

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

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date: September 30, 2009

to: Elliot Pleener  
Supervisory Attorney  
(Estate and Gift Tax)

from: M. Grace Fleeman  
Senior Technical Reviewer, Branch 1  
(International)

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subject: Estate Tax Situs of Property

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Decedent  
Date 1  
State D

ISSUE

Whether any portion of Decedent's RRSP is includible in Decedent's gross estate for federal estate tax purposes.

CONCLUSION

Assuming the Canadian mutual funds held by Decedent's RRSP are classified as corporations for U.S. tax purposes, which appears to be the case, no portion of the RRSP would be includible in Decedent's gross estate for federal estate tax purposes.

## FACTS

Decedent died on Date 1. At the time of his death, Decedent was a Canadian resident, citizen, and domiciliary. He was not then a U.S. citizen or domiciliary, nor had he ever been a U.S. citizen or domiciliary. The executor of Decedent's estate timely filed Form 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return - Estate of Nonresident Not a Citizen of the United States (the "Return") with the I.R.S. Service Center in Philadelphia, PA. The Return was subsequently selected for examination. Your inquiry results from the examination.

At the time of his death, Decedent owned an interest in land and buildings located in State D that was included in his gross estate. During his life, Decedent had contributed to an RRSP. At the time of his death, the RRSP held shares of Canadian mutual funds that, in turn, owned shares of U.S. corporations. No portion of the value of the RRSP was reported as includible in Decedent's gross estate.

An RRSP is similar to an individual retirement account in the United States. Contributions to the RRSP are deductible for Canadian income tax purposes, and the earnings of the RRSP are not subject to Canadian income tax until amounts are withdrawn. It appears that the plan participant may be able to withdraw funds at any time (subject to income tax withholding) and that he has the power to designate a beneficiary of the plan proceeds in the event of the participant's death. Where an individual holds an RRSP at the time of death, Canada imposes an income tax on a deemed distribution of the property held by the RRSP. An RRSP is treated as a trust for U.S. income tax purposes. *Cf.* Notice 2003-25, 2003-1 C.B. 855 (the section 6048 information reporting requirements with respect to certain foreign trusts apply to RRSPs).

You have asked for our views on whether any portion of Decedent's RRSP is includible in Decedent's gross estate for federal estate tax purposes. As noted, Decedent's RRSP owned shares in Canadian mutual funds and these mutual funds owned shares in U.S. corporations.

## LAW AND ANALYSIS

Section 2101(a) imposes an estate tax on the transfer of the taxable estate of every decedent nonresident not a citizen of the United States.

Section 2103 provides that for purposes of the estate tax imposed by § 2101(a), the value of the gross estate of every decedent nonresident not a citizen of the United States shall be that part of the gross estate (determined as provided in section 2031) that, at the time of death, is situated in the United States.

Section 2104(a) provides that shares of stock owned and held by a nonresident not a

citizen of the United States shall be deemed property within the United States only if issued by a domestic corporation.

Section 2104(b) provides that any property transferred by a decedent who is a nonresident and not a citizen, whether the transfer is by trust or otherwise, within the meaning of §§ 2035 through 2038 shall be deemed to be situated in the United States, if it was so situated either at the time of the transfer or at the time of the decedent's death.

Section 2031(a) provides that the value of the gross estate shall be determined by including to the extent provided for "in this part" [referring to §§ 2031-2046 of the Internal Revenue Code], the value at the time of the decedent's death of all property, real or personal, intangible or intangible, wherever situated.

Section 2036(a) provides, in part, for the inclusion in the gross estate of all property transferred by a decedent during life, by trust or otherwise, in which he has retained for life or for any period not ascertainable without reference to his death or for any period that does not in fact end before his death the possession or enjoyment of, or the right to income from, the property, or the right to designate the persons who shall possess or enjoy the property or its income.

Section 2038(a)(1) provides, in part, that the value of the 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 adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or in conjunction with any other person to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent's death.

Section 2039(a) provides that the gross estate shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement if, under such contract or agreement, an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another, for his life or for any period not ascertainable without reference to his death or for any period that does not in fact end before his death. Section 2039(b) provides that section 2039(a) shall apply to only such part of the value of the annuity or other payment receivable under such contract or agreement as is proportionate to that part of the purchase price therefore contributed by the decedent. For purposes of § 2039(b), any contribution by the decedent's employer or former employer to the purchase price of such contract or agreement (whether or not to an employee's trust or fund forming part of a pension,

annuity, retirement, bonus or profit-sharing plan) shall be considered to be contributed by the decedent if made by reason of his employment.<sup>1</sup>

Revenue Ruling 82-193, 1982-2 C.B. 219, considers a situation where D, a nonresident alien, established an irrevocable trust appointing a United States bank as trustee. The trustee invested the trust corpus in a certificate of deposit issued by the bank. On termination of the trust, the trust corpus was payable to D, or if D died prior to termination, to D's estate. The revenue ruling holds that on D's death prior to the termination of the trust, no portion of the trust corpus is includible in the gross estate, because no portion of the trust corpus is situated in the United States at the time of death. Specifically, under § 2105(b), the certificate of deposit held by the trust would be considered property without the United States if the certificate were owned by D directly. The interposition of the irrevocable trust does not affect the underlying character of the bank deposit, for purposes of § 2105(b). Accordingly, D's interest in the trust is property situated outside the United States, and, therefore, not included in the gross estate.

In this case, it appears that, at the time of his death, Decedent possessed a sufficient interest in or control over his RRSP such that (i) § 2036 and/or § 2038 would apply if the RRSP were considered a trust or other entity, (ii) § 2031 would apply if Decedent's interest were more in the nature of outright ownership (similar to a brokerage account); and (iii) § 2039 would apply if Decedent's interest were more in the nature of a retirement annuity. Further, regardless of the characterization of the RRSP, the interposition of the RRSP does not affect the determination of the situs of the property held by the RRSP. Rev. Rul. 82-193, *supra*. Consequently, we believe the RRSP account balance is includible in Decedent's gross estate under §§ 2031, 2039, 2036 and/or 2038, as the case may be, provided the assets held in the account had a U.S. situs at the time of Decedent's death.

The situs of the assets that were held by Decedent's RRSP is determined under §§ 2104 and 2105 for U.S. estate tax purposes. The first determination that must be made is whether the Canadian mutual funds owned by the RRSP are treated for U.S. tax purposes as corporations or trusts. This depends upon the U.S. tax classification of each particular Canadian mutual fund under the entity classification rules of Treas. Reg. §§ 301.7701-1 through 301.7701-4. See Treas. Reg. § 301.7701-1(a).

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<sup>1</sup> Prior to repeal, under § 2039(c), an employer's contributions under a qualified pension plan were not treated as the decedent's contributions, and the portion of the survivor annuity attributable to these contributions was excluded from the gross estate. Under § 2039(e), amounts receivable by a beneficiary under certain decedents' individual retirement and annuity accounts were likewise excluded. In each instance, the exclusion was limited to \$100,000 under § 2039(g). Under the transitional rules in the repeal of §§ 2039(c), (e) and (g), the exclusions of § 2039(c) and § 2039 (e) (subject to the \$100,000 limitation of § 2039(g)) are available for estates of decedents who die after December 31, 1984, and who satisfy certain pay status and benefit election requirements.

If the Canadian mutual funds held by Decedent's RRSP are classified as corporations for U.S. tax purposes, the shares of the mutual funds would not constitute U.S. situs property under § 2104(a) and would not be includible in Decedent's U.S. gross estate. (The underlying assets also would be excluded from Decedent's U.S. gross estate.) You indicated that the RRSP held shares in several mutual funds that are organized as trusts. However, a mutual fund may have been formed as a "trust" under Canadian law, but be properly classified as a corporation under U.S. law. Based on the information provided, it appears that all the Canadian mutual funds held by Decedent's RRSP would be classified as corporations for U.S. tax purposes.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call Joseph Henderson at (202) 622-3446 if you have any further questions.

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