluntary contributions are made to any qualified plans.

### B. *May Contributions Exceed \$1,500?*

I.R.C. section 219(b) limits an individual's IRA contribution deduction in a given year to the lesser of \$1,500 or fifteen percent of his "compensation includible in . . . gross income" for that year.<sup>23</sup> May an individual legally make an IRA contribution of more than \$1,500? Clearly, he may not *deduct* the entire contribution, but may he even *make* it? I.R.C. section 408(a)(1) requires that the written instrument creating the IRA expressly prohibit the acceptance by the trustee of contributions on behalf of an individual in excess of \$1,500 in any taxable year.<sup>24</sup> Still, trustees have been known to perform acts expressly prohibited by their trust instruments. When a trustee performs a prohibited act, the act is ordinarily not void but merely voidable (or at least remediable) at the suit of the beneficiary;<sup>25</sup> and if the beneficiary consents to the breach (as he would by contributing more than \$1,500 to the IRA), there is no one to maintain a suit to set aside the act.<sup>26</sup> Furthermore, I.R.C. section 408(d)(5)(A) seems to contemplate the occasional acceptance of a contribution greater than the maximum dollar amount ever allowable as a deduction.<sup>27</sup> Therefore, one ought to conclude that notwithstanding I.R.C. section 408(a)(1), an individual may make a contribution to an IRA in excess of \$1,500,<sup>28</sup> but he must be

---

23. I.R.C. § 219(b).

24. *Id.* § 408(a)(1).

25. *Keown v. West Jersey Title & Guar. Co.*, 161 N.J. Super. 19, 23, 390 A.2d 715, 717 (1978); see *Ripley v. Denver United States Nat'l Bank*, 273 F. Supp. 718 (D. Colo. 1967); *Johnson v. Long*, 235 Ala. 283, 178 So. 54 (1938); *Work v. County Nat'l Bank & Trust Co.*, 4 Cal. 2d 532, 51 P.2d 90 (1935).

26. *Chicago Title & Trust Co. v. Shellabarger*, 399 Ill. 320, 346-47, 77 N.E.2d 675, 688 (1948); *In re Strawbridge's Estate*, 322 Pa. 406, 409, 185 A. 726, 729 (1936). In order for a beneficiary's consent to bar his remedy against the trustee, the beneficiary must have been sui juris and fully aware of all the relevant facts at the time of his consent, and such consent must not have been induced by the improper conduct of the trustee. See generally 3 A. SCOTT, TRUSTS § 216.3 (3d ed. 1967).

27. I.R.C. § 408(d)(5) is a relief provision that allows an individual, in certain circumstances, to withdraw an excess contribution without having to include the withdrawn amount in his gross income for the year of withdrawal. The provision, however, by its terms, applies only "if the aggregate contributions . . . paid for [the] taxable year to an individual retirement account . . . do not exceed \$1,750. . . ." Thus, this provision contemplates that aggregate contributions might, on occasion, be made in excess of \$1,750, although \$1,750 is the maximum dollar amount ever allowable as a deduction for IRA contributions. See I.R.C. §§ 219, 220; text at notes 28 & 89 *infra*.

28. An analogy might be made to the rules relating to premature distributions from a qualified plan to an owner-employee participating therein. (The term "owner-employee" means a person who "(A) owns the entire interest in an unincorporated trade or business, or (B) in the case of a partnership, is a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership." I.R.C. § 401(c)(3)). If a qualified plan covers any owner-employees, I.R.C. § 401(d)(4)(B) requires that the plan expressly prohibit the payment of benefits to any owner-employee prior to his attaining the age of 59½ (except in cases of disability). Yet I.R.C. § 72(m)(5) seems to assume that this express prohibition may be ignored on occasion, since

prepared to suffer certain adverse tax consequences if he does so.<sup>29</sup>

*ERTA Changes:* ERTA has increased the section 219 deductible limits to the lesser of (1) \$2,000, or (2) an amount equal to the compensation includable in the individual's gross income for the relevant taxable year.<sup>30</sup> A conforming amendment was made to I.R.C. section 408(a)(1),<sup>31</sup> as a consequence of which IRA instruments must expressly prohibit the acceptance of contributions in excess of \$2,000 in any taxable year on behalf of an individual.<sup>32</sup> None of the changes made by ERTA, however, alters the foregoing conclusion that contributions in excess of the maximum allowable deduction may legally be made.<sup>33</sup>

### C. *May an IRA Consist Entirely of Nondeductible Contributions?*

If an individual's IRA contributions for a given year exceed the deductible limits, he must pay a penalty excise tax equal to six percent of that "excess contribution."<sup>34</sup> Moreover, in order to ensure that the excise tax serves as an effective deterrent to the making of excess contributions, the tax is imposed cumulatively. For example, suppose Smith earns \$8,000 of compensation in 1980 but makes a contribution of \$1,400 to an IRA for that year. Because Smith's maximum allowable deduction for IRA contributions for 1980 is \$1,200, he must pay an excise tax of \$12 (6% of \$200) when he files his 1980 income tax return. In 1981, Smith earns \$12,000 of compensation and makes a contribution of \$1,500 to the IRA for that year. Although the entire 1981 contribution is within the deductible limits, the \$200 excess contribution from the previous year is still in the IRA earning tax-deferred income. Therefore, Smith will be charged with a \$200 excess contribution for 1981 as well, and he must pay another \$12 excise tax. Indeed, he must continue to pay the excise tax on the excess contribution so long as it remains in the IRA uncorrected.<sup>35</sup>

As the interest rates available to general investors increase, the deterrent value of the six percent excise tax diminishes. Consider the case

---

it provides for a penalty tax to be imposed if benefits are paid to an owner-employee prior to age 59½.

29. See text at note 32 *infra*.

30. I.R.C. § 219(b)(1), as amended by ERTA § 311(a) (1981).

31. The conforming amendment was effected by ERTA § 311(g)(1)(A) (1981).

32. I.R.C. § 403(d)(5)(A) was likewise the subject of a conforming amendment. See text at note 87 *infra*.

33. I.R.C. § 401(d)(4)(B), which is the subject of the analogy in note 26 *supra*, has been amended by ERTA § 312(e)(2), but this amendment does not affect the analogy.

34. I.R.C. § 4973(a).

35. An excess contribution to an IRA may be corrected by withdrawing the excess pursuant to I.R.C. § 408(d)(4) (see text at notes 76-78 *infra*) or § 408(d)(5) (see text at notes 81-88 *infra*), or by making a corrective undercontribution, a contribution less than the maximum allowable deduction for the subsequent year.

of an individual who is an active participant in a qualified plan and consequently is ineligible to make deductible IRA contributions. If he did establish an IRA, however, he might be able to earn such high interest (on a tax-deferred basis) that even though he had to pay the six percent excise tax on excess contributions every year, he would still show a profit for the whole transaction. May he establish a tax-exempt IRA and make contributions to it (subject to the excise tax), even though all of the contributions will be non-deductible?

Surprisingly, the answer is yes. Nowhere in the Internal Revenue Code is there any mention of eligibility to establish an IRA. The code speaks only of eligibility to deduct contributions to an IRA. So long as the account meets all the requirements set forth in I.R.C. section 408(a), it will be exempt from income taxation pursuant to I.R.C. section 408(e) even if it contains only non-deductible contributions.<sup>36</sup> Of course, the individual will have to pay the six percent excise tax for each contribution in its entirety for as long as each contribution remains in the IRA.<sup>37</sup>

*ERTA Changes:* ERTA does not affect the foregoing analysis, though of course the numerical example involving Smith would have to have been modified had post-1981 taxable years been considered. Suppose a different Smith earns \$10,000 of compensation in 1982 and makes a contribution of \$2,500 to an IRA for that year (assume that he has never made an IRA contribution before). Because his maximum allowable deduction for IRA contributions for 1982 is \$2,000, he must pay an excise tax of \$30 (6% of \$500) when he files his 1982 income tax return. In 1983, Smith earns \$11,000 of compensation and makes a contribution of \$2,000 to the IRA for that year. Although the entire 1983 contribution is within the deductible limits, the \$500 excess contribution from the previous year is still in the IRA uncorrected. Therefore, Smith will be charged with a \$500 excess contribution for 1982 as well.

---

<sup>36</sup> See Private Letter Rul. 7731002 (May 5, 1977).

<sup>37</sup> Suppose an individual in the 50% income tax bracket establishes an IRA even though he is ineligible to deduct contributions thereto. Suppose further that he is able to earn 16% interest on a particular investment. If he invests \$1,000 at 16% but without the IRA shelter, he will earn \$80 of interest income after taxes for the first year. If instead he contributes that \$1,000 to the IRA at 16% his net income on the investment for the year will be \$100 (\$160 of interest income less \$60 of excise tax, per § 4973). To be sure, he will eventually have to pay income tax on the entire \$100 increment, but not until he actually withdraws that sum from the IRA after retirement, see text at notes 67-75 *infra*, at which time he will presumably be in a lower tax bracket. Moreover, that \$100 increment will itself produce further tax-deferred income for as long as it remains in the IRA. Although the excess contribution itself is subject to the 6% excise tax, the income produced by the excess contribution is not.

### D. *Contributions on Behalf of a Nonworking Spouse*

After ERISA was enacted, Congress became concerned that spouses who did not work outside the home (and consequently earned no "compensation") could not participate directly in any tax-deferred retirement saving program.<sup>38</sup> In 1976, therefore, Congress enacted I.R.C. section 220,<sup>39</sup> which permits an individual who *does* earn compensation to deduct IRA contributions made for the benefit of his non-working spouse as well as for his own benefit. An individual may not, however, claim a deduction pursuant to I.R.C. section 219 and a deduction pursuant to I.R.C. section 220 in the same taxable year.<sup>40</sup>

If an individual takes advantage of section 220 by contributing to IRAs for himself and his spouse, he may claim a total annual deduction (for both contributions) of no more than the smallest of the following three amounts: (1) \$1,750; (2) fifteen percent of the compensation includible in the working spouse's gross income for the year; or (3) twice the amount contributed to the IRA with the smaller contribution for that year.<sup>41</sup> The purpose of the third limitation is to encourage the working spouse to make equal contributions to the two IRAs. For example, suppose a husband earns \$10,667 of compensation in 1980 and his wife earns none. If he contributes \$800 to his own IRA and \$800 to his wife's IRA, he may deduct, pursuant to section 220, the entire \$1,600 that he contributed (\$1,600 is 15% of \$10,667). But if instead he divides that \$1,600 unevenly by contributing \$1,400 to his own IRA and only \$200 to his wife's, section 220 will allow him to deduct only \$400 (twice the amount contributed to the IRA with the smaller contribution for the year). He will therefore have to pay a six percent excise tax on an excess contribution of \$1,200,<sup>42</sup> which tax equals \$72.

If the husband decides to make unequal contributions to the two IRAs, he may do better to claim a deduction pursuant to section 219 rather than section 220. We have seen that an IRA may consist entirely of nondeductible contributions.<sup>43</sup> Therefore, if the husband contributes \$1,400 to his own IRA and \$200 to his wife's, reliance on section 219 instead of section 220 would have the following result: The entire

---

38. See S. REP. NO. 94-938, 94th Cong., 2d Sess. 445, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3439, 3872.

39. Section 220 was added to the Internal Revenue Code by § 1501 of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1734 (1976).

40. I.R.C. §§ 219(b)(6), 220(b)(2). In order for the § 220 deduction to be available, neither spouse may be an "active participant" in another plan, *id.* § 220(b)(3), and the noncontributing spouse may not have earned any compensation. *Id.* § 220(b)(7).

41. *Id.* § 220(b)(1).

42. The \$1,200 excess contribution is computed by subtracting the total amount allowable as a deduction pursuant to I.R.C. § 220 (\$400) from the total IRA contributions made (\$1,600).

43. See text at notes 34-35 *supra*.



\$1,400 contribution to the husband's IRA would be deductible,<sup>44</sup> and he would have an excess contribution of only \$200 (the amount in the wife's IRA), the excise tax on which would be \$12.

*ERTA Changes:* ERTA repealed I.R.C. section 220<sup>45</sup> and incorporated in the amended I.R.C. section 219 the provisions relating to IRA contributions on behalf of a nonworking spouse. The amended section 219(c)(1)(A) restricts the spousal IRA deduction to couples that file a joint income tax return for the relevant year. In the amended section 219(c)(2), which prescribes the deductible limits for spousal IRAs, Congress seems to have abandoned its attempt to encourage equality of contributions. Beginning in taxable years commencing after 1981, an individual with a nonworking spouse may deduct as contributions to his IRA and his spouse's IRA a total of \$2,250 (or, if it is less, an amount equal to his compensation for the relevant year). This amount may, without affecting the deduction, be divided between the two IRAs in any way the individual wishes, except that he may not deduct a contribution to either IRA in excess of \$2,000.

For example, suppose a husband earns \$8,000 of compensation in 1983 and his wife earns none. If the husband makes contributions to the two IRAs totaling \$2,250, he may deduct that entire amount pursuant to section 219 (as amended) whether he contributes \$1,125 to each IRA or \$2,000 to his IRA and \$250 to his wife's. If, however, he contributes \$100 to his IRA and \$2,150 to his wife's, he will be charged with an excess contribution of \$150 because contributions to an IRA in excess of \$2,000 in a given year are not deductible.

#### E. *Gift Tax Consequences of IRA Contributions on Behalf of a Spouse*

When an individual makes contributions to an IRA established for his nonworking spouse, those contributions, once in the IRA, "belong" to the spouse to the same extent that contributions to the individual's own IRA belong to the individual. The nonworking spouse is accorded the same powers of control over her IRA and is subject to the same restrictions in dealing with her IRA as is the working spouse with respect to his IRA. Consequently, when a husband, in order to avail himself of the I.R.C. section 220 deduction, contributes money to his wife's IRA, the contribution constitutes a gift for federal gift tax purposes.

I.R.C. section 2503(d) affords some relief from the gift tax by pro-

---

44. \$1,400 is less than 15% of his compensation (\$10,667).

45. ERTA § 311(e) (1981).

viding that such a contribution will, to the extent it is deductible pursuant to section 220, be regarded as the gift of a present interest and therefore subject to the \$3,000 annual exclusion of section 2503(b).<sup>46</sup> Typically, when money is contributed to an IRA, the individual for whom the IRA was established has the power to withdraw that contribution at any time,<sup>47</sup> which suggests that even in the absence of section 2503(d), an individual's contribution to his spouse's IRA would be the gift of a present interest.<sup>48</sup> Why then was the enactment of section 2503(d) necessary? Congress seems to have thought that in the absence of a special provision like section 2503(d), the ten percent penalty tax imposed on withdrawals made prior to age 59½<sup>49</sup> would render contributions to a spouse's IRA future interest gifts, on the theory that the penalty tax poses a substantial bar to the immediate enjoyment of the contributions.<sup>50</sup> The General Explanation of the Revenue Act of 1978<sup>51</sup> prepared by the Joint Committee on Taxation provided, "[S]ince the spouse cannot receive benefits from the [IRA] until age 59½ . . . without a significant tax penalty, the contribution made on behalf of the spouse would *probably* be treated as a transfer of a future

---

46. Each year, a donor may exclude from his "taxable gifts" up to \$3,000 of gratuitous transfers per donee. This exclusion is not available, however, for gifts of "future interests" (a term defined in Treas. Reg. § 25.2503-3 (1972)) but only for gifts of present interests. For example, suppose a donor transfers \$10,000 on trust, the terms of which are that the net income is to be paid to *A* for life, with the remainder to go to *B* on *A*'s death. The life estate is regarded as a present interest, see Rev. Rul. 54-344, 1954 C.B. 319, while the remainder is a future interest. If *A* is a 30-year-old male on the date of the gift, the value of his life estate (the present interest) is \$8,675. See Treas. Reg. § 25-2512-9 (1970). Therefore, \$3,000 of that life estate will be excludable for purposes of computing the donor's taxable gifts; the \$10,000 transfer on trusts results in taxable gifts of \$7,000 (assuming the donor has made no other gifts of present interests to *A* in the same calendar year). Suppose, instead, that *A* was an 85-year-old male. Now the value of the life estate would be only \$2,107, so only \$2,107 would be excludable pursuant to I.R.C. § 2503(b). The \$10,000 transfer on trust would result in taxable gifts of \$7,893.

47. See Private Letter Rul. 8038101 (June 26, 1980) and 8008170 (November 30, 1979).

48. See *Gilmore v. Commissioner*, 213 F.2d 520 (6th Cir. 1954), which held that if a trust beneficiary has the power to demand payments to him of trust corpus, the gift in trust is the gift of a present interest to the extent of that power. See also Private Letter Rul. 7947066 (August 23, 1979).

49. I.R.C. § 408(f)(1) provides that if the individual for whom an IRA was established receives a distribution from the IRA before he attains age 59½, he must pay a penalty tax equal to 10% of the portion of the distribution includable in his gross income for the year of distribution. This penalty tax is designed to encourage individuals to wait until retirement to begin withdrawals from their IRAs.

50. [I]t is not enough to bring the exclusion into force that the donee has vested rights. In addition he must have the right presently to use, possess or enjoy the property. These terms are not words of art, like "fee" in the law of seizin . . . but connote the right to substantial present economic benefit. The question is of time, not when title vests, but when enjoyment begins. Whatever puts the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been given him and that enjoyment makes the gift one of a future interest. . . .

*Fondren v. Commissioner*, 324 U.S. 18, 20-21 (1945) (citations omitted).

51. I.R.C. § 2503(d) was added to the Code by § 702(j) of the Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2932 (1978).

interest and not eligible for the \$3,000 annual per donee exclusion.”<sup>52</sup> The committee’s use of the word “probably” suggests that it was not altogether convinced of the necessity of section 2503(d). To determine whether this provision was indeed necessary, we must examine its application in two cases: deductible contributions and nondeductible contributions.

*Deductible contributions.* Suppose, at a time when his wife is under age 59½, a husband makes a deductible contribution of \$500 to her IRA. As soon as that contribution is made, the wife can withdraw it, but if she does she must pay income tax on that \$500<sup>53</sup> and the ten percent penalty tax pursuant to I.R.C. section 408(f). If the husband and wife file separate income tax returns and the wife is in the twenty-one percent income tax bracket, she will have to pay an income tax of \$105 and a penalty tax of \$50. She will thus receive \$345 net. That the wife can immediately realize only \$345 of the husband’s \$500 contribution does not alter the fact that the husband’s gross gift was of \$500, for a gift is measured for gift tax purposes by the value of what the donor relinquished and not by what the donee received.<sup>54</sup> The question whether the gift is of a present interest, however, does depend on what the donee received.<sup>55</sup>

As the committee report implied, the fact that a donee must pay income tax upon receiving a property interest by gift has no effect on either the character or the value of the gift.<sup>56</sup> The ten percent penalty tax, on the other hand, because it can be avoided simply by waiting until age 59½, seems at first glance to have different gift tax consequences. Congress evidently supposed that if the husband contributed \$500 to his wife’s IRA, where the wife had a choice of withdrawing \$450 immediately (\$500 less the ten percent penalty) or waiting a few years and receiving the full \$500, the existence of the penalty tax rendered the husband’s contribution a gift of a \$500 future interest rather than a gift of a \$450 present interest and a \$50 future interest. In fact, however, such penalties do not transform what would otherwise be a

---

52. JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE REVENUE ACT OF 1978, at 437 (emphasis added).

53. I.R.C. § 408(d)(1).

54. *Herzog v. Commissioner*, 116 F.2d 591, 593 (2d Cir. 1941); see *Treas. Reg. § 25.2511-2(b)* and (f) (1972).

55. *Fondren v. Commissioner*, 324 U.S. 18, 20 (1945); *Rev. Rul. 77-358*, 1977-2 C.B. 342.

56. For example, *Treas. Reg. § 25.2512-9* (1972) makes clear that if a donor transfers property on trust, the terms of which are that the income is to be paid to *A* for life, the value of the donor’s gift of a life estate is a function of only *A*’s gender, *A*’s age at the time of the gift, and the value on the date of gift of the property transferred. Although *A* will presumably have to pay income tax on the distributions of trust income, see I.R.C. § 652, *A*’s marginal tax rate is not a factor to be considered.

present interest into a future interest;<sup>57</sup> they simply affect the value of the gift that may be excluded as a present interest. Therefore, even in the absence of section 2503(d), the husband's \$500 contribution to his wife's IRA would be a gift of a present interest, but it would be a present interest of \$450 (the remaining \$50 would be a gift of a future interest). Section 2503(d)'s only value to the husband consists in enabling him to exclude the entire \$500 gift instead of only \$450. And if the wife were at least age 59½ at the time of the gift, the entire \$500 contribution would be excludable even without section 2503(d).

*Nondeductible contributions:* The ten percent penalty tax on premature withdrawals is imposed only on that portion of the withdrawn amount that is includable in the distributee's gross income. Sections 408(d)(4) and 408(d)(5) provide, in effect, that if a husband makes a nondeductible contribution to his wife's IRA, she may withdraw that contribution without having to pay any income tax on it—a fair result, since the husband was unable to deduct it.<sup>58</sup> Consequently, no matter

---

57. For example, if a person makes a gift of a life insurance policy that the donee can immediately surrender for its cash value, the gift is regarded as the gift of a present interest even though, by surrendering the policy, the donee would obtain a lesser amount than the full policy proceeds he would have received upon the insured's death. *Baer v. Commissioner*, TAX CT. MEM. DEC. (P-H) 43-914, 43-916 (1943), *aff'd without opinion*, 149 F.2d 637 (8th Cir. 1945); Rev. Rul. 55-408, 1955-1 C.B. 113.

58. I.R.C. §§ 408(d)(4) and 408(d)(5) are complicated provisions, explored in detail later in this article. See text at notes 72 *et seq.* and at notes 76 *et seq.*, *infra*. These two provisions were designed to permit what might be called "corrective withdrawals." I.R.C. § 408(d)(1) states the general rule that any amount distributed from an IRA must be included in the gross income of the recipient. It was therefore necessary to provide an exception where an individual who made a larger IRA contribution than was deductible wished to withdraw the excess as a correction. Otherwise, the individual would have to pay income tax on the withdrawn excess contribution even though he was never able to deduct it in the first place. Sections 408(d)(4) and 408(d)(5) constitute the needed exceptions. They provide that if certain conditions are met, these excess contributions may be withdrawn without having to include them in gross income in the year of withdrawal. These sections are couched in extremely broad terms, however. They apply both to IRAs established by an individual for himself and to IRAs established by an individual for his non-working spouse (his wife, let us assume); and in the latter case, they do not require that the husband's excess contribution be withdrawn by the husband in order to be free of income tax in the year of withdrawal. On the contrary, they apply to any distributee. (It is evident that once the husband places even a nondeductible contribution in his wife's IRA, that money is beyond his reach. That is, §§ 408(d)(4) and 408(d)(5) should not be read as granting the husband the power to withdraw excess contributions made to the wife's IRA. Otherwise, the transfer by the husband of nondeductible contributions to the wife's IRA would never be a completed gift—the husband would have retained the power to "revoke" the transfer. *Burnet v. Guggenheim*, 288 U.S. 280, 284 (1933)).

Because nondeductible contributions, unlike deductible ones, may be withdrawn from an IRA tax-free, the question of allocating nondeductible contributions between the IRAs of two spouses may become important when the working spouse avails himself of the I.R.C. § 220 deduction. For example, suppose a husband who earns \$10,000 of compensation (and whose wife earns none) contributes \$900 to his own IRA and \$600 to his wife's IRA and claims a deduction of \$1,200 pursuant to § 220. Shortly thereafter, the wife withdraws the \$600 from her IRA. What portion of her withdrawal constitutes a withdrawal of nondeductible contributions? Because he made total contributions of \$1,500 for a year when § 220 accords him a maximum deduction of \$1,200, the husband made an excess contribution of \$300. The regulations are silent on the point, but it seems logical to allocate that excess contribution proportionately between the two IRA contributions for that year. (*Compare, e.g.*, the proportional method for determining the part of

what the wife's age, she may immediately withdraw any nondeductible contributions her husband might make to her IRA without paying any penalty tax thereon. In other words, with or without section 2503(d), a nondeductible contribution by a husband to his wife's IRA is the gift of a present interest.<sup>59</sup> Of course, section 2503(d) could be construed as impliedly creating a special rule that, despite the general principles reflected by the foregoing analysis, non-deductible contributions to a spouse's IRA are per se gifts of future interests.<sup>60</sup>

an IRA balance that is attributable to excess contributions and hence not excludable from the gross estate. Treas. Reg. § 20.2039-2(c)(2) (1981)). Since 3/5 of the husband's \$1,500 contribution was directed to his own IRA and 2/5 was directed to his wife's IRA, we should find that 2/5 of the excess contribution (2/5 of \$300) or \$120 is allocable to the wife's IRA. But see Proposed Treas. Reg. § 54.4973-1(f), Example 5, 46 Fed. Reg. 36,211 (1981), which suggests that on these facts the \$300 excess contribution would be allocable entirely to the husband's IRA. No explanation is offered by the proposed regulation.

59. A reading of I.R.C. §§ 408(d)(4) and 408(d)(5) reveals that if for a given taxable year the aggregate contributions made by a husband to his or his wife's IRAs exceed \$1,750, the wife may withdraw the excess contribution from her IRA tax-free only if she withdraws it prior to the due date of the husband's income tax return for the year for which the IRA contribution was made. For example, suppose in 1981 a husband earns \$10,000 of compensation and his wife earns none. He contributes, for that year, \$1,000 to his own IRA and \$1,000 to his wife's IRA. Pursuant to I.R.C. § 220(b), his maximum allowable deduction for those contributions is \$1,500, so he had made an excess contribution of \$500—\$250 of excess being allocated to each IRA. See note 56 *supra*. Because the aggregate contributions made by the husband for 1981 exceed \$1,750, however, if the wife is to withdraw that \$250 excess contribution without having to pay income tax (and the 10% penalty tax pursuant to § 408(f)) on the withdrawn amount, she must withdraw the excess by April 15, 1982. If the husband makes his 1981 contributions on April 14, 1982 (retroactive IRA contributions are permissible, see I.R.C. §§ 219(c)(3) and 220(c)(4)), the wife has only one day in which to withdraw the contribution without tax consequences. It would seem that the available period of time in which the wife may withdraw the money tax-free is irrelevant. After the husband contributes the \$250 excess to her IRA, if she possesses for one instant the power to withdraw it in its entirety, the gift of the \$250 should be regarded as the gift of a present interest. In *Bagley's Estate v. United States*, 443 F.2d 1266 (5th Cir. 1971), for example, a husband and wife had died simultaneously in an automobile accident. *Id.* at 1267. The husband, in his will, established a trust for his wife, giving her a life estate therein with a general testamentary power to appoint the remainder. *Id.* The husband's will provided that the power could be exercised in the wife's will only by specific reference to the power (there was a gift over, in default of appointment, to certain designated beneficiaries). *Id.* The husband's will further provided that, in the event of simultaneous death, his wife should be deemed to have survived him. *Id.* The wife's will, executed the same day as her husband's, made no reference to the power of appointment. *Id.* The question before the court was whether, for federal estate tax purposes, the wife possessed that power of appointment at her death. Although, as a practical matter, the wife was unable at her death to exercise the power (since she died the instant after the power was created), the court nonetheless held that she possessed the power at her death. *Id.* at 1270. See also *Crummey v. United States*, 397 F.2d 82 (9th Cir. 1968).

The Internal Revenue Service has recently ruled, however, that where a donor creates in a donee a power to demand transferred funds but fails to communicate to the donee the existence of that power and narrowly restricts the time for its exercise, the power is illusory and hence does not constitute a present interest. Rev. Rul. 81-7, 1981-1 I.R.B. 27, at 28. By this reasoning, if the husband made his 1981 contribution to the wife's IRA on April 14, 1982, the wife's one-day period for withdrawal of the \$250 excess contribution might be regarded as illusory. That is, although she could withdraw the \$250 at any time, she would have only one day in which to withdraw it without paying the 10% penalty tax. Thus, it might be argued that by giving his wife only one day in which to make a penalty-free withdrawal of the \$250, the husband had made a gift of a present interest of only \$225 (\$250 less 10%) and a gift of a future interest of \$25. In view of the Revenue Ruling's clear inconsistency with *Bagley* and *Crummey*, however, it is unlikely that this ruling would be sustained if challenged in court.

60. Even if I.R.C. § 2503(d) was so construed, with the result that every excess contribution to a wife's IRA was the gift of a future interest, such a gift would (except perhaps to the extent of

*ERTA Changes:* I.R.C. section 2503(d) was repealed by ERTA,<sup>61</sup> presumably because Congress thought that the post-1981 unlimited gift tax marital deduction<sup>62</sup> obviated the need for any gift tax relief for interspousal IRA contributions.<sup>63</sup> But because the "terminable interest" rule,<sup>64</sup> though modified by ERTA,<sup>65</sup> was left essentially intact, the repeal of section 2503(d) may produce some unintended gift tax consequences. We have previously seen that even in the absence of section 2503(d), deductible spousal IRA contributions made when the spouse is over age 59½ and all nondeductible spousal IRA contributions would be gifts of present interests and therefore qualify for the annual exclusion.<sup>66</sup> But the repeal of section 2503(d) will cause difficulty in the case of deductible IRA contributions on behalf of a spouse who is under age 59½.

We have seen that in the absence of section 2503(d), if a husband made a deductible \$500 contribution to his wife's IRA at a time when she was under age 59½, this contribution would consist of a \$450 gift of a present interest (excludable) and a \$50 gift of a future interest. Therefore, after the repeal of section 2503(d), the husband's \$500 contribution will include a nonexcludable gift of \$50, which will be taxable unless it qualifies for the gift tax marital deduction. More specifically, the \$50 contribution will be a taxable gift if it is found to be a nondeductible terminable interest. The mere fact that the wife's enjoyment of the \$50 will be postponed until she reaches age 59½ does not render the contribution a terminable interest. If, however, the IRA instrument provides that should the wife die before withdrawing all the money from the IRA the balance on her death will be paid to someone other than her estate, however, then the \$50 contribution will be the gift of a nondeductible terminable interest and will be taxable. A gift tax return

---

any I.R.C. § 408(f) penalty that might be due upon immediate withdrawal by the wife, *see* text at notes 60-66 *infra* still qualify for the gift tax marital deduction. I.R.C. § 2523.

61. ERTA § 311(h)(5) repealed I.R.C. § 2503(d), effective for taxable years beginning after December 31, 1981. ERTA § 311(i)(1) (1981).

62. ERTA § 403(b)(1) (1981) eliminated paragraph (2) from I.R.C. § 2523(a). As a result, there will no longer be a dollar limitation on the amount of property that can be given to a spouse free of gift tax.

63. With I.R.C. § 2503(d) repealed, it would seem at first glance that even though a contribution to the spouse's IRA is fully deductible and therefore not part of the donor's "taxable gifts," a gift tax return nonetheless will have to be filed for the year in which the gift was made. ERTA addressed this filing problem as well by amending I.R.C. § 6019 so that if, in a given year, the only gifts in excess of the annual exclusion are gifts that qualify for the marital deduction, no gift tax return need be filed. ERTA § 403(b)(3)(A) (1981).

64. Gifts of certain "terminable interests" do not qualify for the gift tax marital deduction. I.R.C. § 2523(b). For a discussion of the terminable interest rule and a description of the kinds of interests that are disqualified thereby, *see* R. STEPHENS, G. MAXFIELD & S. LIND, *FEDERAL ESTATE AND GIFT TAXATION* ¶¶ 5.06[8], 11.03[3] (4th ed. 1978).

65. ERTA § 403(d)(2) (1981) enacted I.R.C. § 2523(f), which provides for a special kind of life income interest that is an exception to the terminable interest rule.

66. ERTA § 441(a) (1981) raised the amount of the annual exclusion allowed by § 2503 from \$3,000 to \$10,000.

would therefore have to be filed,<sup>67</sup> though it is unlikely that any gift tax would actually be due.<sup>68</sup>

## ISSUES RELATING TO DISTRIBUTIONS FROM IRAS

### A. *Constructive Receipt*

In general, every distribution from an IRA is taxed in full as ordinary income to the distributee in the year of receipt.<sup>69</sup> A fundamental principle of income tax law is the doctrine of constructive receipt:

Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.<sup>70</sup>

In the case of IRAs, after the individual for whom the account was established has reached age 59½, he typically has the power, pursuant to the IRA instrument, to withdraw at any time as much of the funds in the IRA as he wishes. The doctrine of constructive receipt would therefore suggest that when such an individual reaches age 59½,<sup>71</sup> the entire

---

67. I.R.C. § 6019.

The gift tax consequences could be avoided if the IRA instrument provided that the assets remaining in the IRA on the wife's death were to be paid to her estate, for in that case the wife's interest in the IRA would not be a terminable interest. See the parenthetical phrase "or the estate of such spouse" in I.R.C. § 2523(b)(1). Unfortunately, such a provision would cause the wife to lose the benefit of the I.R.C. § 2039(e) estate tax exclusion. See note 90 *infra*.

68. ERTA has substantially increased the unified credit (I.R.C. §§ 2010, 2505). ERTA § 401 (1981). When these increases are fully phased in (after 1986), a donor will be able to make tax-free gifts of \$600,000 during his lifetime in addition to any gifts that qualify for the marital deduction. See H. REP. ON H.R. 4242 (July 24, 1981), reprinted in Economic Recovery Act of 1981 § 949, STAND. FED. TAX REP. (CCH). As a practical matter, someone in a position to make inter vivos gifts in excess of \$600,000 will be unlikely to have availed himself of such a meager tax shelter as that provided by IRAs.

In note 52 *supra*, there was offered a method of allocating nondeductible contributions between the working spouse's IRA and that of his nonworking spouse. Although ERTA, by increasing the deductible limits of I.R.C. § 219, would change the numbers in the example, it would not alter the conclusion that the nondeductible contributions should be allocated in proportion to the contributions that were directed to each IRA.

69. I.R.C. § 408(d)(1).

70. Treas. Reg. § 1.451-2(a) (1979).

71. Before the individual has reached age 59½, he may not (in the usual case) withdraw funds from the IRA without paying a 10% penalty tax pursuant to I.R.C. § 408(f). This penalty tax would presumably serve as a "substantial limitation" within the meaning of Treas. Reg. § 1.451-2(a) (1979) and so prevent the application of the doctrine of constructive receipt. See Rutland v. Commissioner, TAX CT. MEM. DEC. (P-H) 77-39, 77-49 to 50 (1977); Rev. Rul. 68-482, 1968-2 C.B. 186; 4 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS § 105.2.3 (1981). But see Hicks v. United States, 314 F.2d 180 (4th Cir. 1963). The reader may perceive an inconsistency between the income tax consequences and the gift tax consequences of the 10% penalty tax: While the existence of the penalty tax will not be regarded as a sufficient bar to immediate enjoyment to render a contribution for a spouse a future interest, see text at note 55 *supra*, it will be regarded as a sufficient bar to immediate enjoyment to prevent the application of the construc-

IRA balance should be treated for income tax purposes as if it had thereupon been distributed to him. For example, suppose an individual with an IRA reaches age 59½ on November 23, 1981, and elects to have his IRA balance of \$10,000 distributed to him in ten annual installments. Because he had the unrestricted power to withdraw the entire \$10,000 in 1981, the doctrine of constructive receipt would require him to include the entire \$10,000 in his gross income for 1981, even though he actually received only \$1,000 of it in that year.

Curiously, however, the Internal Revenue Service has consistently ruled that the doctrine of constructive receipt does not apply merely because an individual, whether before or after age 59½, has the power to withdraw IRA moneys whenever he wishes. The Service has instead ruled that, except for the special situations involving pledges<sup>72</sup> or prohibited transactions,<sup>73</sup> the individual is not taxed on IRA moneys until actual receipt.<sup>74</sup> The Service's view is certainly helpful to those maintaining IRAs, but it is difficult to defend logically given the general applicability of the constructive receipt doctrine.<sup>75</sup>

*ERTA Changes:* Effective for taxable years beginning after December 31, 1981, ERTA has deleted the phrase "made available" from I.R.C. section 402(a)(1).<sup>76</sup> This change does not affect IRAs, but it effectively exempts qualified plan participants from the operation of the constructive receipt doctrine.<sup>77</sup> Consequently, there will no longer be any disparity in treatment between IRAs and qualified plans insofar as the constructive receipt doctrine is concerned.

---

tive receipt doctrine. The only response is that the income and gift taxes are not construed in pari materia because the nature and purposes of the two taxes are so different. *Early v. Commissioner*, 445 F.2d 166, 172 (5th Cir. 1971); *Farid-Es-Sultaneh v. Commissioner*, 160 F.2d 812, 814-15 (2d Cir. 1947); *Commissioner v. Estate of Beck*, 129 F.2d 243, 246 (2d Cir. 1942).

72. If an individual for whom an IRA was established pledges any portion of his IRA as security for a loan, the pledged portion will be deemed to have been distributed to him at that time. I.R.C. § 408(e)(4).

73. If an individual for whom an IRA was established engages in a prohibited transaction with respect to the IRA, all the assets in the IRA are deemed to have been distributed to the individual as of the first day of his taxable year in which the prohibited transaction occurred. *Id.* § 408(e)(2)(B). The term "prohibited transaction" is defined in *id.* § 4975(c).

74. See Private Letter Rul. 8008170 (November 30, 1979) and 8038101 (June 26, 1980).

75. Perhaps the Service's position can be defended by noting that the provision dealing with taxation of IRA distributions, I.R.C. § 408(d)(1), requires inclusion in gross income in the year they are "received," whereas the provision dealing with taxation of *qualified plan* distributions, *id.* § 402(a)(1), requires inclusion in gross income in the year they are "distributed or made available." The phrase "made available" has always been regarded as an express reference to the constructive receipt doctrine. *Leavens v. Commissioner*, 467 F.2d 809, 813 (3d Cir. 1972).

76. ERTA § 314(c)(1) (1981). The reference to the constructive receipt doctrine in note 3 *supra* must therefore be eliminated. Beginning in taxable years commencing after 1981, a participant in a qualified plan will be taxed only upon *actual*, not constructive, receipt of a pension payment.

77. See note 76 *supra*.



B. *Return of Excess Contributions Prior to the Due Date of the Return—the Problem of Withdrawing Attributable Income*

If an individual makes an IRA contribution in excess of the deductible limits for that year, he must pay a six percent excise tax on the excess. Should he subsequently attempt to avoid the excise tax by withdrawing the excess contribution, I.R.C. section 408(d)(1) would require that he pay income tax on the withdrawn amount. It seems unfair to require him to pay income tax on the withdrawn excess contribution; being nondeductible, it was already subject to income tax as nondeductible for the year the compensation from which it was made was earned. Accordingly, Congress enacted two exceptions to the general rule of section 408(d)(1): section 408(d)(4), which applies when excess contributions are withdrawn before the due date of the individual's tax return, and section 408(d)(5), which applies when excess contributions are withdrawn after the due date.

Section 408(d)(4), read in conjunction with the last sentence of I.R.C. section 4973(b), provides that if an individual who makes an excess contribution to an IRA withdraws that excess contribution and the income attributable thereto prior to the due date of the return for the year for which the excess contribution was made, he need not pay the six percent excise tax on the excess contribution or any income tax on it for the year of withdrawal. Of course, the withdrawn income attributable to that excess contribution is subject to income tax.<sup>78</sup>

Consider this example: Suppose Green, a calendar-year taxpayer, makes an excess contribution of \$400 for 1980 but withdraws that excess (together with \$20, which represents the income attributable to that \$400) on April 14, 1981, in order to avoid the six percent excise tax. Section 408(d)(4) provides that if the \$400 excess contribution was made in 1980, the \$20 must be included in Green's 1980 gross income; but if the excess contribution was actually made in 1981,<sup>79</sup> the \$20 must be included in his 1981 gross income. That is, the Code relates the taxation of the attributable income to the year of the contribution rather than to the year the income is withdrawn. If the attributable income were invariably taxed in the year of withdrawal, a taxpayer might be inclined to make a sizable excess contribution on, say, January 1, 1980, withdrawing that contribution and the attributable income

78. Treas. Reg. § 1.408-4(c)(2)(ii) and (iii) (1980) describes the method for computing the amount of net income attributable to an excess contribution. Evidently, if an individual withdraws an excess contribution prior to the due date of the return but fails to withdraw the attributable income prior to that due date, the withdrawn excess contribution must be included in his gross income in the year of the withdrawal, even though it was never deductible in the first place. The excess contribution, however, will not be subject to the six percent excise tax. See I.R.C. § 4973(b)(2)(A).

79. Retroactive IRA contributions are contemplated by I.R.C. §§ 219(c)(3) and 220(c)(4).

on January 1, 1981. He would thereby have earned twelve months of IRA income in 1980, enjoyed that income the very instant 1980 was over, and yet deferred the tax on that income until April 15, 1982.<sup>80</sup>

*ERTA Changes:* There are none that affect the foregoing discussion.

### C. *Same—The Penalty Tax on Premature Distributions*

Suppose, in accordance with I.R.C. section 408(d)(4), an individual withdraws from his IRA before the due date of his return the excess contribution and the income attributable thereto. Suppose further that the individual is less than 59½ years old on the date of the withdrawal. The ten percent penalty tax of section 408(f) is imposed only on that portion of a premature distribution that is includable in the distributee's gross income. Therefore, because the only portion of the section 408(d)(4) withdrawal that will be includable in the individual's gross income is the income attributable to the excess contribution, the individual will have to pay the ten percent penalty tax only on that attributable income. However, the fact that the attributable income may "relate back" for income tax purposes raises an interesting question.

Suppose Brown, a calendar-year taxpayer, makes an excess contribution of \$300 on January 9, 1980, as part of his IRA contribution for 1980. On April 1, 1981, he withdraws the \$300 excess contribution from the IRA, together with \$22, representing the income that the excess contribution earned between January 9, 1980, and April 1, 1981. If Brown attains the age of 59½ on March 12, 1981, will the ten percent penalty tax on premature distributions be due?<sup>81</sup>

At the time of the actual withdrawal, Brown is over the age of 59½. Section 408(d)(4) provides, however, that the \$22 is to be included in his 1980 gross income, even though that sum presumably includes three months' worth of income from 1981. The question therefore arises: Is the crucial date for determining whether Brown is 59½ the date of the actual withdrawal (April 1, 1981) or some date in 1980?

Section 408(f) states that the penalty tax on premature distributions is imposed simply by increasing the income tax due "for the taxable year in which such distribution is received" by an amount equal to ten percent of "the distribution which is includable in his gross income

80. Of course, the rule of I.R.C. § 408(d)(4) results in a different kind of distortion. If a taxpayer makes an excess contribution on January 1, 1980, and withdraws it (and the attributable income) on April 1, 1981, he must include all of the attributable income on his 1980 return, even though about 3/15 (three months' worth) of that income was actually earned in 1981.

81. Of course if any I.R.C. § 408(f) tax is due at all, it is due only on the \$22 of attributable income.

for such taxable year.”<sup>82</sup> In other words, section 408(f) contemplates that if any attributable income which might constitute a premature distribution must be included in the distributee’s 1980 gross income, then the penalty tax may be imposed, if at all, only for 1980. More generally, the penalty tax must be imposed for the year in which the premature distribution is taxed. Since Brown had not yet attained the age of 59½ by December 31, 1980 (the year in which the \$22 gross income must be included), he must pay the section 408(f) penalty tax on that \$22.

*ERTA Changes:* There are none that affect the foregoing discussion.

*D. Excess Contributions Withdrawn After the Due Date of Return—a Possible Method of Exploiting IRAs*

Some time after I.R.C. section 408(d)(4) was enacted, it occurred to Congress that an individual might fail to discover that he had exceeded the deductible limits until after the due date of the return. To afford such an individual relief, section 408(d)(5) was enacted in 1978.<sup>83</sup> The operation of this later provision can best be illustrated by continuing the example involving taxpayer Brown.<sup>84</sup> Suppose Brown had withdrawn the \$300 excess contribution on April 20, 1981, instead of April 1. Section 408(d)(5) provides that, despite the general rule that all IRA distributions are taxable, the withdrawal of the \$300 excess need not be included in Brown’s 1981 gross income (though of course he could not deduct it for 1980). Consequently, he would not be liable for the section 408(f) penalty tax on the \$300 if he was under age 59½. He would, however, be required to pay the I.R.C. section 4973 excise tax on the excess contribution for 1980.

Even though that excess contribution remained in the IRA for at least part of 1981, it appears that Brown would not have to pay the section 4973 excise tax for 1981 so long as that excess was in fact withdrawn during 1981.<sup>85</sup> Furthermore, unlike section 408(d)(4) (which deals with corrective withdrawals made before the due date of the return), section 408(d)(5) does not require the individual to withdraw the income attributable to that excess contribution. Thus, in our example, once Brown decides to leave 1980’s \$300 excess contribution in the IRA beyond April 15, 1981, he would do well to leave it in until December 31, 1981. By leaving the excess contribution in the IRA until the very

82. I.R.C. § 408(f).

83. Revenue Act of 1978 § 157(c)(1), Pub. L. No. 95-600, 92 Stat. 2805 (1978).

84. See text at note 81 *supra*.

85. See I.R.C. § 4973(b)(2)(B).

end of 1981 (withdrawing it just in time to avoid the section 4973 excise tax for 1981), he would allow that excess contribution to earn the maximum amount of tax-deferred income in the future.<sup>86</sup>

There is a feature of section 408(d)(5) that may have been devised to discourage taxpayers from exploiting IRAs in this manner. Section 408(d)(5), by its terms, does not apply to an excess contribution made for a given year if the aggregate contributions for that year exceed \$1,750.<sup>87</sup> Consequently, in our example, if Brown had contributed \$1,800 to his IRA for 1980 (an excess contribution of \$600, let us assume), and if he withdrew that \$600 excess on April 20, 1981, he would have to pay income tax on the \$600 for 1981, even though he was never able to deduct it for 1980. In other words, he would have to pay income tax on that \$600 twice! Moreover, if he was under age 59½ on the date he withdrew the \$600, he would also have to pay the ten percent penalty tax on premature distributions.<sup>88</sup>

*ERTA Changes:* ERTA has not changed the substance of the foregoing material, but the increase in the deductible limits<sup>89</sup> necessitates new numerical examples. Suppose Brown makes a \$3,000 IRA contribution for 1982—the first IRA contribution he has ever made. If Brown earned compensation in 1982 of at least \$2,000, that IRA contribution represents an excess contribution of \$1,000. If he withdraws that excess contribution on April 20, 1983, he will have to pay income tax on the \$1,000 for 1983, even though he was never able to deduct it for 1982. Moreover, if he is under age 59½ on the date he withdraws the \$1,000, he will also have to pay the ten percent penalty tax on premature distributions. If his 1982 contribution had been \$2,100 instead

---

86. It should be noted in this connection that the excise tax on excess contributions does not apply to the income produced by the excess contributions.

87. Congress enacted I.R.C. § 408(d)(5) in 1978 in order to allow an individual who failed to discover that he had exceeded the deductible limits until after the due date of the return to withdraw the excess contribution without being taxed upon such withdrawal. Because deductible contributions can never exceed \$1,750, no matter what an individual's compensation might be, an individual who made a contribution in excess of that figure could hardly claim to have exceeded the deductible limits inadvertently. Therefore, he should not, in Congress's view, be entitled to the relief afforded by § 408(d)(5). See JOINT COMM. ON TAXATION, *supra* note 52, at 106.

88. The relief afforded by I.R.C. §§ 408(d)(4) and 408(d)(5) is not available to a taxpayer who has successfully claimed a deduction for that excess contribution pursuant to I.R.C. § 219 or 220. See *id.* §§ 408(d)(4)(B) and 408(d)(5)(A)(ii). For example, suppose Jones, who earns \$9,000 of compensation in 1980 and is therefore entitled to a deductible contribution of only \$1,350, nonetheless makes an IRA contribution of \$1,500 for 1980 and claims a § 219 deduction for the entire amount on his 1980 return. Suppose further that the Internal Revenue Service does not discover the overcontribution. Jones withdraws the \$150 excess contribution in 1985. Because by that date the 3-year statute of limitations, I.R.C. § 6501, will have run so that the excess deduction claimed for 1980 cannot be rectified, Jones will have to include the \$150 that he withdrew in his gross income for 1985.

89. By way of preface it should be noted that ERTA § 311(g)(2)(1981) changed the \$1,750 figure in I.R.C. § 408(d)(5) to \$2,250 in order to conform to the new higher deductible limits. For a discussion of the purpose behind the dollar limitation in I.R.C. § 408(d)(5), see note 85 *supra*.

of \$3,000, then, because his total contribution for 1982 did not exceed \$2,250, section 408(d)(5) would allow him to withdraw the \$100 excess contribution even after the due date of the 1982 return without having to include the \$100 in his gross income for the year of withdrawal.<sup>90</sup>

E. *Improper Accumulations—Using the Joint and Last Survivor Expectancy for Persons Other Than the Surviving Spouse*

I.R.C. section 408(a)(6) requires that an IRA provide for the prompt distribution of the account assets to the individual for whose benefit that account was established, once he reaches retirement age. Specifically, the assets of the IRA must be distributed in accordance with one of the following three schedules: (1) The entire account balance must be distributed to the individual by the close of his taxable year in which he reaches age 70½; or (2) the entire account balance must be distributed ratably in a series of periodic payments for a period certain (that is, a fixed period of years) that does not extend beyond the life expectancy of the individual or the joint life and last survivor expectancy of the individual and his spouse, where the distributions commence no later than the taxable year in which the individual attains age 70½; or (3) the entire account balance must be distributed ratably in the form of an annuity for the life of the individual or for the lives (on a joint and last survivor basis) of the individual and his spouse, where the distributions commence no later than the taxable year in which the individual attains age 70½.<sup>91</sup>

Suppose Johnson, an unmarried calendar-year taxpayer born June 24, 1915, has established an IRA, and his life expectancy at age seventy is 12.1 years. He elects to have his IRA balance paid to him in twelve annual installments commencing on February 4, 1985. His election further provides that if he dies before the twelve payments are made to him, the balance is to be paid to his son in a manner consistent with section 408(a)(7). This distribution schedule is permissible provided the amount of each installment is determined in accordance with Treasury Regulations.<sup>92</sup> Starting in 1985, the calendar year in which Johnson attains age 70½, that regulation specifies a minimum distribution. If the IRA balance on January 1, 1985, is \$18,000, the distribution

90. The numerical example offered in note 88, *supra* must likewise be modified to reflect the changes made by ERTA. Suppose White, who earns \$6,000 of compensation in 1982 and is therefore entitled to deduct IRA contributions of up to \$2,000, nonetheless makes an IRA contribution of \$2,200 for 1982 and claims an I.R.C. § 219 deduction for the entire amount on his 1982 return. Suppose further that the Internal Revenue Service does not discover the overcontribution. White withdraws the \$200 excess contribution in 1987. Because by that date the 3-year statute of limitations will have run so that the excess deduction claimed for 1982 cannot be rectified, White will have to include the \$200 that he withdrew in his gross income for 1987.

91. Treas. Reg. § 1.408-2(b)(6) (1980).

92. *See id.* § 1.408-2(b)(6)(v).

for 1985 must be not less than \$1,488, which is the quotient obtained by dividing \$18,000 by 12.1 (Johnson's age-seventy life expectancy). Suppose Johnson in fact receives \$1,500 from his IRA in 1985, and his IRA balance on January 1, 1986 is \$18,073.<sup>93</sup> The distribution for 1986 must be not less than \$1,628, which is the quotient obtained by dividing \$18,073 by 11.1 (one less than Johnson's seventy-year life expectancy). This distribution pattern is maintained for subsequent years.

In order to enforce the section 408(a)(6) requirement of prompt distribution, a penalty excise tax is imposed, pursuant to I.R.C. section 4974, equal to fifty percent of the amount by which the minimum amount required to be distributed from an IRA in a given taxable year of the distributee exceeds the amount actually distributed to him in that year. Returning to our example, suppose that in 1985 Johnson withdraws only \$1,088 from his IRA. The minimum distribution required for 1985 is, as we have seen, \$1,488. Since Johnson withdraws only \$1,088 in a calendar year for which the minimum required distribution is \$1,488, there has been an improper accumulation of \$400 for 1985. Therefore, in addition to including the \$1,088 in his gross income pursuant to section 408(d)(1), Johnson must pay a section 4974 excise tax in the amount of \$200.

Let us change the facts of the example slightly. Suppose Johnson is married and the couple's joint life and last survivor expectancy when Johnson is seventy years old is 18.8 years. He elects to have his IRA balance (which, on January 1, 1985, is \$18,000) paid to him in eighteen annual installments commencing on February 4, 1985, and if he dies before the eighteen payments are made to him, to have the balance paid to his son. Accordingly, \$1,000 is distributed to him in 1985. Is the section 4974 excise tax due for 1985? If Johnson is permitted to determine the minimum required distribution by using the joint life and last survivor expectancy rather than his own single life expectancy (that is, if he may determine the minimum required distribution by dividing the account balance by 18.8 instead of 12.1), then there is no excise tax due for 1985. The following question must therefore be addressed: May an individual use the joint life and last survivor expectancy when his spouse is not in fact the designated beneficiary? On the one hand, it could be argued that the purpose of allowing an individual to use the joint life and last survivor expectancy as an alternative to the single life expectancy is simply to permit him to provide a survivor's benefit for his spouse. Such an argument would lead to the imposition

---

93. The reader should keep in mind that although the IRA balance was reduced to \$16,500 immediately after the 1985 distribution, that balance continued to earn interest.

of the excise tax in our problem case, because the spouse was not the designated beneficiary.

On the other hand, we should consider the Internal Revenue Service's interpretation of an analogous provision which governs qualified plans covering "owner-employees."<sup>94</sup> I.R.C. section 401(a)(9), like section 408(a)(6), requires that distributions from such plans be made promptly upon a participating employee's retirement. There are two methods of compliance set forth in the statute, the second of which (like section 408(a)(6)) requires that distributions be made "over the life of such employee or over the lives of such employee and his spouse" or "over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and his spouse."<sup>95</sup> In a Revenue Ruling interpreting section 401(a)(9), the Service noted that "neither section 401(a)(9) nor any other provision of the Code or regulations requires that the spouse actually be the participant's beneficiary"<sup>96</sup> in order to spread distributions over the lives of the employee and his spouse. Accordingly, that ruling authorized a qualified plan distribution to the employee for life and thereafter to his beneficiary (who was not the employee's spouse) for as long as the employee's spouse should live.<sup>97</sup> The beneficiary would have, after the employee's death, the equivalent of an estate *pur autre vie*. This ruling suggests, by analogy, that the proposed IRA distribution to Johnson and his surviving son for an eighteen-year term is acceptable, since Johnson does in fact have a spouse at the time of the election of the distribution schedule, and since the joint and last survivor expectancy of Johnson and his spouse exceeds eighteen years.<sup>98</sup>

*ERTA Changes:* There are none that affect the foregoing discussion.

#### F. *Estate Tax Exemption on the Beneficiary's Death*

I.R.C. section 2039(e) provides that, with certain exceptions<sup>99</sup> the

---

94. See note 28 *supra*.

95. I.R.C. § 401(a)(9)(B).

96. Rev. Rul. 72-240, 1972-1 C.B. 108.

97. *Id.* The Ruling itself dealt with an ordinary qualified plan, rather than one covering owner-employees. The Ruling noted, however, that the rules for plans covering owner-employees are at least as strict as those for ordinary qualified plans. Therefore, because the distribution schedule would have been proper under a plan covering owner-employees, the Internal Revenue Service held that the schedule was proper under the plan before it.

98. The IRA regulations offer no guidance on this point. See Treas. Reg. § 1.408-2(b)(7)(i) (1980) (last sentence).

99. The I.R.C. § 2039(e) exclusion does not apply to that portion of an IRA that is either (1) attributable to excess contributions or (2) paid to the decedent's executor. Furthermore, in order for the exclusion to be available, the date-of-death balance in the IRA must be paid out in the form of a "qualifying annuity," a term defined in Treas. Reg. § 20.2039-2(b) (1981).

balance in an IRA upon the individual's death is exempt from estate taxation. Suppose Hugh and Wendy are husband and wife and Hugh has maintained an IRA for several years, having made only deductible contributions thereto. Hugh dies in 1981, without ever having withdrawn any assets from the IRA. Wendy is the designated beneficiary of the IRA. Although she has the power, upon Hugh's death, to withdraw the entire IRA balance in a lump sum, she elects, prior to the timely filing of Hugh's estate tax return,<sup>100</sup> to receive his IRA balance in ten annual installments beginning in 1981. She further elects that, if she dies prior to the completion of these payments, the remaining installments are to be paid as they come due to her son, Sam. Ordinarily, the date-of-death balance in Hugh's IRA would be included in his gross estate pursuant to section 2039(a),<sup>101</sup> but because the balance is paid to Wendy in the form of a qualifying annuity,<sup>102</sup> section 2039(3) provides that the balance in the IRA on Hugh's death will be excluded from his gross estate.

So far, there is no difficulty. Suppose, however, that Wendy dies after receiving only six of the ten annual installments of Hugh's IRA balance. Will Wendy's estate have to pay estate tax on the four remaining installments that pass to Sam? (Let us assume that the value for estate tax purposes of those four installments is \$4,000.) In the absence of an applicable exclusionary provision in the Internal Revenue Code, the \$4,000 will be includable in Wendy's gross estate, and again the provision of the Code that requires inclusion is section 2039(a).<sup>103</sup> The Internal Revenue Service takes the position that the exclusionary provision of section 2039(e) applies only upon the death of the individual for whom the IRA was originally established (Hugh) and not upon the subsequent death of a beneficiary (Wendy).<sup>104</sup> This position bears examining.

The Service has taken a similar position with respect to section 2039(c). That section excludes from the gross estate certain benefits paid at death under a qualified retirement plan, and the Service has

---

100. See Treas. Reg. § 20.2039-5(b) (1981).

101. See generally R. STEPHENS, G. MAXFIELD, & S. LIND, *supra* note 58, at ¶ 4.11.

102. See note 99, *supra*.

103. It is true that I.R.C. § 2039(a) applies only to that portion of the survivor's benefit that is attributable to the decedent's contributions (or those of the decedent's employer). I.R.C. § 2039(b). Yet because upon Hugh's death Wendy had the power to withdraw the entire IRA balance, but instead chose to withdraw the balance in 10 installments, she should be regarded as having constructively received the entire balance and as having used that balance to purchase an annuity for herself and Sam as survivor. See *Estate of Kleemeier v. Commissioner*, 58 T.C. 241, 253 (1972).

104. See Treas. Reg. § 20.2039-1(a) (1981). Of course, if Wendy had not had any power to determine the form of distribution at Hugh's death, there would be no basis for including the IRA balance in her gross estate in the first place, so the supposed inapplicability of the I.R.C. § 2039(e) exclusion would be of no consequence.



ruled that the exclusion applies only to the gross estate of the employee who was covered by the plan, and not to the estate of his surviving beneficiary.<sup>105</sup> In the case of section 2039(c), however, the Service's position is amply supported by legislative history.<sup>106</sup> More important, the language of the Code itself makes clear that the "decendent" whose estate receives the benefit of the exclusion is the employee whose employer sponsored the qualified plan.<sup>107</sup> This does not hold true with regard to section 2039(e), however. Although there are passages in a committee report that suggest that section 2039(e) is to apply only to the gross estate of the individual who first established the IRA,<sup>108</sup> there is no language in the Code itself that suggests that the exclusion's applicability is to be thus limited. To be sure, the Code states that it is necessary, for purposes of computing the amount excludable, to identify which contributions to the IRA were or were not deductible,<sup>109</sup> but there is no requirement that the decedent have been the person to whom the deduction was available.

As of this writing, there is no case law in point. If the Service's position is ever challenged, it is difficult to predict whether the court will cite the venerable rule that an unambiguous statute's meaning is not to be altered by resort to legislative history, or the not quite so ancient but equally venerable rule that no statute, however apparently plain its meaning, should be construed in such a way as to do violence to the evident intent of the legislature.<sup>110</sup> It is true that the Service's interpretation of section 2039(e) is consistent with the committee report, but the Service has not always been deferential to expression of

---

105. Rev. Rul. 56-656, 1956-2 C.B. 280, 281; *Estate of Kleemeier v. Commissioner*, 58 T.C. 241, 281 (1972).

106. See *Estate of Kleemeier v. Commissioner*, 58 T.C. 241, 255-56 (1972).

107. For example, the Code states the general rule that the decedent's gross estate "shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement . . ." to the extent that the annuity is attributable to contributions made by the decedent or his employer by reason of the decedent's employment. I.R.C. § 2039. Section 2039(c) then grants an exclusion by providing in part: "[C]ontributions or payments made by the decedent's employer . . . under a [qualified plan] shall not be considered to be contributed by the decedent. . . ." *Id.* § 2039(c).

108. I.R.C. § 2039(e) was enacted by § 2009(c)(1) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1894 (1976). The Report of the House Committee on Ways and Means explained the reasons for the enactment of § 2039(e) as follows: "Your committee believes that the estate and gift tax exclusions presently available to taxpayers participating in many retirement programs should be extended to cover those who establish an individual retirement account . . ." H. REP. NO. 94-1380, 94th Cong., 2d Sess. 69, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 3356, 3423 (emphasis added).

109. I.R.C. § 2039(e) provides that the estate tax exclusion "shall not apply to that portion of the value of the amount receivable under [the IRA] . . . which bears the same ratio to the total value of the amount so receivable as the total amount which was paid to or for such [IRA] and which was not allowable as a deduction under section 219 or 220 and was not a rollover contribution bears to the total amount paid to or for such [IRA]."

110. For a brief discussion of these conflicting views of the role of extrinsic aids to statutory construction, see 1 B. BITTKER, *supra* note 71, at ¶ 4.2.2.

congressional intent<sup>111</sup> and so leaves itself open to the charge of respecting committee reports only when doing so is likely to produce increased revenues.

*ERTA Changes:* There are none that affect the foregoing discussion.

### *Conclusion*

Prior to the enactment of ERTA, the IRA deduction was available only to individuals not participating in qualified plans. Because the kind of person who is inclined to consult an attorney regarding his retirement planning is typically covered by a qualified plan, attorneys were not often required to display any knowledge of IRAs. With the expansion of IRA eligibility to include qualified plan participants, however, attorneys will be called upon more and more to consider the IRA as a retirement planning tool for their clients.

---

111. See B. BITTKER, *supra* note 71, at ¶ 20.2.4, suggesting that the Internal Revenue Service, in fashioning regulations construing I.R.C. § 162(f) (deduction of fines and penalties), undertook to disallow a class of deductions that a congressional committee report—albeit a post-enactment report—indicated should be allowed.