

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-01(1)M
Estate Tax
July 31, 2001

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M000526A

On May 26, 2000, a Petition for Advisory Opinion was received from Lawrence A. De Angelus, Higgins, Roberts, Beyerl & Coan, P.C., 1430 Balltown Road, Schenectady, New York 12309.

The issues raised by Petitioner, Lawrence A. De Angelus, are:

1. Whether real property located outside of New York, which is part of the corpus of an inter vivos revocable trust, is considered to be “real property” that is excluded, pursuant to section 956(a) of the Tax Law, from a New York domiciliary Grantor-Decedent’s (“Decedent”) New York gross estate computed under section 954(a) of the Tax Law, or is considered an intangible interest in a trust that is “intangible personal property” that is included in the Decedent’s New York gross estate.
2. What is the answer to Issue 1, if the real property is held in an irrevocable trust created by the Decedent which gives to Decedent a general power of appointment?
3. What is the answer to Issue 1, if the real property is held in an irrevocable trust created by a third party which gives to Decedent a general power of appointment?

Petitioner submits the following facts as the basis for this Advisory Opinion.

Assume the Decedent died a resident of New York State prior to February 1, 2000. During his life he had created a revocable trust, to be administered under the laws of New York State. The corpus of this trust included a parcel of real property located outside of New York State. Decedent died without having revoked the trust. Under sections 2036(a)(2) and 2038 of the Internal Revenue Code (“IRC”), the entire value of the trust corpus (including the out-of-state realty) is included in the Decedent’s federal gross estate.

Discussion

Section 954(a) of Article 26 of the Tax Law provides that the New York gross estate of a deceased resident means the decedent’s federal gross estate as defined in the IRC (whether or not a federal estate tax return is required to be filed) modified as required by section 954 of the Tax Law.

Section 954(a)(1) of the Tax Law, as effective through January 31, 2000, provided that the decedent’s federal gross estate is reduced by the amount determined under section 956(a) of the Tax

TSB-A-01(1)M
Estate Tax
July 31, 2001

Law. Section 956(a) of the Tax Law, as effective through January 31, 2000, provided that if the federal gross estate of a deceased resident includes the value of real or tangible personal property having an actual situs outside New York State, such value shall be subtracted from the federal gross estate in determining the New York gross estate.

Section 2036(a)(2) of the IRC provides that the value of the federal gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for the decedent's life or for any period not ascertainable without reference to the decedent's death or for any period which does not in fact end before the decedent's death, the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Pursuant to section 2036 of the IRC, a decedent's federal gross estate includes real property that is transferred with a retained life estate, because where the transferor retains a significant interest in the transferred property (e.g., a life estate or an estate that in fact ends at the transferor's death), the transaction is not complete until the transferor's death. (United States v. Estate of Joseph P. Grace, 395 US 316, 320 ["The general purpose of the statute was to include in a decedent's gross estate transfers that are essentially testamentary - i.e., transfers which leave the transferor a significant interest in or control over the property transferred during his lifetime"]).

In Northern Trust Bank of Florida, Adv Op Comm T&F, June 5, 2000, TSB-A-00(1)M, a nonresident decedent transferred real property located in New York State to an irrevocable trust retaining an income interest in the trust property for 10 years, and was an income beneficiary under the trust at the date of death. Pursuant to section 2036 of the IRC, the transfer of such property was not considered to be fully effective until the decedent's death. The completed transaction at the time of the decedent's death was not the transfer of the interest in the trust (an intangible); rather, it was the transfer of the real property to the trust. Therefore, what was included in the decedent's federal gross estate was the value of the real property which the decedent owned immediately before such transfer. Accordingly, for New York estate tax purposes, it was the value of the real property located in New York that was transferred to the trust which was included in the decedent's New York gross estate pursuant to section 960 of the Tax Law.

Section 2038(a)(1) of the IRC provides that the value of the federal gross estate shall include the value of all property transferred after June 22, 1936, to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of the decedent's death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to

TSB-A-01(1)M
Estate Tax
July 31, 2001

alter, amend, revoke, or terminate, or where any such power is relinquished during the three-year period ending on the date of the decedent's death.

The transfer of real property to a revocable trust, under section 2038 of the IRC, is similar to the transfer of real property with a retained life estate, under section 2036 of the IRC, in that the transaction is not considered to be fully effective and complete until the decedent's death. Therefore, with respect to the transfer of real property to a revocable trust under section 2038 of the IRC, the completed transaction at the date of the decedent's death is the transfer of the real property, not the transfer of the interest in the trust (an intangible). Accordingly, it would be the value of the real property that the decedent owned immediately before the transfer that is included in the decedent's federal gross estate.

In this case, with respect to Issue 1, the Decedent's federal gross estate would include, pursuant to section 2038 of the IRC, the value of the real property located outside of New York State that was transferred to the revocable trust. Pursuant to section 954(a) of the Tax Law, the Decedent's federal gross estate is the starting point for computing the Decedent's New York gross estate. Under section 956(a) of the Tax Law, the value of the real property having an actual situs outside of New York State is subtracted from the Decedent's federal gross estate in determining the Decedent's New York gross estate pursuant to section 954 of the Tax Law.

With respect to Issue 2, section 2041(a)(2) of the IRC provides that the value of the federal gross estate shall include the value of all property to the extent of any property with respect to which the decedent has at the time of death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 through 2038 of the IRC.

Section 20.2041-1(b)(2) of the Treasury Regulations provides that for purposes of section 2041 of the IRC, "the term 'power of appointment' does not include powers reserved by the decedent to himself within the concept of sections 2036 to 2038 [of the IRC]... The power of the owner of a property interest already possessed by him to dispose of his interest, and nothing more, is not a power of appointment, and the interest is includible in his gross estate to the extent it would be includible under section 2033 or some other provision of part III of subchapter A of chapter 11."

Accordingly, with respect to Issue 2, where the Decedent created an irrevocable trust and reserved a power within the concept of sections 2036 to 2038 of the IRC, such power is not considered to be a "power of appointment" under section 2041 of the IRC. However, where the conditions of sections 2036, 2037 or 2038 of the IRC are met, the Decedent's federal gross estate would include the value of real property located outside of New York State, because the transfer of such property would not be fully effective or completed until the Decedent's death. Therefore, the

TSB-A-01(1)M
Estate Tax
July 31, 2001

answer to Issue 2, is the same as Issue 1. The Decedent's starting point, under section 954(a) of the Tax Law, for computing the Decedent's New York gross estate would include the value of real property having an actual situs outside of New York. However, the value of such property would be subtracted pursuant to section 956(a) of the Tax Law.

With respect to Issue 3, if a third party created an irrevocable trust which gave a general power of appointment to an individual (or person) over the enjoyment of property not originating with such person, all of the property in the trust over which such individual (or person) possessed the general power of appointment at death is includible in the decedent's federal gross estate pursuant to section 2041 of the IRC.

In the Matter of Paris Singer, 37 Misc2d 400, affd 19 AD2d 616, affd 14 NY2d 611, a Connecticut decedent owned a life estate in a trust holding real property, along with the right to appoint the corpus of the trust by will. The court held that under section 249-p of Article 10-c, a nonresident's net estate included only real and tangible personal property located in New York and not a power of appointment over the same property. In reaching this conclusion, the court reasoned as follows:

The only items of property of a nonresident taxable under this statute are real property situated and tangible personal property having an actual situs in this State. There is no provision for the taxation of the exercise of a power of appointment with respect to such properties. That a donee of a power of appointment has no legal estate in the subject matter of the power is well recognized (Farmers Loan & Trust Co v Mortimer, 219 NY 290; Matter of Walbridge, 178 Misc 32 and cases therein cited). Consequently, in prescribing the items to be included in the gross estate of a resident of this State, the Legislature specifically included the exercise of powers of appointment (Tax Law, § 249-r, subd 7). The omission of such a provision in section 249-p of the Tax Law is indicative of the legislative intent not to include powers of appointment when exercised by a nonresident. In the absence of a clear direction to do so there should not be included in the term "net estate" as used in section 249-p of the Tax Law property not owned by the nonresident but over which he has a power of appointment only.

This case is distinguishable from Singer, supra, because key to the court's reasoning in Singer, was something peculiar to the structure of Article 10-C, *i.e.*, the express inclusion of property over which a resident decedent has a power of appointment in the section defining the net estate of resident decedents, but the omission of any mention of such property in the section defining the net estate of nonresidents. In regard to the estate tax imposed by Article 26, no similar argument could be made. Rather, the silence of Article 26 in regard to general powers of appointment suggests the opposite conclusion. Further, the cases on which the court relies for its proposition that "a donee of a power of appointment has no legal estate in the subject matter of the power" are both non-tax

TSB-A-01(1)M
Estate Tax
July 31, 2001

cases. There is ample authority in the state tax area for a different rule, *i.e.*, because of the substantiality of the ownership rights conferred on a holder of a general power of appointment over the appointed property, whether a decedent estate owns real property outright or controls it via a general power of appointment should make no difference in the tax result.

Accordingly, with respect to Issue 3, where a third party created an irrevocable trust which gave the Decedent a general power of appointment, the value of the property subject to the power is included in the Decedent's federal gross estate pursuant to section 2041 of the IRC. Therefore, the answer is the same as Issue 1 and Issue 2. The Decedent's starting point, under section 954(a) of the Tax Law, for computing the Decedent's New York gross estate would include the value of real property having an actual situs outside of New York. However, the value of such property would be subtracted pursuant to section 956(a) of the Tax Law.

DATED: July 31, 2001

/s/
Jonathan Pessen
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NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.