***Kerr v. Commissioner, 5 T.C. 359 (1945)***

Under the Revenue Act of 1932, the exercise of a power of appointment does not constitute a taxable gift by the holder of the power because the property transferred is considered a benefaction from the donor of the power, not the property of the power holder.

**Summary**

Florence B. Kerr was granted powers of appointment over a share of her father's estate (share C). In 1920 and 1938, she exercised these powers to appoint income and principal from share C to her brother, Lewis. The Commissioner of Internal Revenue argued that these appointments constituted taxable gifts from Florence to Lewis under the Revenue Act of 1932. The Tax Court held that exercising a power of appointment is not a transfer of the power holder's property but a disposition of the original donor's property. Therefore, Florence's appointments were not taxable gifts under the 1932 Act, which did not explicitly tax the exercise of powers of appointment.

**Facts**

Decedent's will divided his residuary estate into three shares: A, B, and C. Share C was designated for the decedent's son, Lewis, but due to strained relations, it was not given to him outright. Instead, the will granted Florence (petitioner) a life interest in the income of share C and a testamentary power of appointment over the capital. Crucially, it also granted Florence a lifetime power to appoint income and capital of share C to any person of the testator's blood, excluding herself, with the power to revoke and modify such appointments.

In 1920, Florence executed a deed appointing Lewis to receive all income from share C for their joint lives, revocable by Florence. From 1932 to 1938, Lewis received income from share C. In 1938, Florence irrevocably appointed to Lewis one-half of the capital of share C and the income from the remaining half for Lewis's life.

The Commissioner argued that the income payments to Lewis from 1932-1938 and the 1938 irrevocable appointment constituted taxable gifts from Florence to Lewis.

**Procedural History**

The Commissioner of Internal Revenue assessed gift tax deficiencies against Florence B. Kerr for the years 1932 to 1938. Kerr petitioned the Tax Court to redetermine these deficiencies. This case represents the Tax Court's initial determination.

**Issue(s)**

 

1. Whether the periodic payments of income from share C to Lewis from 1932 to 1938, pursuant to the revocable 1920 appointment, constituted taxable gifts from Florence to Lewis under the Revenue Act of 1932.
2. Whether the irrevocable appointment in 1938 of income from share C for Lewis's life constituted a taxable gift from Florence to Lewis under the Revenue Act of 1932.

## Holding

1. No, because Florence's revocable appointment of income and subsequent payments to Lewis were not gifts of her property but exercises of her power of appointment over her father's property.
2. No, because the irrevocable appointment of income in 1938 was also an exercise of her power of appointment, not a gift of her own property, and such exercises were not taxable gifts under the Revenue Act of 1932.

## Court's Reasoning

The court reasoned that the decedent's will clearly intended Florence to act as a conduit for passing share C to Lewis, consistent with the decedent's wishes. The power of appointment granted to Florence was not intended to give her absolute ownership of share C's income. The court emphasized that "*A 'power of appointment' is defined as a power of disposition given a person over property not his own.*"

The court stated, "*The property to be appointed does not belong to the donee of the power, but to the estate of the donor of the power. By the creation of the power, the donor enables the donee to act for him in the disposition of his property. The appointee designated by. the donee of the power in the exercise of the authority conferred upon him does not take as legatee or beneficiary of the person exercising the power but as the recipient of a benefaction of the person creating the power. It is from the donor and not from the donee of the power that the property goes to the one who takes it.*"

Applying this principle, the court concluded that Florence, in exercising her power of appointment, was merely directing the disposition of her father's property, not gifting her own. The Revenue Act of 1932 imposed a gift tax on transfers of "property by gift." Since Florence was not transferring her own property but exercising a power over her father's property, no taxable gift occurred under the 1932 Act. The court noted that the Revenue Act of 1942 amended the law to explicitly include the exercise of powers of appointment as taxable gifts, but this amendment was not retroactive and did not apply to the years in question.

## Practical Implications

*Kerr v. Commissioner* is significant for understanding the application of gift tax law to powers of appointment prior to the 1942 amendments to the Internal Revenue Code. It establishes that under the Revenue Act of 1932, the exercise of a power of appointment was not considered a taxable gift. This case clarifies that for gift tax purposes under the 1932 Act, a crucial distinction existed between transferring one's own property and exercising a power to direct the disposition of another's property. For legal professionals, this case highlights the importance of analyzing the source of property rights in gift tax cases involving powers of appointment, especially when dealing with tax years before 1943. It influenced the interpretation of gift tax law concerning powers of appointment until the law was changed to specifically address these transfers.