

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-09(2)M
Estate Tax
September 22, 2009

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M090420A

Petitioner, [REDACTED], requests an Advisory Opinion about the application of the alternate valuation provisions of Internal Revenue Code (IRC) § 2032 to assets held in a brokerage account with transfer on death instructions in place pursuant to Estates, Powers and Trusts Law (EPTL) Article 13. We conclude that, for purposes of the alternate valuation provisions of IRC § 2032, the alternate valuation date may be used because the assets subject to “transfer on death” instructions pursuant to EPTL Article 13, Part 4, are not considered to be distributed, sold, exchanged, or otherwise disposed of as of the Decedent’s date of death.

Facts

Decedent died on January 18, 2009. On the date of death, Decedent was the sole owner of assets in a brokerage account with “transfer on death” instructions in place, pursuant to EPTL Article 13, Part 4. Decedent did not revoke these instructions during her lifetime and did not refer to them in her will. The assets in the brokerage account were not distributed to the beneficiaries and stayed in the name of the Decedent until more than six months after Decedent’s death. The value of Decedent’s gross estate is below the threshold for filing a federal estate tax return, but a New York estate tax return is required to be filed. Petitioner asks whether he can elect the alternate valuation date in IRC §2032(a)(2) six months after Decedent’s date of death, or whether the assets are considered “distributed, sold, exchanged, or otherwise disposed of,” as provided in IRC § 2032(a)(1), on Decedent’s date of death, and thus valued as of that date.

Analysis

New York’s estate tax is generally conformed to the IRC with all amendments enacted on or before July 22, 1998. *See* Tax Law § 951(a). If the estate were required to file a federal tax return, the Tax Department would generally defer to the Internal Revenue Service on matters of interpretation of federal law and would accept the alternate valuation treatment allowed on the federal estate tax return. However, because Petitioner is not required to file a federal estate tax return, and because Petitioner’s question also raises an issue of interpretation of State law, we are providing this opinion on the application of State and federal law to a New York estate.

EPTL § 13-4.7 allows securities to be registered in beneficiary form under certain conditions. If so registered, ownership of the security passes on the death of a single owner, or when the last of multiple owners dies, to the surviving beneficiary or beneficiaries who survive the death of all owners. That section further provides that on proof of death of the owner or owners, and compliance with any applicable requirements of the registering entity, that security may be reregistered in the name of the beneficiary or beneficiaries. Until the security is divided, multiple beneficiaries hold their interests as tenants in common. *See* EPTL § 13-4.7. The transfer on death that results from a registration in beneficiary form is not a testamentary transfer; rather, it is effective “by reason of the contract

regarding the registration between the owner and the registering entity.” *See* EPTL § 13-4.9. The designation of a beneficiary has no effect on ownership and can be revoked until the owner’s death, and may also be revoked or amended by an express direction in the owner’s will. *See* EPTL § 13-4.6.

IRC section 2032(a) provides, in relevant part, that the value of a decedent’s gross estate may be determined as follows:

- (1) In the case of property distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent’s death such property shall be valued as of the date of distribution, sale, exchange, or other disposition.
- (2) In the case of property not distributed, sold, exchanged, or otherwise disposed of, within 6 months after the decedent’s death such property shall be valued as of the date 6 months after the decedent’s death.

Treasury Regulations provide that property is considered to be “distributed” upon the first to occur of the following:

- (i) The entry of an order or decree of distribution, if the order or decree subsequently becomes final;
- (ii) The segregation or separation of the property from the estate or trust so that it becomes unqualifiedly subject to the demand or disposition of the distributee; or
- (iii) The actual paying over or delivery of the property to the distributee.

26 CFR § 20.2032-1(c)(2). The regulations also state that “[i]f a binding contract for the sale, exchange, or other disposition of property is entered into, the property is considered as sold, exchanged, or otherwise disposed of on the effective date of the contract, unless the contract is not subsequently carried out substantially in accordance with its terms.” 26 CFR § 20.2032-1(c)(3).

In this case, Decedent did not revoke the beneficiary designation during her lifetime or by her will. The assets are not testamentary assets, and neither Petitioner nor any other person is empowered to revoke the beneficiary designation. However, EPTL Article 13, Part 4, provides that it does not “limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.” EPTL § 13-4.9(b). All property of a decedent is chargeable with payment of “[a]dministration and reasonable funeral expenses, debts of the decedent and any taxes for which the estate is liable.” EPTL § 13-1.3(a). Thus, these assets were not unqualifiedly subject to the demand or disposition of the beneficiaries on Decedent’s date of death. *See* 26 CFR § 20.2032-1(c)(2)(ii). The registration of the securities in beneficiary form does not, by itself, result in a deemed distribution or other disposition for purposes of section 2032. *See, e.g.,* Priv. Ltr. Rul. 67-01-311591A (Jan. 31, 1967). Accordingly, Petitioner may elect to value these assets based on the alternate valuation date in

