taxnotes®

Volume 156, Number 12 ■ September 18, 2017

Waiting for the Other Shoe

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Reprinted from *Tax Notes*, September 18, 2017, p. 1575

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Waiting for the Other Shoe

by Russell A. Willis III

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In this article, Willis argues that while the logic of the Tax Court's decision in *Estate of Dieringer* may be flawed and the Ninth Circuit may reverse, the executor's troubles may be far from over.

Briefing is now complete in an appeal to the Ninth Circuit from the Tax Court decision last year in *Estate of Dieringer*.[1] A date has not yet been set for oral argument. At stake is an assessed estate tax deficiency of $4.12 million, with an accuracy-related penalty of $825,000.

The Tax Court sustained the disallowance of a large portion of a claimed estate tax charitable deduction for a residuary gift from the decedent's revocable trust to a private foundation. The gift was to have been funded by the decedent's stock in a closely held corporation, but the corporation redeemed most of the stock from the trust at a fraction of its reported value.

The reasoning of the lower court decision is questionable, and the appeals court could reverse it. But more severe difficulties might lie ahead for the executor.

I. Background

At the time of her death in 2009, the decedent, Victoria Dieringer, held most of the voting and nonvoting stock in a corporation, Dieringer Properties Inc. (DPI), which managed commercial and residential rental properties, mostly in and around Portland, Oregon. This stock comprised the bulk of her estate. Her revocable trust, to which her will poured over, provided for several pecuniary gifts to specified charities, with the residue passing to a private foundation.

One of the decedent's sons, Eugene Dieringer, served as sole trustee of the trust (and thus as the "executor" under section 2203) and sole trustee of the foundation. Dieringer was president of DPI and held voting stock in it; also, he and one of his brothers each held nonvoting stock.

On the estate tax return, the executor reported the decedent's voting stock at its full value, as a percentage of the adjusted net asset value of the corporation,[2] and the nonvoting stock at a discount of 5 percent.

Slightly more than six months after Victoria Dieringer's death, DPI redeemed all her voting stock and a large portion of her nonvoting stock from the trust in exchange for two unsecured promissory notes. Ostensibly to provide a cash flow to fund payments on these notes, Eugene Dieringer and two of his brothers each bought voting and nonvoting shares, also in exchange for unsecured notes. Simultaneously, DPI elected S corporation status to lay the groundwork for avoiding a tax on built-in gains down the road.[3]

There were several legitimate business purposes for these transactions, as the Tax Court acknowledged.[4] Among these were the need to provide the foundation with sufficient cash to

[1] *Estate of Dieringer v. Commissioner*, 146 T.C. 117 (2016).

[2] It does not appear the reported value attributed a premium to the decedent's controlling interest in the voting stock.

[3] At the time, the recognition period under section 1374(d)(7) was seven years.

[4] *Estate of Dieringer*, 146 T.C. at 132.

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make its minimum required distributions and to avert a situation in which the foundation would have excess business holdings. Also, a redemption would "freeze" the amount to be distributed to the foundation, protecting it against the risk of a near-term decline in the value of the stock. And it would place the foundation in the position of a preferred creditor, "for purposes of cashflow," ahead of the shareholders.

Also, although not mentioned in the text of the opinion, the S election created further problems, requiring a redemption as a practical matter. As noted in an affidavit submitted by Kevin Kerstiens,[5] a lawyer for the corporation, in support of the executor's motion for summary judgment, the imputed passthrough of income items would have caused the foundation to incur unrelated business taxable income; and because section 1361(b)(1)(D) requires that an S corporation have only one class of stock, any distributions from DPI to the foundation would have required pro rata distributions to the other shareholders, depleting the corporation's cash position.

II. The Catch

However, in valuing the decedent's stock for purposes of the redemption, the corporation used a different appraisal, discounting not only the nonvoting stock but also the voting stock for lack of marketability and lack of control — despite the fact that the decedent held a little more than four-fifths of the voting stock (all of which was surrendered in the redemption) and a slightly higher percentage of the nonvoting stock. Thus, the promissory notes distributed to the foundation reflected only slightly more than half the value of the stock reported on the estate tax return. The decedent's trust reported a capital loss on the redemption.[6]

The IRS asserted a deficiency of $4.12 million on the estate tax return, disallowing the claimed charitable deduction for the bequest to the foundation to the extent of the difference between the reported value of the stock and the value of the promissory notes. The additional tax had the effect of reducing the pecuniary bequests to the other charities, resulting in a "circular" computation of the estate tax liability. The notice of deficiency also asserted a negligence penalty of 20 percent of the underpayment.

III. The Tax Court Decision

The Tax Court held that the amount allowable as an estate tax charitable deduction was limited to the proceeds actually distributed to the foundation from the decedent's revocable trust — that is, the aggregate face amount of the promissory notes.

The court rejected the executor's argument that the drop in the value of the DPI stock was attributable to a "poor business climate." In the interval between the decedent's death and the redemption, the adjusted net asset value of the corporation had declined only slightly.[7] Nearly all the difference between the reported estate tax value

[5]Record on appeal at 454. As noted below, *infra* text accompanying note 36, Kerstiens also represented Dieringer in his capacity as trustee of the foundation on a petition to the Multnomah County probate court to approve the redemption after the fact. The firm in which he is a shareholder has represented the executor at all stages of the current proceeding.

[6]Record on appeal at 384. The loss was reported on Form 1041 for the decedent's trust for a fiscal year ending March 31, 2010, just under a year after the date of the decedent's death. The fiscal year election would be available if the trust had elected, under section 645, to be treated as part of the decedent's probate estate, but that box is not checked on the return. Instead, a box indicating that the reporting entity is itself the decedent's estate is checked. It is unclear whether the trustee also filed Form 8855, making the section 645 election. There was no probate (testimony of Kerstiens, record on appeal at 96). The Form 1041 reports a charitable deduction more than offsetting current net income but does not indicate whether this reflects an actual distribution or a claimed set-aside under section 642(c)(2), which, again, would be available only if the trust were treated as part of the decedent's probate estate under section 645. The initial Form 990-PF for the foundation reported receipt of the promissory notes and unredeemed stock on January 1, 2011, suggesting the claimed deduction on the Form 1041 was for a set-aside.

[7]While the executor did not elect alternate valuation to reflect any claimed decline in the value of the stock in the six months following the decedent's death, section 2032(c), by its terms, would not allow an election unless there had been a decline not only in the value of the gross estate but also in the amount of transfer taxes imposed. Assuming the entire residue were eligible for an estate tax charitable deduction, the election would not have been available in any event.

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and the redemption price was attributable to the discounts employed in the second appraisal.

The appraiser, who had prepared valuations for both the estate tax return and the redemption, was called as a witness by the government and testified that Kerstiens had not informed him of the details of the redemption transaction[8] but had instead affirmatively instructed him to value the decedent's stock as a minority interest. The Tax Court credited this testimony.

Noting that Dieringer — who became the controlling shareholder as a result of the redemption — was also the sole trustee of the decedent's trust and of the foundation, the court found the stock had been redeemed "for a fraction of its value without any independent and outside accountability."[9] Dieringer and his brothers had "thwarted [the] decedent's testamentary plan," the court said, "by altering the date-of-death value of decedent's intended donation through the redemption of a majority interest as a minority interest."[10]

As an analogy,[11] the court cited reg. section 20.2055-2(b)(1), which limits the amount of the estate tax charitable deduction to only that portion of property that is transferred for a charitable purpose and is not subject to a power in a transferee or a trustee to divert the property to noncharitable uses. Although here the trustee did not formally have a power to divert, he accomplished the same result, the court said, by causing a redemption of the decedent's stock at a steep discount.

Finding that Dieringer "knew that a significant percentage of the value of decedent's bequeathed shares was not passing to the foundation and that [he] and his brothers were acquiring a majority interest in [the corporation] at a discount," the court determined he had not acted "with reasonable cause and in good faith" in incurring the tax underpayment.[12] The court, therefore, sustained the assessment of a negligence penalty.

IV. Arguments on Appeal

In his opening brief to the Ninth Circuit, Dieringer argued that the analogy to reg. section 20.2055-2(b)(1) was inapt. That the corporation had authority under state statute to redeem its own shares, he argued, did not render the decedent's bequest to the foundation "contingent or subject to post-death diversion." Also, he argued, the two key decisions the government cited in its briefing to the Tax Court, *Ahmanson Foundation*[13] and *Sage's Estate*,[14] are distinguishable.

A. *Ahmanson Foundation*

There were several other issues in *Ahmanson*, a 1981 Ninth Circuit decision, but for this discussion, the case stands for the proposition that the same asset may have one value for purposes of its inclusion in the estate tax base and another value for purposes of the charitable deduction.

The decedent held a controlling interest in the voting stock of HFA, a holding company, which, in turn, held stock in a savings and loan. He placed this stock in a revocable trust, which also held all the voting and nonvoting stock in a shell corporation, Ahmanco, that was to be funded at his death with the HFA stock. The decedent left the voting stock in Ahmanco to his son and the nonvoting stock to a private foundation.

The appeals court held the nonvoting stock was includable in the decedent's estate at its full value, without discount, because a third-party

[8] Record on appeal at 107-108. If the corporation had redeemed some portion of the decedent's voting shares comprising less than a majority, leaving her trust still holding voting control, minority interest discounts might have been appropriate. While the appraiser testified on cross-examination that neither Dieringer nor Kerstiens withheld from him any information he requested, apparently he did not ask what features of the redemption would justify discounting the decedent's stock as a minority interest.

[9] *Estate of Dieringer*, 146 T.C. at 133.

[10] *Id*. at 134.

[11] *Id*. at 133-134. It appears the Tax Court did not rest its decision on the regulation itself, which would have implied a finding that Dieringer, in one or another of his capacities, was literally "empowered to divert the property" to a nondeductible use or purpose. In its response brief on appeal, the government argued alternatively that while it was not necessary to rely on the regulation, it did in fact apply.

[12] *Id*. at 135.

[13] *Ahmanson Foundation v. United States*, 764 F.2d 761 (9th Cir. 1981).

[14] *In re Sage's Estate*, 122 F.2d 480 (3d Cir. 1941).

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purchaser acquiring the voting and nonvoting stock "in a block" would be in a position to recapitalize and remove the limitation.[15] However, the court said, a discount would apply to the value of the nonvoting stock passing to the foundation. "By severing the voting power of the stock from its economic entitlement, and giving only the economic entitlement to charity," the court said, the decedent himself had "reduced the value of the stock to the charity."[16]

In his opening brief, Dieringer argued that *Ahmanson* was focused on a diminution in value created by the decedent's testamentary plan itself. In this case, "in sharp contrast," Dieringer argued, "nothing in the decedent's testamentary plan caused the reduction in the value of [the] DPI stock."[17] If Dieringer and his brothers had in fact diverted value from the bequest to the foundation, as the Tax Court found, they had done so without express or implied sanction of the decedent, and the IRS should have found "other ways" to challenge the redemption valuation.[18]

Whether the IRS might yet pursue some of those "other ways" is a subject we will return to in a moment.

B. *Sage's Estate*

In *Sage's Estate*, a quarter of the amount the executor had claimed as a deduction for a residuary bequest to a trustee for specified charitable purposes was instead paid by the trustee to the decedent's widow to settle her contest of the will. The Board of Tax Appeals sustained a deficiency assessment, and the Third Circuit federal appeals court affirmed.

The *Sage's Estate* decision appears to rest on two arguably inconsistent grounds. On one hand, the court said the widow took "by inheritance" rather than "by purchase"[19] — in effect treating the settlement agreement as having superseded the will as the dispositive instrument — and that a charitable deduction could not be allowed for the amount passing (albeit indirectly) to her.[20]

On the other hand — and this is the aspect of the holding for which the government cited the case in its briefing, both to the Tax Court and on appeal — the court appeared to suggest that a charitable deduction might be reduced when some or all of the bequest is later diverted to a noncharitable use,[21] without reference to whether a legatee or fiduciary was "empowered" to effect that diversion.

Acknowledging the 1929 decision of the Supreme Court in *Ithaca Trust*,[22] which the executor evidently had cited in his brief on this point, the *Sage's Estate* court said, "While a decedent's gross estate is fixed as of the date of his death, deductions claimed in determining the net estate subject to tax may not be ascertainable or even accrue until the happening of events subsequent to death."[23] By way of example, the court mentioned expenses of administration, which, of course, are not analogous.

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[15] *Ahmanson Foundation*, 764 F.2d at 769.

[16] *Id*. at 772.

[17] Opening brief at 46.

[18] *Id*. at 30. *See also* Reply brief at 7, 13.

[19] Citing *Lyeth v. Hoey*, 305 U.S. 188 (1938). At issue in *Lyeth* was whether the receipt of property by an heir in settlement of a will contest was taxable as income. The *Lyeth* court said not.

[20] *Sage's Estate*, 122 F.2d at 484, citing section 303(a)(3) of the Revenue Act of 1926, which is identical in relevant part to section 2055(a)(3) of the 1986 Code.

[21] *Sage's Estate*, 122 F.2d at 484.

[22] *Ithaca Trust v. United States*, 279 U.S. 151 (1929). The executor in *Ithaca Trust* had claimed a charitable deduction for the remainder after a life estate in trust for the decedent's surviving spouse, discounted by a factor reflecting her actuarial life expectancy. She died only a few months later, and the executor sought a refund, claiming a larger charitable deduction. The Court rejected the claim, saying:

> The estate so far as may be is settled as of the date of the testator's death. The tax is on the act of the testator not on the receipt of property by the legatees. Therefore the value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future, and the value is no less real at that time if later the prophecy turns out false than when it comes out true. Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables.

279 U.S. at 155, internal citations omitted.

[23] 122 F.2d at 484.

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"This precise situation is provided for," the court said, by the predecessor to current reg. section 20.2055-2(b)(1), which it said was "peculiarly pertinent" to the facts at hand.[24] The court paraphrased the regulation as limiting the deduction when some or all of a bequest to charity is in fact diverted to a nondeductible use.[25] But this paraphrase elides the express condition of the regulation that a legatee or fiduciary be "empowered to divert" the bequest.

In *Sage's Estate*, the legatee was expressly empowered by the settlement agreement to divert funds to the widow, and the regulation was indeed "pertinent." But *Sage's Estate* should not be read more broadly to support the suggestion that a diversion *ultra vires*, as arguably occurred in the case now pending before the Ninth Circuit, should reduce the deduction.

C. *Wells Fargo*

In his opening brief, Dieringer cited a 1944 Ninth Circuit decision that might prove dispositive. In *Wells Fargo*,[26] the court reversed a decision of the Tax Court that had reduced the amount of a claimed charitable deduction for a remainder in trust, subject to a life income interest in the decedent's sister, with discretionary encroachments on principal up to 10 percent, "in the event of sickness, accident, want, or other emergency."

The sister had substantial independent means, and the Tax Court indicated that were it not for the fact that several encroachments were in fact made,[27] it would have found the likelihood of encroachment to be so minimal that it would not affect the claimed deduction. But in light of what had actually occurred, the court sustained the deficiency assessment, which assumed a maximum exercise of the trustee's encroachment power.

"The Tax Court was wrong," the Ninth Circuit held, citing *Ithaca Trust*, "when it permitted evidence of such actual invasion of the trust corpus to influence its decision."[28] The analogies to the present case are persuasive.

The government has made no effort in its response brief to distinguish *Wells Fargo*, instead arguing that the "true principle" of "the *Ithaca Trust* line of cases" — represented by a string citation — was not that "post-death events are irrelevant" but that "a charitable contribution whose amount is not 'presently ascertainable' with sufficient precision at the date of death is not deductible."[29]

On its face, that would be an argument for disallowing the deduction altogether, not just to the extent the bequest was diverted. And it does not address the key question, which is whether Dieringer in fact had power to divert or whether he acted outside his authority in causing the trust to surrender the voting stock at a discount.

V. The Problem of Self-Dealing

The practical result of the transaction at issue was that Dieringer and two of his brothers acquired stock in DPI at a discount of several million dollars, at the expense of the foundation.

If the decedent's trust had distributed the stock to the foundation, a redemption would have been an act of "direct" self-dealing, unless, under section 4941(d)(2)(F), the identical offer was made to all shareholders of the same class and the price was at least fair market value.[30]

The parties chose instead to redeem the stock from the trust and distribute the proceeds to the foundation. This would be an act of "indirect" self-dealing, unless it was structured to come within the "estate administration exception" of reg. section 53.4941(d)-1(b)(3), which requires, among other things, that the transaction be approved by a court "having jurisdiction over" the trust and that the trust receive "an amount which equals or exceeds the fair market value of

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[24] *Id*. at 485, citing article 47 of Treasury Regulations 80, 1934 Ed., to which current reg. section 20.2055-2(b)(1) is, in relevant part, identical.

[25] *Sage's Estate*, 122 F.2d at 485.

[26] *Wells Fargo Bank & Union Trust Co. v. Commissioner*, 145 F.2d 132 (9th Cir. 1944).

[27] Although this is not made entirely clear in the text of the *Wells Fargo* opinion, these encroachments apparently were in the nature of undocumented loans to the beneficiary, which were repaid.

[28] 145 F.2d at 133.

[29] Response brief at 53.

[30] At the time, Dieringer and one of his brothers were the only other holders of stock in DPI, and either or both of them could have chosen not to participate in a redemption.

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the foundation's interest or expectancy in such property at the time of the transaction."

Section 4941(a)(1) imposes a first-tier excise tax of 10 percent of "the amount involved with respect to the act of self-dealing" on any "disqualified person" who participates in the transaction, for each year in the "taxable period" — which, under section 4941(e)(1), begins in the year in which the transaction occurred and ends at the earlier of the date of mailing of a notice of deficiency, the date the excise tax is assessed, or the date the transaction is "corrected" by restoring the foundation to "a financial position not worse than that in which it would be if the disqualified person were dealing under the highest fiduciary standards." Section 4941(a)(2) imposes a tax of 5 percent, up to $20,000, on any foundation manager who participated in the act of self-dealing, knowing it was such an act. Liability for each of these taxes is joint and several.

If the transaction is not corrected within the taxable period, section 4941(b)(1) imposes a further, second-tier tax on the self-dealer in the amount of twice the "amount involved," and section 4941(b)(2) imposes a second-tier tax in the amount of half the "amount involved" — again, capped at $20,000 — on any foundation manager who refuses to agree to part or all of the correction.

In this case, DPI would be a "disqualified person" under section 4946(a)(1), since it is a corporation in which a "substantial contributor" — the decedent — held more than 35 percent of the voting stock. Because the decedent herself would have been a disqualified person, Dieringer and his two brothers would also be disqualified persons.[31] Dieringer, as sole trustee of the foundation, would be a foundation manager, according to section 4946(b).

Under reg. section 53.4941(e)-1(b)(2)(iii), the "amount involved" would be "the excess of the fair market value of the property transferred by the private foundation over the amount which the private foundation received, but" — and this might prove to be a difficult exception to meet in this case, given the Tax Court's findings — "only if the parties have made a good faith effort to determine fair market value." Otherwise, under reg. section 53.4941(e)-1(b)(1), the "amount involved" is "the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received."

If the IRS were to pursue the excise tax here, the "amount involved" would be at least $8.96 million and possibly as much as $14.18 million (or more, if the net asset value of DPI increased in the interim). The taxable period has been running for eight years already.

VI. An Odd Wrinkle

Assuming the transaction was inadequately disclosed, the statute of limitations on the first-tier tax, at least, would be six years, under section 6501(e)(3). But six years from when?

Section 6501(l)(1) says the limitation is measured from the filing of the Form 990-PF "for the year in which the act (or failure to act) giving rise to liability for such tax occurred." But here, the transaction occurred in 2009, while the initial return for the foundation was for calendar year 2011, the year it was finally funded.

That return did show the promissory notes as having been received from the decedent's estate, but it did not mention the underlying redemption transaction, which had occurred outside the reporting period. Apparently, the return was filed on extension, and under reg. section 301.6501(b)-1, if this were the relevant return,[32] the statute would have begun to run August 15, 2012, and would still be open.

Also, because the first-tier tax is imposed for each year in the taxable period — which remains open until the IRS takes action or the parties "correct" the act of self-dealing — there are at

[31] The purchase by each of the two brothers of treasury stock in exchange for promissory notes, ostensibly to provide cash flow, might be recast as an indirect purchase from the decedent's trust.

[32] The Form 1041 for the decedent's trust covering the period in which the transaction occurred reported a capital loss on the transaction but did not describe it as a redemption. Again, apparently the return was timely filed on extension, and if that return were treated as triggering the statute of limitations, the statute would have begun to run November 15, 2010. Any Form 1120 or Form 1120-S filed for the corporation for the relevant period is not a matter of public record, but presumably these were filed over six years ago. It does not appear any of the parties filed a Form 4720 or Form 4720-A openly disclosing a self-dealing transaction.

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least three years open at any given moment, possibly six.

VII. The State Court Proceeding

Two years almost to the day after the redemption closed, Dieringer, in his capacity as trustee of the foundation, petitioned the probate court in Multnomah County, Oregon, to approve the transaction retroactively.[33] Although the IRS had not yet issued a notice of deficiency on the estate tax return, the petition recited that the agency was "requesting information from the [e]state" about the redemption.[34] The petition identified Kerstiens as the lawyer for the foundation. No other parties were named or served, and the petition was granted six days after it was filed,[35] on what appears to have been a walk-through.

The petition attached a copy of the second appraisal and mentioned "a downturn in the real estate market and [DPI] cashflows" by way of explaining why fewer than all nonvoting shares had been redeemed, but said nothing about the fact that the price paid for the stock was discounted from the reported estate tax value.

The petition recited that the foundation was waiving objection to the redemption under Or. Rev. Stat. section 130.045(6)(e) and that it was consenting to an "amendment" of the decedent's trust under Or. Rev. Stat. section 130.200(2).[36] The petition did not elaborate on why the redemption might be treated as amending the trust, but it did mention that the trust had terminated some months previously, upon distribution of the promissory notes to the foundation.

The probate judge apparently did not ask whether the state attorney general might be an indispensable party, and clearly the lawyer for the foundation did not raise the question.

VIII. Attorney General as Indispensable Party

One could perhaps construct an argument that the attorney general was not an indispensable party. Ultimately, the question is whether either the decedent's trust or the foundation was a "charitable trust" within the meaning of Or. Rev. Stat. section 130.170, before the amendment of that section in 2013 — which either clarified or expanded the definition to include, at paragraph (1)(a), any trust that "designates" one or more charities "to receive distributions." By its own terms, Oregon Senate Bill 592, which also enacted several other amendments to the trust code, applies prospectively only to "trust proceedings commenced on or after" its effective date of June 26, 2013.

But the foundation itself is organized as a trust, and it is fairly clear that it would have met the definition of the pre-2013 statute, which defined the phrase "charitable trust" more generally, with reference to "purposes beneficial to the community."[37] An argument could be made that the decedent's revocable trust also met this definition.

Or. Rev. Stat. section 130.040(3) provides that the state attorney general has the rights of a "qualified beneficiary" regarding a charitable trust, which, of course, would include the right, under Or. Rev. Stat. section 130.710(1), to be kept "reasonably informed about the administration of the trust and of the material facts necessary . . . to protect [her] interests."

Assuming the foundation, at least, was a "charitable trust" for purposes of the Oregon statute, the attorney general would have been an "interested person" under Or. Rev. Stat. section 130.045(1)(d) and a "beneficiary" entitled to notice under Or. Rev. Stat. section 130.045(6)(c) of a petition to approve a nonjudicial settlement, affording her an opportunity to object.[38] If this were viewed as a petition for declaratory relief

[33] Record on appeal at 425.

[34] One supposes that this inquiry came up during the examination of the estate tax return. Nowhere in the record on appeal is there the slightest suggestion that the IRS ever engaged in any dialogue with the taxpayer on the question of excise taxes on self-dealing.

[35] Record on appeal at 429.

[36] The cited statute uses the word "modification."

[37] The statute specifically identifies "advancement of education or religion" as a charitable purpose. The trust agreement constituting the Dieringer Family Foundation names several Catholic organizations, including schools, as the default beneficiaries, but it permits the trustees to "add or substitute charitable organizations that carry out the purposes to which the [settlors] contributed during their lives."

[38] The statute is derived, with some modification, from section 111 of the Uniform Trust Code.

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under Or. Rev. Stat. section 28.040(3),[39] failure to join a party whose interests would be affected would be jurisdictional[40] — and under Or. Rev. Stat. section 28.110, the attorney general would not be bound by the determination.

Also, under Or. Rev. Stat. section 130.170(4), a court may not "modify" or terminate a charitable trust unless the attorney general is a party to the proceeding.[41] But again, it is not clear whether the proceeding here "modified" either trust, despite the reference in the petition to an unspecified "amendment."

The statute of limitations for claims against the trustee for misfeasance, under Or. Rev. Stat. section 130.820(1), is "six years after the date the act or omission is discovered, or six years after the date the act or omission should have been discovered, whichever is earlier." Apparently, the Oregon attorney general has not yet "discovered" the transaction at issue here, so that statute may still be open.

IX. Conclusion

The taxpayer seems to have the better argument on appeal, but his difficulties may be far from over. ■

COMING SOON

Tax Notes

Taxation of treasure trove — rethinking *Cesarini* and baseballs. In the second part of his report, Hank Adler examines the tax treatment of so-called treasure trove, which views discovery as a realization event, and suggests using a different method for taxing cash and noncash found property.

The manufacturing equipment industry's perspective on tax reform. Ike Brannon and Michelle Hanlon asked members of the Association of Equipment Manufacturers about their thoughts on tax reform and share the responses, including that the most important change desired is that business rates decrease.

State Tax Notes

The reality of the transfer tax trap. Maria Eberle and Hayes Holderness advise taxpayers to be aware of the broad readings and varying scopes of state and local real property transfer taxes to avoid the traps inherent in them.

***Estate of Backemeyer*: A view from New York.** Dario Arezzo discusses agriculture estate tax issues at both the federal level and in New York and how a 2016 Tax Court decision could affect farmers and their heirs.

Tax Notes International

Canada and treaty shopping — from then to now. Ron Choudhury and Victoria Rodrigues trace the Canadian tax response and treatment of treaty shopping over the last 20 years.

Latest developments to the advance pricing agreement procedures in China. Cym Lowell and Robbie Chen discuss the fast-evolving international tax environment, focusing on recent changes to the rules for advance pricing agreements in China, which seek to help China continue to grow as a modern economic power and foster a cooperative environment between multinational enterprises and the Chinese government.

[39] That statute authorizes a fiduciary to seek a declaratory judgment for "any question arising in the administration of the estate or trust."

[40] *Stanley, Adm. v. Mueller*, 211 Or. 198, 315 P.2d 125 (1957).

[41] The statute is derived, with some modification, from section 411 of the Uniform Trust Code.

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