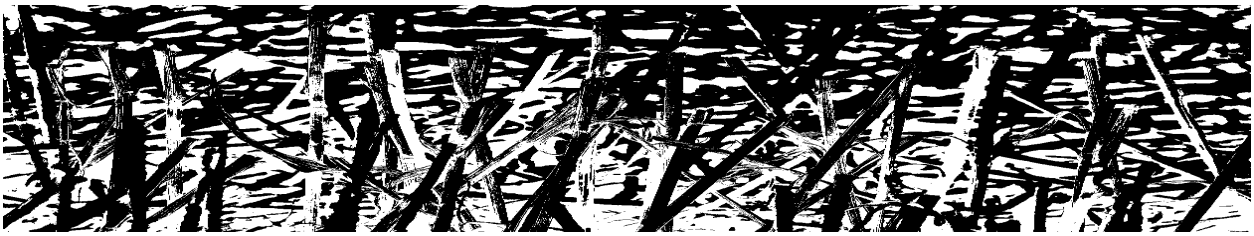

Jack Straw Fortnightly*

in brief

Immediately after we posted Jack Straw four comma nine, the 11th Circuit federal appeals court released its opinion in *Hewitt*, invalidating IRS' interpretation of the reg dealing with proceeds of a judicial extinguishment of a conservation easement to preclude compensation to the transferor for post-contribution improvements.

We detailed the arguments almost two years ago in Jack Straw three comma five. The appeals court essentially adopted the position expressed by Judge Holmes in his dissent in *Oakbrook Holdings*.

Still awaiting a decision from the 6th Circuit in *Oakbrook*, incidentally, though for reasons we mentioned in Jack Straw four comma five, that case may be decided adversely to the taxpayer on a different ground.

Dozens of syndicated easement cases pending in the Tax Court, almost all appealable to the 11th Circuit, have been stayed pending the outcome in *Hewitt*, and since most of these can no longer be disposed of on the technicality, we may be facing lengthy trials with competing expert opinions on valuation.

And/or possibly settlements.

Jack observes that in Notice 2017-10, IRS said it would be arguing economic substance and abuse of the partnership form. We have seen none of that yet.

some possible fallout

Already the appeals court decision in *Hewitt* is being cited by litigants in other cases as signifying this or that. There is for example a motion to dismiss the amended complaint in *Peskin v. Peachtree Investment*, a case it appears we have not yet covered in the Straw.

Tl;dr, this is a class action brought by investors in three syndicated easement programs, claiming the promoters lied to them about the near certainty that the claimed charitable deductions would be disallowed and that they would instead incur penalties for grossly overvaluing the easement.

There are several such lawsuits pending in the northern district of Georgia, brought by the same lawyers against various promoters.

One of the defendants in *Peskin* is the Bryan Cave law firm, whose opinion letters were used to promote the easement programs to prospective investors.

In a January 10 filing supplementing their motion to dismiss the amended complaint, Bryan Cave argued that the *Hewitt* decision "negates the causation element of every one of plaintiffs' claims against [the firm]."

In a response filed January 13, the plaintiffs argued that of course this is not true, as the invalidity of an improvements clause[1] is only one of several grounds on which they are alleging Bryan Cave's opinion letters were flawed.

two or three tiers

Interesting decision out of the Massachusetts state supreme court last month, saying a remainder beneficiary of an irrevocable trust was not entitled to notice that the trust even existed, much less an accounting, until after the death of the beneficiary whose life interest preceded.

One blogger commented that this was "yet another" instance in which the "qualified beneficiary" concept, set forth in section 103 of the uniform trust code, has "confused" the courts. But there is nothing confusing here, the court simply got it wrong.

We might chalk the result up to "confusion" if the plaintiff here were succeeding not to an outright remainder but to a life or term interest in further trust, but that confusion would have arisen because in enacting its version of the uniform code,

Massachusetts altered the definition of "qualified beneficiary" to exclude what the drafting committee, without actually explaining its rationale, described as the "intermediate tier" of successive beneficiaries. Section 103(12) of the uniform code includes all three "tiers."

Your correspondent engaged in an e-mail exchange with the chair of the drafting committee, who noted that a bill currently pending in the state legislature to enact the uniform decanting act also includes an amendment to this section, bringing it into line with the uniform definition.

just say no

Yet another "no rule" position from IRS on charitable remainder trusts, this time on an issue for which if there have been letter ruling requests we have not seen them.

In Rev. Proc. 2022-3, section 5, questions "under study" on which the agency will not "temporarily" not rule, pending issuance of formal guidance, we have

item (16), whether an estate is entitled to an estate tax marital deduction, and item (23) whether a donor is entitled to a gift tax marital deduction, quote,

> for any portion of the annuity or unitrust interest of a charitable remainder trust that may be distributed between the [decedent's/donor's] spouse and an [exempt] organization at the discretion of a trustee.

end quote.

What is being described here is a mechanism for regulating the flow of taxable income into the hands of the spouse. While the spouse might accomplish a similar result by making gifts to the exempt org from the proceeds of the unitrust or annuity payout, this might not be a wash in every case.

One might suppose that placing an item in category 5 might suggest that there is a formal guidance project on the horizon, but Jack observes that there are several items that have been carried in that category for a number of years already, and a few instances in which an item has been quietly dropped from category 5 without formal guidance having been issued.

Jack also observes that a charitable remainder trust for a spouse will qualify for an estate or gift tax marital deduction even if her interest in a unitrust is subject to a net income exception, with or without makeup, and even if the trust is for a term of years rather than for her life, and even if her interest is subject to a qualified contingency, *e.g.*, divorce or remarriage. So the concern here is not to protect the spouse.

And Jack yet further observes that we have not seen any letter rulings on this question. Presumably if there have been any ruling requests, IRS has rejected these, and the present announcement is simply a matter of deflecting further requests. Possibly we will see a revenue ruling.

In an e-mail exchange with your correspondent, Larry Katzenstein suggests that actual the issue here is that if the trustee has discretion to distribute a portion of the annuity or unitrust payout to an exempt org, it is impossible to determine the present value of the marital interest.[2]

and finally

We have a reply brief in *Meyer*, making pretty credible arguments why the trial court should have granted his motion for a protective order, see Jack Straw four comma nine.

Also, the February 7520 rate will hold for a third month at one point six percent.

oddments

[1]

In an appeal from the Tax Court's bench opinion in *TOT Property Holdings*, one of the easement syndicates at issue, Bryan Cave did not challenge the validity of the extinguishment proceeds reg, and the appeals court determined that the reg on its face did not allow an adjustment for post-contribution improvements.

[2]

The present value of possible distributions to the exempt org would not be deductible in any event because these are at the trustee's discretion.

Jack says, the rain only gets in sometimes