

ISSUE

Does an interest in a business enterprise acquired by a private foundation under the terms of a will, executed under the circumstances described below, come within the provisions of sections 4943(c)(4) and 4943(c)(5) of the Internal Revenue Code?

FACTS

Prior to May 26, 1969, A executed a will leaving his residuary estate to P, a private foundation described in section 509(a) of the Code. After May 26, 1969, A executed a new will which expressly revoked the prior will. The new will increased the total amounts of the specific bequests while P remained the sole residuary legatee. At all times from the date the original will was executed until his death, A owned x percent of the voting stock of corporation M, a business enterprise as defined in section 4943(d)(4) and section 53.4943-10(a) of the Foundation Excise Tax Regulations. Following A's death, the M stock was transferred to P under the terms of the residuary clause of the will. The x percent of M stock held by P results in P holding an interest in a business enterprise that exceeds the permitted holdings provided by section 4943(c)(2).

LAW AND ANALYSIS

Section 4943(a)(1) of the Code imposes a tax on the excess business holdings of a private foundation equal to 5 percent of the value of such holdings.

Section 4943(c)(1) of the Code states that the term "excess business holdings" means the amount of stock or other interest in a business enterprise that the foundation would have to dispose of to a person other than a disqualified person for its remaining holdings to be "permitted holdings."

Section 4943(c)(2) of the Code provides generally that the permitted holdings of a private foundation are 20 percent (or 35 percent in appropriate cases) of the voting stock (or profits interest for partnerships or joint ventures, and in all other cases, beneficial interest) in a business enterprise reduced by the holdings of all of the foundation's disqualified persons.

Section 4943(c)(4) of the Code provides special transitional period rules in cases where the combined holdings of a private foundation and its disqualified persons in a business enterprise on May 26, 1969, exceed the 20 percent limitation or 35 percent limitation of section 4943(c)(2).

Section 4943(c)(5) of the Code provides that certain of the special transitional period rules under section 4943(c)(4) shall apply to any interest in a business enterprise which a private

foundation acquires under the terms of a will executed on or before May 26, 1969, which are in effect on such date and at all times thereafter, as if such interest were held on May 26, 1969.

Section 53.4943-5(a)(4) of the regulations provides that, for purposes of section 4943(c)(5) of the Code, an amendment or republication of a will which was executed on or before May 26, 1969, does not prevent any interest in a business enterprise which was to pass under the terms (which were in effect on May 26, 1969, and at all times thereafter) of such will from being subject to certain of the special transitional rules under section 4943(c)(4) solely because there is a reduction in the interest in the business enterprise which the foundation was to receive under the terms of the will or there is any other change which does not change the rights of the foundation with respect to such interest in the business enterprise. However, if under such amendment or republication there is an increase in the interest in the business enterprise which the foundation was to receive under the terms of the will in effect on May 26, 1969, such increase shall not be subject to the special transitional rules under section 4943(c)(4).

Section 4943(c)(4)(B) of the Code provides grace periods that suspend imposition of the excess business holdings tax to permit private foundations to make orderly dispositions of the May 26, 1969, holdings in cases where the permitted percentages of section 4943(c)(2) are exceeded. Section 4943(c)(5) applies certain of the grace periods to interests acquired by private foundations under the terms of wills executed on or before May 26, 1969, if such terms are in effect on such date and at all times thereafter. Such wills may be amended or republished to the extent provided in section 53.4943-5(a)(4) of the regulations without preventing the application of the rules of section 4943(c)(4) to any interest passing to a private foundation.

The terms "amendment" and "republication" of a will, as used in section 53.4943-5(a)(4) of the regulations, have no precise legal definitions under the common law of wills generally. The term "amendment" is not a term of art, and has no particular legal significance other than its dictionary meaning: a change, alteration, or substitution. The term "republication" refers to a reaffirmation in some form of a testator's intent expressed in an original document. Republication includes the reaffirmation of terms of an existing will by the execution of a new will or a codicil. Even where reexecution of a will expressly revokes the prior will, the reaffirmation in the second will of legacies and terms contained in the first can be viewed as a republication of those consistent terms. See Page on Wills, section 23.1, 23.4, 23.5 (1960); 95 C.J.S. Wills, 303 (1957); and T. Atkinson, Handbook of the Laws of Wills, 464 (2d ed. 1953).

In this case, the second will carries over the terms of the original will with respect to the legacy to P. Thus, the second will constitutes an amendment or republication of the original

will within the meaning of section 53.4943-5(a)(4) of the regulations. It follows that the M stock was acquired by P under a term contained in both the original will and the second will, which was in effect on May 26, 1969, and at all times thereafter.

HOLDING

The interest in a business enterprise acquired by a private foundation under the terms of a will, executed under the circumstances described above, comes within the provisions of sections 4943(c)(4) and (c)(5) of the Code, and, therefore, is treated as if it were held by the private foundation on May 26, 1969.