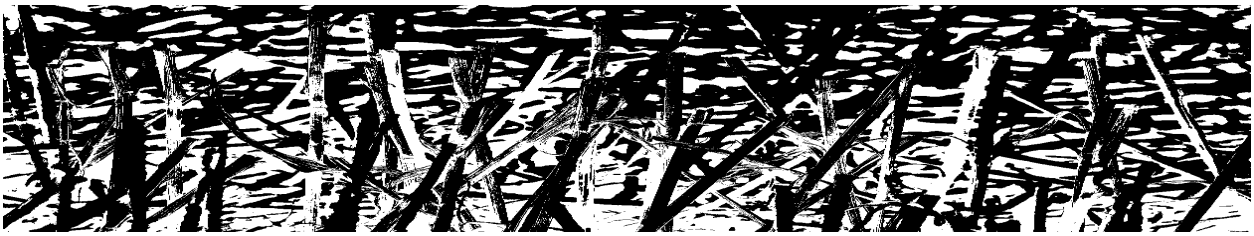

Jack Straw Fortnightly*

discontinuity

It has been ~~nearly sixteen~~ more than twenty-one weeks since our previous issue, which was posted August 03. The word "fortnightly" in the header does carry an asterisk, signifying "or occasional," but this is an order of magnitude.

Evidently your correspondent did intend to put something out much earlier, as there have been a couple of documents posted to the Jack Straw landing page literally since August 04 in the placeholder for this issue, "five comma eight."

These are copies of two revenue rulings from the mid-fifties,[1] when the tax Code in roughly its present form was still very young, which your correspondent had intended to link to a discussion of splitting a gift to an irrevocable trust in which the spouse has a beneficial interest.

The question had come up on one of the listservs, and your correspondent was reminded of a post he had made some years ago to a "case studies" tab on his website about "correctly reporting an indirect skip," in which this was one of the issues. There were several others.

And then in the intervening weeks your correspondent posted two other revenue rulings, also from the fifties, which he had collected in responding to an e-mail inquiry whether cash distributions from a decedent's estate to a private foundation could be reported on a K-1 as carrying out distributable net income.

Apparently the distributions could not be traced to gross income, and either there had been no distributions made to noncharitable beneficiaries in the current year or there was an agenda to ameliorate the tax incidence of those distributions. Those details were not made clear. The query had arrived on your correspondent's desk second or third hand.

But these are more in the nature of "think" pieces, and the Straw is a newsletter, not a blog. And while your correspondent was preoccupied with paying work, a couple or three things did actually happen in the "real" world.

So we will relegate those two topics to blog posts, one here and the other here, and try to catch up at least a little with what has been

happening over the past several months at IRS and in the courts.

Specifically,

at variance

As we were rolling out our previous issue back in early August, there was pending in a federal district court in Texas a motion to reconsider a summary judgment dismissing a refund claim.

The Keefers had been denied a deduction for the transfer of an interest in a limited partnership to a donor advised fund.

In granting the government's motion for summary judgment, the court determined

> (a) that the contemporary written acknowledgment did not make the necessary recitation that the fund sponsor would have "exclusive legal control" of the contributed property and
>
> (b) that the transferors had held back a right to distribution from an existing cash reserve attributable to the contributed interest, a classic "partial interest" problem, if a bit subtle. [2]

The taxpayers did achieve one small victory, albeit hollow.

The government had argued that the taxpayers should be precluded by reg. section 301.6402-2(b)(1) from advancing arguments that were "at variance" with the theories they had pursued in their initial refund claim -- specifically, responding to the government's position that the transfer was an anticipatory assignment of income.

The court rejected this argument, agreeing with the taxpayers that it was the government that had introduced the issue in its responsive pleadings, thereby waiving the cited regulation.

But on the substantive question, the court did rule that by holding back the cash reserve the taxpayers had in effect transferred to the DAF sponsor only the right to proceeds of the pending sale of the hotel property held by the partnership.

The motion for rehearing was denied on August 10, and no notice of appeal was filed.

future interests

The section 7520 rate soared to five point two percent in December, up a hundred twenty basis points in just two months, but it is falling back sixty points to four six in January.

The two-month lookback to the four point zero rate for October, which favors annuity and other "income" interests, is closing as we speak. The December rate, which favors remainder interests, will be available through March.

Jack thinks we might plateau at the somewhat lower January rate, but the extreme leverage we had on for example GRAT remainders a couple of years back is slipping away.

gift annuity rates

Apparently taking its cue from rising current yields in the bond

markets, the ACGA has announced another increase in its recommended gift annuity payout rates, to take effect January 01. The rates assume an investment return of five and a quarter pct., up seventy-five basis points from the assumption on which they based a rate increase just six months ago.

Two years ago, in July 2020, they had retreated to an assumed investment return of only three seventy-five. In the four years immediately following the collapse of financial markets in 2008, they adjusted rates downward five times.

Taking care here not to infringe a copyright on the "full report" to members[3] explaining the rate increase, your correspondent will simply note that

the assumed investment return of five and a quarter pct. is based on portfolio weighted fifty-five pct. to ten-year Treasuries. Your mileage may vary.

And while those are up considerably from January, at this writing they are off about seventy-five basis points from a crest at four and quarter or thereabouts in late October, early November.

But Jack is not a prognosticator of markets.

reg project reinstated

On November 04, the Treasury and IRS issued their priority guidance plan for fiscal 2023, and they did actually reinstate the project to address the question whether basis in assets held in a "grantor" trust is adjusted at the settlor's death, even where the trust is not includible in her estate.

The Greystocke Project was not entirely alone in urging that this project be reinstated.[4] The Tax Law Center at NYU mentioned the issue briefly, ranking the priority as "low."

And Americans for Tax Fairness situated the issue in a somewhat larger context, urging the agency to rescind Rev. Rul. 85-13 altogether and to acquiesce, finally, in the 1984 opinion of the 2d Circuit in *Estate of Rothstein*, which had treated the settlor's purchase of closely held stock from an irrevocable "grantor" trust as a recognition event.

We had discussed this issue in some depth in Jack Straw four comma seven, and again in five comma two.

And at some point we might take a dive into the history behind *Rothstein*, reaching back to the 1940 decision of the Supreme Court in *Clifford*, what you might call a common law iteration of some of the "grantor" trust principles that were only later enacted as what is now subpart E of subchapter J of the Code.[5]

We might, that is, if anything ever comes of this guidance project. Jack reminds the reader that this item was carried as a guidance priority for six years before it was dropped, with no action.

syndicated easements

Adopting the reasoning of the federal district court in Knoxville in *CIC Services*, on remand from the

Supreme Court, and of the 6th Circuit federal appeals court in *Mann Construction*, eleven members of the Tax Court in a reviewed opinion in *Green Valley Investors*, invalidated Notice 2017-10, in which IRS had identified the syndicated conservation easement as a "listed transaction," requiring participants and material advisors to file disclosures or, as immediately relevant here, face penalties.

Four others concurred in the result. Judges Gale and Nega dissented.

Jack has expressed his views at some length in four comma nine and again in five comma four in connection with *Mann Construction* and in five comma five in connection with *CIC Services*.

Tl;dr, Jack argued that "[w]ith the enactment of section 6707A(c)(1) in 2004, Congress expressly empowered IRS to make these inquiries," and he predicted incorrectly that the trial court on remand in *CIC Services* would allow the Notice to stand.

Brief update, the parties in *CIC Services* have agreed to dismiss their cross-appeals to the 6th Circuit. So IRS is walking away from that fight. The decision in *Green Valley Investors* is not final, and it remains to be seen whether the agency will pursue an appeal, which would lie to the 4th Circuit.

But they are launching a project to reinforce the 2017 Notice with a formal regulation -- notice and public comment, the whole nine yards. The proposed reg does not purport to make the reporting obligation retroactive, but the "purpose" statement says the Notice is to remain in effect, at least outside the 6th Circuit.

Comments are due by February 06. It remains to be seen whether the agency will pursue a similar course with respect to microcaptives and whatever the h*ll was going on in *Mann Construction*.

Meanwhile, legislative text implementing the reporting requirements of the 2017 Notice was included in the appropriations measure that cleared both chambers last week and was signed by the President on Friday.

The new section 170(h)(7) and related penalty provisions are effective as to transactions occurring after the date of enactment, but the text expressly disclaims any inference as to the appropriate tax treatment of transactions occurring on or before that date.

also of course

The so-called "Secure 2.0" package, including the so-called "legacy" IRA, was wrapped into the appropriations measure as well.

We talked about the latter back in April in five comma five. Nobody is going to fund a remainder trust with only 50k, so we are looking at gift annuities.

One shot, 50k, indexed for inflation. Minimum payout five pct., but then the ACGA recommended rates for anyone over 70-1/2 -- even the two-life tables -- are already above five pct.

No investment recovery, *i.e.*, entirely taxable as ordinary, but then, the IRA distributions would have been as well. The 100k limit on outright QCDs will also be indexed.

Other features of "Secure 2.0" are beyond our scope, except to mention that the required beginning date is increased to age 73 starting in 2023, and to age 75 in 2032, which is some years off.

But this does increase the lag between the age at which a taxpayer can make a QCD and the age at which she can count this toward her minimum required distribution.

improvements clauses

At its conference on January 06, the Supreme Court will be taking up a petition for cert from *Oakbrook Land Holdings*.

We discussed this case in Jack Straw five comma four, the 6th Circuit federal appeals court reaching a result in conflict with the 11th on the validity of the "proceeds" reg on extinguishment of a conservation easement.

The government had sought extensions to file cert petitions from two decisions of the 11th Circuit, *Hewitt* itself, of course, see Jack Straw five comma one and four comma five, and from a subsequent, unpublished opinion in Glade Creek, but has allowed the extended deadlines to lapse, putting all its eggs in the *Oakbrook* basket.

There were three amicus briefs filed, one on behalf of a commercial redeveloper of historic structures, another on behalf of a (c)(6) business league, and another on behalf of the (c)(3) affiliate of a (c)(4) advocate for "fiscally conservative" tax policy.

If the Court grants cert, we will follow up in more detail.

a marketed structure

We now have a scheduling order in *Eickhoff*, which we covered in Jack Straw five comma four, the government seeking to shut down a "marketed structure" purporting to trap realized gains inside a charitable remainder annuity trust, etc.

Trial is set for July 2024. We will continue to monitor any discovery disputes, and any disposition of the motion of one of the defendants to dismiss the government's disgorgement claim for failure to state.

The government has subpoenaed documents from ten nonparty witnesses, presumably taxpayers who had implemented the "marketed structure." Several of these names do seem to correspond with the names of petitioners in pending and/or terminated proceedings in the Tax Court.

And there is one recent memorandum decision, adverse to the taxpayers, that seems to have arisen from this mess.

The taxpayers in *Furrer* had funded the remainder trust with crops. The court disallowed the claimed deduction altogether because the taxpayers had not obtained a qualified appraisal, and in the alternative limited the deduction to the taxpayers' zero basis in what would have been inventory.

The court then went through a three-page analysis why the "trapping" idea does not work.

The decision is not yet final at this writing, but Jack does not anticipate the taxpayers will pursue an appeal.

the wheels grind

Astonishingly, the parties seem to have settled the *Ecovest* lawsuit, just as it enters its fifth year. An action to enjoin promoters of syndicated easements and to require them to disgorge profits.

We covered this matter in some depth in April 2019 in two comma four and two comma five, with a very brief update two years ago in four comma one.

In May 2021, the initially named individual defendant consented to a permanent injunction and to the payment of some undisclosed amount to the government. But it appeared the appraiser was prepared to fight to the death. Perhaps not.

The parties are to file a status report by January 20. Jack thinks we may eventually see at least some of the details of any settlement, as it will likely involve further injunctions.

and finally

There are a couple or three other small items collected in the "five eight" folder, but we want to try to get this out before midnight.

oddments

[1]

These and two other revenue rulings also from the fifties posted to the Jack Straw landing page at the "five comma eight" placeholder, but linked to a couple of blog posts were excerpted from online copies of back issues of the Cumulative Bulletin, each of which runs about a hundred megabytes and takes forever to download. You are welcome.

As we noted in connection with Jack Straw four comma seven last August, we seem to be building a small library of these.

In the case of some older letter rulings and general counsel memos -- informal guidance in other words --, we have sometimes had to go behind paywalls to retrieve copies to post, and it is possible that at some point we will be facing takedown notices.

[2]

The government was also arguing noncompliance with the requirement that the appraiser's taxpayer identification number be recited in the appraisal document, but the court found it unnecessary to reach that issue.

Jack has been surprised to find that this is a sticking point with some appraisers who apparently do not do much work in providing "qualified" appraisals to substantiate claimed income tax charitable deductions.

The requirement of reg. section 1.170A-17(a)(3)(iv) is unambiguous. The simple expedient is to obtain a separate EIN for use only in your "qualified" appraisal practice.

[3]

If the reader hits a dead end with the hyperlink, this is by design. The "full report" is paywalled to ACGA members only. But dues are only three fifty, maybe you should join.

[4]

Several commenters also urged the agency to reinstate a project to clarify that a taxpayer who contributes inventory (think: food) may recover current year acquisition costs as "cost of goods sold," while recovering the remaining portion of the deductible amount as a charitable contribution under section 170(e)(3).

This project had also been listed since 2015, but omitted from last year's plan, again without explanation. But it appears the project may already have been relaunched back in June.

[5]

Your correspondent fondly remembers the first semester of his federal income tax course in law school, which the professor taught from a common law perspective, as though section 61 were the entire Code. Quite a number of cases with the party name "Helvering."

[6]

See Jack's post mortem in five comma five.

Jack says, continue singing it forever, just because