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CONTRACTS FOR THE PURCHASE OF PROPERTY OR OF AN INTEREST IN A BUSINESS FROM A DECEDENT'S ESTATE

WINFIELD BLACKWELL*

I. THE PROBLEMS WHICH BUSINESS MEN WANT TO SOLVE

Business men today, particularly men who own property jointly, stockholders in close-held or family corporations and members of business partnerships are faced with several problems as they plan their estate and look into the future.

A man's business interests become assets of his estate at his death unless he disposes of them in his lifetime, and pass on to others who take under his will or by intestacy. Foresighted men realize the difficulties which this creates both for a family of a decedent and for his business associates. Principal problems are: (1) Problems of valuation of close-held assets for death tax purposes. (2) The desirability of guaranteeing to the decedent and his family a ready market for close-held assets and avoidance of forced liquidation. (3) Reasonable assurance to partners or joint owners of close-held assets or business of continued control of the survivors in the event of one member's death. (4) Avoidance of unnecessary delay and technical complications in dissolving and re-forming a partnership or business upon one member's death.

Under present day taxes, the first mentioned problem, the death tax valuation of close-held assets is probably the most important problem of all. However, a thoughtful and skillfully drawn contract made as a part of a general tax plan should deal with all such problems, as well as the matter of tax valuation.

The key section from a tax standpoint is Section 811 of the Federal Internal Revenue Code, which provides: "The value of the gross estate of the decedent should be determined by including the value at the time of his death of all property, . . . to the extent of the interest therein of the *decedent at the time of his death.*" In the case of stocks listed and traded in on an exchange of other assets where the fair market value at time of death can be readily established, there is little difficulty. However, in the case of shares or stock in close-held corporation or partnership interests, or jointly owned properties, controversies almost invariably arise between the taxpayer's estate and the revenue agent as to the proper valuation. Frequently the government will insist upon

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a valuation based upon such factors as capitalization of earnings, intrinsic or book value, etc., whichever results in the greater valuation. In such cases the definition of "Fair Market Value" between the willing buyer and the willing seller, neither being under any compulsion to buy or sell, is not conclusively helpful.¹

A survivor-purchase agreement when properly drawn obligates the decedent's estate to sell, and the survivor to buy, his interest at death. It is enforceable and valid. The mutual promises of the partners are adequate consideration. It is not testamentary in character. The price fixed in the agreement will govern the valuation of the property for death tax purposes.² Such agreements are frequently called "Buy and Sell" agreements when between partners and stockholders; "Stock Retirement" agreements when providing that the corporation is to buy shares of a stockholder upon death; and "Business Insurance" agreements, when life insurance is used to provide the purchase funds.³

II. TYPES OF PROPERTY MOST FREQUENTLY INVOLVED

A. Shares of stock in close-held corporations.

The letter of the estate tax law is "value" and since it has been held to tax such market value as *there is at the time of death*, everything which affects market value, such as restrictions on the sale of the property, must be taken into consideration. Obviously a prudent buyer would not pay as much for restricted property as for property which can be freely sold. Restrictive covenants on stock which make it different from unrestricted stock in the same corporation affect its market value, provided such restricted covenants inhere in the title of the stock itself. It is important to determine whether the corporation is a party to the agreement, and whether the buyer is restricted in disposing of the stock under the applicable State law, or whether the restrictive agreement is personal only between the original seller and another. The importance of assuring the stockholder of a close-held corporation that the stock of any stockholder who dies should not go into unfriendly hands is evident. Also, even where members of the family hold all of such stock it is frequently important that stock ownership proportions be maintained and not disturbed by a death.

B. Partnership interests.

The importance of survivor-purchase agreements for property interests is more noticeable in the case of partnership than in stock in

¹ U. S. Treas. Reg. 105, §81.10.

² *Wilson Estate v. Bowers*, 57 F. 2d 682 (C.C.A. 2d 1932); *Lomb v. Sugden*, 82 F. 2d 166 (C.C.A. 2d 1936); *Commissioner v. Bensel*, 100 F. 2d 639 (C.C.A. 3d 1938); *Helvering v. Salvage*, 297 U.S. 106 (1936).

³ *Laikin & Lichter, Tax Aspects of Survivor-Purchase Agreements*, [1948] Wis. L. Rev. 139.

close-corporations. Reasons are obvious. Death of a stockholder does not legally interrupt the continuity of the corporation's business. On the other hand death of a partner causes the legal dissolution of the partnership, and results in the interruption of business, requiring a surviving partner to liquidate or wind up the business and make distribution, and leaves the decedent's family or estate frequently without income during the period of administration and in a precarious position.

C. Jointly owned realty.

Problems arise here, usually as a result of commercial buildings or improved real estate owned jointly by heirs, or joint owners holding same as an investment. Clearly the same type of problems of valuation, continued control and a ready market exist here, as in the case of individual partnership interests.

III. METHODS OF DEALING WITH THESE PROBLEMS AND THEIR TAX CONSEQUENCES

A. As to stock purchase options in general.

It can be stated that when there is a contract supported by adequate legal consideration, the sale to be at a definite price, or by definite price formula, and where the contract is specifically enforceable, it will be valued at the agreed contract price for death tax purposes.⁴ There are different fact situations for which different contracts are needed.

1. Contracts of stockholders. In *Commissioners v. Bensel*, 100 F. 2d 639 (C.C.A. 3rd 1938) a father was principal stockholder in a close-corporation, and his son was a highly paid and capable executive in his father's company, but was estranged and hostile to the father. The son was willing to continue in the company only if the father would contract to allow the son an option to buy the stock at \$232,500, which price was based on the price at which sales of stock had been made at that time. The agreement further provided that the purchase price of the stock was to be paid to the executors of the father after his death. At the time of the father's death the stock had increased in value and was worth \$3,049,800. The son then exercised the option. The government claimed that the option price should not control in view of the much higher actual fair market value at date of death. However, the court held that the price as stated in the option was the proper valuation for death tax purposes in the father's estate. An important factor was the existence of adequate consideration for the option contract.

In *Lomb v. Sugden*, 82 F. 2d 166 (C.C.A. 2d 1936) Mrs. Lomb and

⁴ Hughes, FEDERAL DEATH TAX §169; *Lomb v. Sugden*, *supra* note 2; *Wilson Estate v. Bowers*, *supra* note 2; *Commissioner v. Bensel*, 36 B.T.A. 246 (1937), *aff'd* 100 F. 2d 639 (C.C.A. 3d 1938).

other stockholders of Bausch and Lomb Company, contracted that no stockholder could sell his or her stock without first offering such stock to the other stockholders in proportion to their holding. If the others refused to buy at the option, the owner could then sell to outsiders. The contract further permitted any stockholder to give his stock or bequeath it by his will to any of the other stockholders, or to give or bequeath up to 10% to strangers. If a deceased stockholder should leave no issue surviving, his estate must offer the first refusal to the other stockholders before being free to sell to strangers. The Second Circuit Court of Appeals held that the contract was specifically enforceable, that it limited the decedent's right to sell it freely and required her to give it away or to sell at the fixed price. Therefore it limited the value of the stock to the low price at which decedent during her lifetime, or executors at her death, were obligated to sell. A similar holding was made in the *Wilson Estate v. Bowers*, 57 F. 2d 682 (C.C.A. 2d 1932) where the option contract was supported by the reciprocal option agreements as consideration. Although the person entitled to first option was the nephew of the decedent, and although he elected to take the shares as a legatee under the decedent's will rather than as a purchaser under the option contract, the option price was held to govern.⁵

In North Carolina such agreements among the stockholders appear to be valid and enforceable.⁶ See *Fawcett v. Fawcett*, 191 N.C. 678, 132 S.E. 796 (1926) where two bank officials and stockholders contracted that the bank stock of the first one to die should be sold to the survivor at par. It also provided that the contract could be cancelled by either party's giving notice at any time. The question of tax value was not involved here. However, the acceptance of the stock option or contract price is dependent upon the contract's essential validity. Accordingly, the court's decision was important in that it held the contract specifically enforceable as supported by sufficient consideration, that it was not contrary to public policy, and was not subject to the law of wills.⁷

2. Contracts between a key employee and decedent. The validity of such contracts depends upon whether they are specifically enforceable and supported by adequate consideration according to contract law. If so, the tax valuation will be the price as fixed in the contract.⁸

3. Contracts between the corporation and decedent. The first ques-

⁵ See also *W. R. Helmholz, Exr.*, 28 B.T.A. 165 (1933).

⁶ *Wright v. Iredell Tel. Co.*, 182 N.C. 308, 108 S.E. 744 (1921), discussed in *A Survey of Statutory Changes in North Carolina in 1941*, 19 N.C. L. Rev. 435, 470 (1941).

⁷ See also, *Greater New York Carpet House, Inc. v. Herschmann*, 258 App. Div. 649, 17 N.Y. Supp. 2d 483 (1st Dep't 1940).

⁸ *Commissioner v. Bensel*, *supra* note 2. But see *Armstrong's Estate v. Commissioner*, 146 F. 2d 457 (C.C.A. 7th 1945).

tion to be determined in each such instance is whether the general corporation law permits the parties and the corporation to make and carry out such a contract. The laws of certain states do not permit a corporation to contract to purchase shares of its own stock from the stockholders. However, in North Carolina the court has held a charter provision enforceable which provided that stockholders could not sell their shares without the Board of Directors' approval of any proposed buyer.⁹ Care should be taken to avoid any provision which would result in the corporation's purchasing such stock out of capital or which would result in a decrease of capital stock contrary to the statutes. One line of cases holds that a restrictive covenant in a corporation charter requiring any stockholder who wishes to sell to give the first refusal to the other stockholders at a fixed price, does not in itself conclusively determine the value of the stock for tax purposes, but is merely a factor and should be considered along with other relevant factors in arriving at fair market value.¹⁰

B. Survivor-purchaser contracts in partnerships.

1. Options to buy decedent's interest. In the case of an ordinary partnership, where one partner dies the partnership is terminated and the value of his property interest consists of his right to share in what remains of the partnership assets, after all its liabilities have been satisfied and the net assets are distributed in kind or sold and divided in cash to the several partners according to their interests.¹¹ It is obvious that in such cases it is extremely difficult to determine what is the fair market value of such an interest at the date of deceased partner's death. If a contract is entered into during the partner's lifetime, and if the option is binding on the partner during his lifetime, the valuation at the time of his death will be the price fixed in the option contract. It is emphasized that the option must be binding during the decedent's lifetime. The valuation will not control for death tax purposes if at all times prior to the actual moment of his death he was free to deal with the property as he saw fit. In such cases a power expired at his death and passed from him.

However, the mere fact that a contract is in the form of an option giving the survivor the right to purchase after decedent's death, rather than being a contract obligating the survivor to buy, does not invalidate the valid and binding effect of the option if otherwise complete and enforceable.

⁹ Wright v. Iredell Tel. Co., *supra* note 6.

¹⁰ Krauss v. United States, 140 F. 2d 510 (C.C.A. 5th 1944) (gift tax); F. A. Koch, Exr. v. Commissioner, 28 B.T.A. 363 (1933) (restrictive covenant in by-laws requiring stockholders to give first refusal to corporation or other stockholders at a stated price); C. P. Chamberlin, 2 T.C.M. 649 (1943); Worcester County Tr. Co. v. Commissioner, 153 F. 2d 967 (C.C.A. 8th 1946) (gift tax).

¹¹ Blodgett v. Silberman, 277 U.S. 1 (1928).

2. Contracts binding survivors to buy decedent's interest. There are numerous advantages in drafting the contracts so as to bind the decedent's estate to sell, and the survivors to buy, the decedent's interest in the partnership. A few of such advantages are: the business future of the surviving partners is assured; liquidating losses to the survivors are avoided; the survivors avoid having to become liquidating trustees and the details and burden of a fiduciary relationship with the decedent's estate; the purchase contract will be enforced by the courts, if necessary; as to the benefits to the estate, it has an assurance of receiving payment at a fixed price for the decedent's interest; decedent's estate can be settled promptly and efficiently; members of decedent's family are partially relieved of business worries; and the tax valuation controversy is minimized.

3. "Profit sharing agreements" for decedent's estate or family.

a. *Income tax consequences.* There are different types of partnerships. One type is where considerable capital investment is involved and the partnership earnings are largely attributable to the capital assets. Another type is where very little capital is required, such as a professional partnership of attorneys, doctors, or other professional men, and where most of the income depends upon personal services. In some types of partnerships a long time is required to realize and collect the income, whereas in others the business is largely on a C.O.D. basis. Many partners realize the sudden and drastic decrease in their families' income which will result when the principal earning power of the family unit is cut off by the death of the partner. Accordingly, it is frequently desired that provision be made in the partnership agreement for income payments to be continued for a certain period of time after the death of the deceased partner to his estate or family. Such agreements sometimes provide for income payments to be made to his estate or widow, whereas others provide that the surviving partners must form a new partnership and admit the widow or some other members of decedent's family as a partner for a certain period of time. There are certain tax dangers to be guarded against, in particular the estate tax consequences and the income tax consequences of such arrangement. The principal point to remember at all times is that it is a problem of accurate and complete draftsmanship of the agreement. Details must necessarily vary with each partnership agreement and the particular circumstances desired. However, the important part is so to plan the agreement as to minimize the total income taxes and death taxes which will become payable upon the death of the partner. The federal income tax provides that "in the case of the death of a taxpayer there shall be included in computing net income and for the taxable period in which

falls the date of his death, amounts accrued up to the date of his death" Unless a partnership agreement is properly drawn, a deceased partner's estate may be required to pay income tax on certain amounts representing income accrued to the date of his death, although not actually received in cash by him as a partner, plus federal estate tax on the exact same amount of accrued income at date of death, plus income tax on sums which may be paid to his executors as share of earnings after his death if provided under the particular partnership contract. In the leading case of *Bull v. United States*, 295 U.S. 247 (1934), Mr. Bull was a partner in a ship broker's firm. Substantially little invested capital assets were needed. The partnership contract provided for the survivors to pay the deceased partner's estate his share of profits earned for one year after his death and that the business should be continued for that purpose for one year with the estate to "share profits or losses." The Supreme Court held that all profits accruing to the deceased partner up to and before date of death are taxable to him as income, and that such amount is also taxable as part of the corpus of his estate under federal estate tax. The court also held that monies paid to his executors as share of earnings after death are income only. The court pointed the way for correct draftsmanship by stating that if the partnership contract had provided that the *interest* of the deceased partner in the partnership shall be *acquired* by the surviving partners by paying certain purchase price payments to the estate, the transaction would be a sale and the payments to the estate would not be taxable as income to the estate but would be taxable as income to the surviving partners. Such so-called double taxation of the same amounts of money under the income tax and under the estate tax has been held constitutional.¹² Another danger to be avoided is that more than a full year's income can possibly be taxed in a single income tax return for a deceased partner, by carelessly drafted provisions for his estate to share in partnership earnings after death.¹³ The more desirable method of drafting in most cases would appear to be provision for the surviving partners to pay to the decedent's estate payments for the decedent's interest in the partnership by way of the purchase price for his interest in the capital assets owned and good will. In that way such payments would be received by the decedent's estate without being considered income subject to the income tax, and their total amount would be the valuation of his partnership interest for estate tax purposes only.

In drafting any such partnership agreement, however, the particular desires of the partners must be reconciled. A younger partner who

¹² *Darcy v. Commissioner*, 66 F. 2d 581 (C.C.A. 2d 1933).

¹³ *Guaranty Trust Co., Exr. v. Commissioner*, 303 U.S. 493 (1938); *McClennen v. Commissioner*, 131 F. 2d 165 (C.C.A. 1st 1942) (an attorney whose estate was taxed with 18 month's income after death).

might feel that his life expectancy would be longer than an older partner might prefer to have the agreement provide for a continuation of income for a certain period of time after decedent's death to the decedent's estate with a corresponding lesser amount to be paid by him as surviving partner as the purchase of the decedent's interest in the partnership. In such way the amount of income payments to the decedent's estate would be taxable as income to the decedent's estate and not to the surviving partner. On the other hand, an older member of a partnership who might expect his death to occur before some of the younger partners, might wish to have the provision to make the greater portion of the payments to be considered as part of the purchase price for his interest in the capital and good will of the partnership, and to have a lesser proportion made as income payments after death to his estate. His estate would thus only be taxed on the purchase price as a part of his taxable estate. Other considerations obviously are to estimate the approximate estate tax bracket in which the particular partner's estate would fall, and also to estimate his income tax bracket and the income tax bracket of his estate for the period after his death, taking into consideration any income payments by way of continuing partner's income.¹⁴

b. *Estate tax consequences.* The estate tax consequences under differently drawn profit sharing or survivor-purchase partnership agreements have been partially referred to above along with the income tax consequences. One of the primary dangers is that the item of good will of a partnership will be given an excessively high valuation by the Government and that the estate of the deceased partner, unless a proper purchase contract is in effect, finds great difficulty in giving evidence as to the exact and proper valuation for good will. For a partnership agreement in which it was spelled out that good will was to belong to the survivors without any consideration and that, accordingly, the decedent's interest in that good will had no taxable valuation at his death, see *Blodget v. Commissioner*, 18 BTA 1050 (1930)

C. *Realty purchase contracts.*

Any survivor-purchase contract involving jointly owned realty should likewise provide for the essential requirements, including the fact of being binding upon the party from whose estate the interest is to be purchased during his lifetime, being supported by adequate consideration, providing a definite fixed price or formula for fixing the price,

¹⁴ Friedman & Silbert, *Planning for the Income of an Estate and Its Heirs*, 17 *FORD. L. REV.* 1-37 (1948); Parlin, *Accruals to Date of Death for Income Tax Purposes*, 87 *U. OF PA. L. REV.* 295 (1939); *Helvering v. Enright*, 312 U.S. 636 (1941); see also, *Helvering v. McGlue's Estate*, 119 F. 2d 167 (C.C.A. 4th 1941); see *INT. REV. CODE* §126.

and must comply with any applicable provisions of the Statute of Frauds or other statutes making special provision for contracts dealing with real estate. Any undivided interest in real estate which is subject to a substantial restriction on being sold or transferred is clearly not of the same value as unrestricted property.¹⁵ An analogy is made to cases of land restricted by law to residential use, in which case no one would argue that such land could be valued as if it were free and available for business, industrial or any other purposes.

D. Insurance devices.

Life insurance has come to play an increasingly important part in providing the means for making effective the carrying out of survivor-purchase contracts in partnership agreements as well as in stock purchase contracts and contracts for the purchase of interest of a decedent's estate in other types of property after death. Many survivor-purchase contracts which were otherwise satisfactory from a legal and a tax standpoint, have lost their usefulness when a survivor becomes financially unable, after the death of a decedent, to comply with his contract to pay a full cash purchase price to the decedent's estate for the decedent's interest in the partnership or business. Furthermore, as pointed out in the previous section of this discussion, in many cases the older partner or associate holds a major interest in the property which is the subject of the survivor-purchase contract, and the younger member, who is more likely to outlive the older one, frequently has less financial means and ability to carry out a survivor-purchase contract than the older member. For those reasons, insurance policies on the lives of the several parties to a survivor-purchase contract have proved in many cases to be most useful. The alternatives to a fund provided by life insurance proceeds would be either to build up the anticipated purchase price in advance through savings, to attempt to borrow the purchase price immediately after the death, or to provide in the agreement for payment of the purchase price, with or without security for the decedent's estate. The life insurance method of financing such survivor-purchase agreements more nearly guarantees successful completion of the purchase plan. In effect, it is an advanced installment method of paying the purchase price for the deceased partner's interest. Such agreement providing for financing by life insurance policies rests on the same basis as similar agreements which do not include the insurance feature, and, if otherwise properly drawn, are binding and enforceable.¹⁶

The essential things which the insured survivor-purchase contract

¹⁵ *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910).

¹⁶ *Coe v. Winchester*, 43 Ariz. 500, 33 P. 2d 286 (1934); *Lockwood's Trustee v. Lockwood*, 250 Ky. 262, 62 S.W. 2d 1053 (1933); see *First Nat'l Bk of Rome v. Howell*, 195 Ga. 72, 23 S.E. 2d 415 (1942) (where agreement obviously not drawn by attorney); *Kavanaugh v. Johnson*, 290 Mass. 587, 195 N.E. 797 (1935).

should include are: a definite obligation, rather than a mere option, on the part of all the partners, by which they agree, binding their estates also, that the surviving partners will buy and the deceased partner's estate will sell to the survivor or survivors the partnership interest of a deceased partner; a definite commitment as to the amount of the purchase price or exact method by which purchase price will be determined; a definite commitment by the partners to purchase and maintain life insurance policies in an agreed amount with which to finance the purchase from the estate of whichever partner may die first; a definite commitment as to the ownership and control of the life insurance policies covered by the agreement, and the manner of disposal of the policies on the lives of the surviving partners after death of the decedent; a definite obligation for the surviving partners to assume all obligations of the partnership and save the deceased partner's estate harmless therefrom; a definite commitment as to the time and manner of paying any balance of the purchase price in excess of the insurance proceeds, and conversely, as to the disposition of any insurance proceeds which may be in excess of the purchase price.

The persons who are to have the benefit of the insurance must, of course, have a legal insurable interest in the life of the one to be insured. In North Carolina, the law was specifically amended in 1941 to provide that they have an insurable interest in the life of an associate, where they have contracted for the purchase by the survivors of the stock of a deceased associate.¹⁷

IRC Sec. 22 (b) (1) excludes from taxable income of the recipient the proceeds of life insurance paid on the insured's death. The insurance proceeds will not be included in the taxable estate of the decedent whose life was insured unless he paid the premiums, directly or indirectly, or possessed any of the incidents of ownership at the time of his death. Accordingly, no partner should apply for or control or have any incidents of ownership in the policy on his own life nor should the proceeds be payable to his estate or family as beneficiaries, nor should the partnership pay the premiums. In order to assure the decedent's estate that the insurance proceeds will actually be used for the purposes intended and required by the survivor-purchase contract, it is frequently desirable to have the insurance policies held by a trustee with the proceeds payable to the trustee who shall have the duty of applying the same to the purchase, promptly after death, of the decedent's interest.

If the partners are equal partners, the problem is simpler than the case where the partners have different percentages of ownership in the

¹⁷ N. C. Pub. Laws 1941, c. 20; N. C. GEN. STAT. §58-104 (1943); *see also*, 19 N.C. L. REV. 490 (1941).

assets of the business and in the profits. A problem of the proper proportionate payment of premiums on the life insurance policy also arises where the partners' insurance ages are different. The matter is simply one of agreement. The premiums may be pooled, and paid equally, or may be paid in accordance with the proportionate share of the partnership interest which the paying partner has at the time of making the agreement, or in accordance with the proportionate share of the partnership which the paying partner will have after another partner dies and his interest is acquired. Another advantage of having the individuals own the policies on the life of the other partner or partners and pay the premiums is to avoid having the policies included in the partnership assets, subject to immediate claim by partnership creditors against the cash surrender value.¹⁸ In order to prevent the insurance proceeds from being subject to income tax under the exception which occurs where a policy has been transferred for value to someone other than the insured during his lifetime, one should avoid the transfer and use of personal insurance owned prior to entering into the survivor-purchase agreement.

E. A few tax pitfalls, and how to draft agreements.

Will an otherwise valid survivor-purchase contract lose its effectiveness in fixing valuation for estate tax purposes by a kinship relation between the survivor and the decedent? The answer appears to be that such relationship will not invalidate the contract if otherwise valid, and if supported by a valid and full consideration. If the option or purchase contract prescribes a price at which the survivor may buy which is less than the economic money's worth at the time the contract was entered into, the fact of blood relationship between the parties would undoubtedly be a factor justifying the holding that the transaction amounted to a transfer or gift in contemplation of or taking effect at death.¹⁹ However, as graphically illustrated in the *Wilson* case, *supra*, and the *Lomb* case, *supra*, the blood relationship of the survivor-option holder did not prevent the Court from holding that the option price should govern as the valuation, although the option price was greatly less than the fair market value at the date of death.

It need hardly be pointed out that such survivor-purchase option should not be placed in a decedent's will, if the benefits described above are desired. The option must be binding during the lifetime, otherwise the owner would have had it in his power until the moment of death

¹⁸ *Bohnsack v. Detroit Trust Co.*, 292 Mich. 167, 290 N.W. 367 (1940); *Greater New York Carpet House, Inc. v. Herschmann*, *supra* note 7; 3 P-H WILLS, ESTATES & TRUSTS SERV. ¶8001 (1948).

¹⁹ INT. REV. CODE §22 (b) (2).

to dispose of the property freely at the then fair market value. See *Delone v. Commissioner*, 6 T.C. 1188 (1946).

A survivor-purchase contract need not be "frozen," but may be amended from time to time by mutual agreement. The contract could provide for its expiration on a certain date and for its renewal from time to time by mutual agreement with a revision in the option or contract price from time to time, so long as it clearly stated that the last previous option or contract price continues in binding effect until the expiration date or until superseded by a renewal agreement.

It is also safe planning to create an absolute obligation to sell. See, *Fostoria Glass Co. v. Yoke*, 45 F. Supp. 962 (D.C. W. Va. 1942).

It should be emphasized again that this paper is not intended to be comprehensive, nor is it intended to be a draftsman's form. It is primarily a check list to remind the attorney of the various essential factors which should be dealt with and covered in a survivor-purchase contract.²⁰ An alert attorney in drafting any such agreement will refresh himself as to the matters upon which the parties to the agreement must specifically agree. In particular, he should see to it: that the agreement states clearly whether the purchase price includes the full valuation of any good will of the business interest or not; that the option or contract purchase price is intended to be a purchase price for the capital or property interest of the deceased and in no way includes any sum which is in the nature of income, if that is the agreement, and if not, he should spell out clearly exactly what portion of the payments to the decedent's estate are to be considered as income to the decedent's estate and whether such represents income to the decedent's estate prior to death or after death. Truly, drafting such contracts as these proves the wisdom of "a stitch in time saves nine."

Armstrong's Estate v. Commissioner, 146 F. 2d 457 (C.C.A. 7th 1945) is a case illustrating the pitfalls of unwary drafting. There an owner of stock of a close corporation assigned stock during his lifetime to a trustee, who was to pay the income to the settlor's wife for her life. An option was given to a trusted employee to buy the stock at any time within five years after the settlor's death for \$25,000. The trust was revocable during the settlor's life by his signature and the employee's, or by the employee's ceasing to be an employee of the company or dying, etc. No consideration was given by the employee for the option. The court held that the trust and the shares of stock at their full, fair market valuation at date of death, were subject to federal estate tax as a transfer in contemplation of or to take effect at death, and that the government was not required to limit the valuation of the stock to the price defined in the option. Also, see *Delone v. Commissioner*, *supra*,

²⁰ INT. REV. CODE §811 (c).

an income tax case, for an example of tax losses due to bad draftsmanship.

It is interesting to note an opinion of the Attorney General of North Carolina, dated February 19, 1940 stating that a "decendent does not have the power to determine the value of his estate or any part thereof by an intervivos option to sell." However, the statute law does not appear to go as far as the Attorney General's opinion. General Statutes Sec. 105-9 uses the words "in determining the *clear market value* of property taxed under this Article, . . ." General Statutes Sec. 105-29 provides that if the amount of the decedent's estate "as assessed and fixed by the Federal Government" is more than that previously fixed for State inheritance tax purposes, the North Carolina Commissioner shall reassess and fix the value at the amount as fixed by the Federal Government. General Statutes Sec. 105-7 (c) also provides that the amount of the North Carolina tax shall be computed in full accordance with the Federal Estate Tax Act. Accordingly, in the light of the Federal Act and decisions construing its applicability to such survivor-purchase contracts, the procedure for purposes of the North Carolina death taxes will probably substantially conform.

IV. CONCLUSION

In conclusion, the author wishes to point out two facts. First, there is no assurance that the existing line of court decisions will remain undisturbed by the Supreme Court. However, the planning of estates and the making of business decisions can only be done according to the best current condition of the law. Second, it is believed that the importance of survivor-purchase contracts and of tax and business planning in that field should continue to expand and grow rather than to diminish. Authorities agree that the trend of business is toward decentralization, and (the Anti-Trust Division of the Department of Justice to the contrary) that the number of small and middle sized business units is steadily growing. As a result there is a constant stream of close-held businesses, whether in the form of corporations, partnerships or otherwise, in which the men who are associated together need to make provision for purchasing the interests in the business of any of their members who may die and the corollary need to provide a ready and satisfactory market for the interest of a deceased member for the benefit of his family. Finally, and not least, there is the desirability of avoiding the delay, uncertainty and expense of tax litigation after a member's death as to the correct valuation of his interest.