



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

CC-2001-06
Oct 15, 2001
Attachment 1

CC:PSI:B04
MRSamuels

ACTION ON DECISION

SUBJECT: Therese Hahn v. Commissioner
110 T.C. 140 (1998)
T.C. Dkt. No. 17210-96

Issue:

Whether I.R.C. § 2040(b)(1) applies to joint interests created before January 1, 1977, where the deceased joint tenant died after December 31, 1981.
2040.02-00

Discussion:

John P. Hahn signed a subscription agreement to purchase shares of a co-op apartment in 1972 for \$44,000. In 1973 these shares were issued to John and his wife Therese as joint tenants with right of survivorship. Mrs. Hahn became the sole owner of the shares, upon Mr. Hahn's death in 1991. One hundred percent of the value of the shares on the date of Mr. Hahn's death (\$700,000) was reported on Mr. Hahn's Federal estate tax return as the value of his interest in the shares.

In 1993, Mrs. Hahn sold the shares for \$720,000. On her 1993 Federal income tax return, she reported no gain on the sale, having calculated her basis in the shares to equal \$758,412 (\$700,000 date of death value, plus \$58,412 in other adjustments). The Service determined that Mrs. Hahn could receive a stepped-up basis for only fifty percent of the date of death value of the shares, resulting in a basis of \$428,340 composed of the following amounts: one-half of the original cost basis (\$22,000), one-half of the date of death value (\$350,000), and \$56,340 in other adjustments. In a Notice of Deficiency, the Service determined that Mrs. Hahn had a gain of \$166,660 on the sale (after allowing for a one-time exclusion of \$125,000 of gain from the sale of a principal residence under section 121). Mrs. Hahn filed a petition with the U.S. Tax Court to contest this determination.

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Prior to 1977, section 2040 provided that the gross estate includes the value of all property held at the time of decedent's death by the decedent and another person in a joint tenancy or tenancy by the entirety, except such part of the entire value that is attributable to the amount of consideration in money or money's worth furnished by such other person. The Tax Reform Act of 1976 added subsection (b) to the statute creating a special rule where the joint tenants were husband and wife. Section 2040(b)(1) provided that only one-half of the value of a qualified joint interest was includible in the decedent's gross estate, without regard to which spouse furnished the consideration to acquire the jointly held property. Section 2040(b)(2) provided in part that "qualified joint interest" means an interest in property held by decedent and the decedent's spouse as joint tenants or as tenants by the entirety, but only if the joint interest was created by one or both spouses, and the creation of the joint interest constituted in whole or in part a gift for purposes of chapter 12. The new fifty percent inclusion rule of section 2040(b) was applicable to joint interests created after December 31, 1976.

The Economic Recovery Tax Act of 1981 redefined "qualified joint interest" to eliminate the requirement that the creation of the joint interest be treated as a gift. No change was made to section 2040(b)(1). The 1981 amendment was applicable to estates of decedents dying after December 31, 1981.

In this case, respondent argued that the 1981 amendment to section 2040(b)(2) expressly or impliedly repealed the effective date of section 2040(b)(1), and, therefore, the fifty percent inclusion rule was applicable in this case where the decedent died after 1981, even though the joint interest was created prior to 1977.

The Court held that the 1981 amendment did not expressly repeal the effective date of section 2040(b)(1), since there is no language in the 1981 amendment that specifically repeals the effective date of subsection (b)(1). The Court also held that the 1981 amendment did not impliedly repeal the effective date of section 2040(b)(1), because section 2040(b)(1) enacted in 1976 and the 1981 amendment to section 2040(b)(2) are not in conflict and are not mutually exclusive. Accordingly, the Court held that section 2040(b)(1) does not apply to spousal joint interests created before January 1, 1977.

Other courts that have previously examined this issue have reached the same conclusion. See Patten v. United States, 116 F.3d 1029 (4th Cir. 1997); Gallenstein v. United States, 975 F.2d 286 (6th Cir. 1992); Baszto v. United States, 1997 U.S. Dist. LEXIS 17992 (M.D. Fla. 1997); Wilburn v. United States, 1997 U.S. Dist. LEXIS 17003 (D. Md. 1997); Anderson v. United States, 1996 U.S. Dist. LEXIS 7713 (D. Md. 1996).

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Accordingly, the Service will no longer litigate that section 2040(b)(1) applies to joint interests created before January 1, 1977, where the deceased joint tenant died after December 31, 1981.

Recommendation:

Acquiescence

Reviewers:

MAYER R. SAMUELS
Attorney-Adviser (Tax)

Approved:

RICHARD W. SKILLMAN
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By: _____
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