



OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

IRB 2012-46  
November 13, 2012

**ACTION ON DECISION**

**SUBJECT:** Joanne Wandry v. Commissioner  
T.C. Memo. 2012-88 (filed March 26, 2012)  
Nos. 10751-09, 10808-09

**Issue:**

Whether each taxpayer relinquished dominion and control over a 2.39 percent membership interest.

**Discussion:**

In 2004, each taxpayer executed a document transferring to each donee that number of membership interests in an LLC equal to a specified dollar value. Relying on an appraisal, each taxpayer then transferred a fixed percentage interest to each donee equal to the specified dollar value, *i.e.*, a 2.39 percent interest. Each transfer was subject to a reallocation between the taxpayer and the donee based upon the fair market value of the interest as finally determined for federal gift tax purposes. Until such time, each donee will enjoy the beneficial ownership of a 2.39 percent interest.

In the Tax Court, the parties resolved the valuation issue by agreeing to a value that was higher than that stated in the taxpayers' appraisal. Interpreting the instrument of transfer in light of Estate of Petter v. Commissioner, 653 F.3d 1012 (9<sup>th</sup> Cir. 2009), the Tax Court held that the gifts were of a specified dollar value of LLC interests, to be construed in light of the agreed value, *i.e.*, a 1.98 percent interest. Further, the court held that the instrument of transfer did not allow the taxpayers to "take property back" but rather, simply corrected the allocation of the interests between the taxpayers and the donees.

The application of the gift tax is based on the objective facts and circumstances of the transfer, and not upon the donative intent of the donor. Treas. Reg. § 25.2511-1(g). A gift is complete for federal tax purposes when the donor parts with dominion and control, leaving him no power to change its disposition. Treas. Reg. § 25.2511-2(b). The donor's retention of an interest that is dependent upon the occurrence of an event beyond the donor's control will not cause the transfer to be incomplete. Smith v. Shaughnessy, 318 U.S. 176, 181 (1943); Robinette v. Helvering, 318 U.S. 184, 187

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(1943); Estate of Kolb v. Commissioner, 5 T.C. 588, 593 (1945); Mack v. Commissioner, 39 B.T.A. 220, 229 (1939).

In determining the scope of the transfer, the Tax Court dismissed the entries on the LLC's books and records, the entries on the taxpayers' gift tax returns, and the entries on the LLC's subsequent income tax returns, finding that the instrument of transfer best described the gifts. Based on the LLC's books and records, the gift tax returns, and the LLC's income tax returns, however, it is undisputed that on the date of the gift, each taxpayer transferred a 2.39 percent interest to each donee, subject to a return of a portion of that interest in the event of a final determination of a greater value. The final determination of value for federal gift tax purposes is an occurrence beyond the taxpayers' control. Thus, on the date of the gift the taxpayers relinquished all dominion and control over the fixed percentage interests. The fact that the contingency occurred, and that the taxpayers are now entitled to a return of a portion of the interests, does not change this fact. See Treas. Reg. § 25.2511-2(b). Estate of Petter v. Commissioner, *supra*, is not to the contrary. In Petter, there was no possibility that the transferred property would return to the donor, and thus, the court had no need to consider the extent to which the gift was complete. Accordingly, the Tax Court erred in determining that the property transferred for federal gift tax purposes was anything other than the fixed percentage membership interest, *i.e.*, a 2.39 percent interest, transferred on the date of the gift to each donee.

**Recommendation:** Nonacquiescence

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**Reviewers:**

Approved:

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