only by a person who has legal interests in seeking cancellation of that administrative action. By and large, courts, including the Supreme Court in this case, have interpreted the "legal interests" in Article 9 as "the interests protected by law" (what is called the "legally protected interests doctrine"). What the "law" means, however, has differed from court to court.

This Court interprets the "law" as the "statutory provision authorizing the administrative action." And the Court held that the authorizing provision must be read not in isolation but in conjunction with other related statutory provisions. At the end of this line of reasoning, the Supreme court theoretically admitted the standing of a resident suffering from a jet noise to sue Transportation Minister for cancellation of licenses given to commercial airlines.

The Court, however, held that the interests argued by the plaintiff in this case could not be regarded as "legally protected" even under the liberal interpretation of this Court.

The evaluation of this ruling varies. One commentator considers this decision to be the transformation of the "legally protected interests doctrine" while another thinks it to be a sophistication of the doctrine.

Prof. KENJI URATA
AKIHIKO KIMIJIMA

2. Law of Property and Obligations

A case on a mistake of tax liability.

Decision by the First Petty Bench of the Supreme Court on September 14, 1989. Case No. (*o*) 385 of 1988.

[Reference: Civil Code, Articles 95 and 768, Income Tax Act, Article 33.]

[Facts]

The Plaintiff married the defendant on June 15, 1962. They have two sons and a daughter, and lived in a house in Shinjyuku-ku, Tokyo. The plaintiff had a love-affair with a female colleague of the bank where he was employed. The defendant decided to separate and proposed to divorce in November 1984. As the plaintiff feared to lose his position in his bank, he agreed to the divorce and the defendant proposed to bring up their children in their house. The plaintiff then decided to marry and to live with his former colleague. He agreed to transfer his property which included a house and its site and another house as a distribution of property on the time of divorce. He signed a document of the divorce by agreement (*Kyougi Rikon*) and a document of notification of divorce, and entrusted the defendant to report these document to a family registration office and make a land registration concerning the property.

The defendant reported the divorce on November 24, 1984 and made a land registration of the transfer of the ownership of the property due to the distribution of property. The plaintiff then left the house and married his former colleague and had a son.

At the time of the distribution of property, the plaintiff and defendant spoke of the tax liability of the defendant who was supposed to be taxed because of the acceptance of property. However, there was no exchange of discussion on the tax liability of the plaintiff. After the divorce, the plaintiff was informed of his tax liability by a senior staff member at his place of employment, and he recognized that the amount of a transference income tax (*Jyouto Syotoku Zei*) would be 222,240,000 yen by the calculation of a licenced tax accountant.

The plaintiff (X) filed a claim for the revocation of the registration of the ownership of the property, asserting that at the time of the distribution of property, the plaintiff declared his motive of not being subject to tax liability of a transference income tax, and if he had known his tax liability would be more than two hundred million yen, he would not have declared his intention, and therefore the said contract was void because of a mistake in an essential ele-

ment of a juristic act. The defendant argued that there was no mistake and even if there was a mistake, judging from his occupation, experiences and the subsequent circumstances of the contract, the plaintiff was in gross negligence and he himself could not claim nullity of the contract.

At the trial of first instance, the court rejected the claim. At the trial of second instance, the court supported the judgment of the first instance trial, and rejeted the appeal by the plaintiff. The opinion of the trial of second instance is as follows:

It is an established interpretation of legal precedent that the transfer of land and building at the time of the distribution of property is subject to transference income tax. Because the plaintiff had no knowledge of his tax liability for the distribution of property, he did not make special arrangements for his tax liability in the contract of the distribution of property, and he did not make special clauses of its tax liability. But he is not allowed to assert the mistake in the essential elements of the juristic act, even if he did not expect this tax liability.

From the particulars of the case, the court presumes that if the plaintiff had known of his heavy tax burden, he would have made a different distribution of property contract. However, this is a case of the mistakes in motive concerning tax liability, and also, there was no discussion between the parties on the tax liability of the plaintiff. Therefore, the court can not assume that the contract was made on the assumption of no tax liability on the part of the plaintiff and that the plaintiff declared his no tax liability as a motive of their contract.

X submitted a *jokoku* appeal.

[Opinions of the Court]

Plaintiff's *jokoku* appeal allowed.

The mistake in motive in a declaration of intention makes a juristic act null and void as a mistake in regard to any essential elements of the juristic act, only if those motives are declared to the other party and they become essential elements of the juristic act, and only if the court recognizes that if there were no mistakes the person would

not declare the juristic act (Decision by the Second Petty Bench of the Supreme Court on November 26, 1954. Case No. (*o*) 938 of 1952, 2088 *Minshū* 8 and Decision by the Second Petty Bench of the Supreme Court on May 29, 1970. Case No. (*o*) 829 of 1969, 273 *Saibanshū Minji* 99). Also an implicit declaration of the motive does not prevent itself from becoming an essential element of the juristic act.

Applying these theories to this case, "transfer of property" in Article 33 section 1 of the Income Tax Act regards any juristic act of property transfer as either onerous or gratituious, therefore the distribution of property which has been owned as property of either husband or wife, comes under the "transfer of property", and accrues a transference income (Decision by the Third Petty Bench of the Supreme Court on May 27, 1975. Case No. (*gyo-tsu*) 4 of 1972, 641 *Minshū* 29 and Decision by the First Petty Bench of the Supreme Court on February 16, 1978. Case No. (*gyo-tsu*) 27 of 1976, 71 *Saibanshū Minji* 123).

Therefore, the transfer of the property as a distribution of property at the time of divorce by either husband or wife produces a donor with transference income and he is subject to taxation. According to particulars of the case, the plaintiff misunderstood the tax liability at the time of the distribution of property contract and the plaintiff anxiously spoke of the tax liability to the defendant who was supposed to be taxed because of her acceptance of property through the distribution of property. Based on the court records of the case, the defendant herself recognized her tax liability. Therefore, the plaintiff considered the tax liability from the distribution of property to be an important factor. He also assumed that in general he had no tax liability, and he implicitly declared his above mentioned intention.

As the object of the distribution of property is the whole property of the plaintiff which includes the former house of both parties, and as the amount of tax is extremely high, there is much room for acknowledgement if he had not misunderstood he would not have declared his intention of the distribution of property contract. The fact that there was no discussion on the plaintiff's tax liability be-

tween them only means that there was no explicit declaration of no tax liability of the plaintiff, and it does not prevent the court from the above interpretation.

[Comment]

This case is very important in the fact that the husband's misunderstanding of his tax liability of property transference tax in the distribution of property contract may be recognized as a mistake in the essential element of a juristic act, even if it is a mistake in motive.

The first problem is a question of tax liability in the distribution of property. At the time of divorce, husband and wife shall distribute their property in order to separate their property acquired during marriage, and to support the other party and children after divorce. This is called the distribution of property under Article 768 of the Civil Code. The transfer of property by distribution of property gives rise to the donor liability of transference income tax. This is the firm position of the Supreme Court decisions. As the donor bought the property inexpensively in the past and transfered it to the other party at the prevailing price, the donor received a profit from the difference between its selling price (in this case price at the time of distribution) and purchase price. This property transference income tax is different from the real estate acqusition tax (*Fudosan Syutoku Zei*) which shall be payed by the acquirer.

There is some criticism of the tax liability of the distribution of property. Some lawyers interpret differently the related articles of the Income Tax Act. Another criticism which is very important to civil lawyers, concerns characteristics of the distribution of property. According to this criticism, the essence of the distribution of property is a separation of the joint property acquired during marriage through efforts of both parties. In the case of genuine joint property, no one is subject to property transference income tax. In comparison with genuine joint property, the liability of property transference income tax through the distribution of property is unreasonable. Also the accepted interpretation of property transference income tax obstructs the proper arrangement of the distribution of property, as the donor fears uncertain tax liability.

However, we find no future possibility of change at this point, so we would rather concentrate on the question of mistake, especially mistakes in motive in Article 95 of the Civil Code. Article 95 provides that a declaration of intention shall be null and void, if made under a mistake in regard to any essential element of the juristic act; but if there has been gross negligence on the part of the declarant he cannot himself claim its nullity.

A mistake, misunderstanding of the true nature of a thing, is defined as nonconformity between the declared intention and the real intention of a contracting party. A juristic act is void when there is a mistake in its essential elements. The essential elements of a juristic act mean those elements indispensable to the juristic act, such as a mistake in its nature, the object, the party concerned, and the other important particulars composing the juristic act. A typical example of mistake in regard to the object of a juristic act is the case where a person has bought what he believes to be a painting of Piccaso, and it has turned out to be false. And where there is a mistake in an essential element of a jursitic act, the person concerned can assert its invalidity by proving the fact of mistake. However, when person has committed a mistake through his own gross negligence, he cannot declare such a juristic act null and void.

Concering the essential elements of a juristic act, one of the most difficult questions is a mistake in motives. Examples of a mistake in motives are, a purchase of a pack horse in belief of buying a good, pregnant horse, a purchase of waste land with a misunderstanding of buying a proposed site for a new *shinkansen* station, and a gift of a jewel to friend under the mistaken belief that they are engaged but in fact there is no engagement.

A mistake in motives does not involve a mistake as to any essential element of a jursitic act. For a motive which induces a party to make a declaration of intention cannot be an intrinsic part of that declaration, and consequently cannot be a part of the juristic act. Therefore, in case of mistakes in motive the party who declares his intention can not receive any protection. However, as mistakes in motive are common phenomena of everyday life and there is a great need to protect the declarant, the court and prevailing academic opin-

ions required declaration of motives in order to protect the declarant. Mistakes in motives are regarded as an essential element of a juristic act when motives are shown to the other parties. Although there are different legal opinions among academic lawyers, most of them treat mistake in motives as a kind of mistake in the essential elements of a juristic act. The court has firmly established this theory for many years. On the basis of court opinion, the declaration of intent includes implicit as well as explicit declaration. As the plaintiff anxiously spoke of the tax liability of the defendant and the defendant herself anticipated her tax liability, we can interpret that both of them understood that the defendant had a liability to pay property transference income tax. The most important point in this case is the recognition of mistakes in motive of implicit declarations by the Supreme Court.

Another related question is the application of rules of mistake in distribution of property contract at the time of divorce. Article 95 is usually so interpreted that the rules of mistakes apply to whole kind of juristic acts. However, some influential legal opinions among academic lawyers insist that Article 95, especially its proviso, does not apply to the juristic act of non-property relations because it must be based on a person's real intention and it should be void and null even if he has committed a mistake through his own gross negligence. However, the distribution of property contract regulates property relations of the divorced parties as a necessary result of a divorce, so Article 95 should apply to this contract.

The final question is the existence of gross negligence on the part of the plaintiff. Ordinary citizens probably think that the accepting party of a distribution of property has a responsibility to pay property transference tax, so it is rather natural for the plaintiff to misunderstand his legal liability to pay tax. However, on the other hand, as the property of this case was very expensive, so the plaintiff should have consulted a professional such as a tax accountant or an attoney concerning liability to pay tax, the amount of tax, and the way to pay it, and through consultation the parties must lay down contractual provisions concerning tax liability in detail. The plaintiff's failure to make special provisions on these matters corresponds to negligence,

but whether his negligence comes under gross negligence or not is not clear, so the court shall examine further details and decide the case.

Prof. KATSUICHI UCHIDA

3. Family Law

Two cases regarding the acceptability of a fingermark impressed upon a holographic will as an affixed seal for the will to be effective.

1. A case in which it was held that a fingermark impressed upon a holographic will was acceptable as an affixed seal for the will to be effective (hereinafter referred to as Case 1).

Decision by the First Petty Bench of the Supreme Court on February 16, 1989. Case No. (*o*) 1137 of 1987. A case calling for the affirmation of the nullity of a will. 43 *Minshū* 45.

[Reference: Civil Code, Article 968(1).]

[Facts]

A woman drew up her holographic will and impressed her thumbmark upon it on January 30, 1974, and she passed away on December 27, 1981. By this will, the testator intended to leave all her estate to her youngest daughter (Y_1, defendant, *koso* respondent, *jokoku* respondent). Had it not been for this will, three sons and three daughters of the testator would have been co-successors to the estate. One of the sons (X, plaintiff, *koso* appellant, *jokoku* appellant) brought an action against the other brothers and sisters ($Y_1 \sim Y_5$) for the affirmation of the nullity of the will, asserting that the will in question had only the testator's fingermark in place of her seal and, therefore, the will should be declared to be null and void.