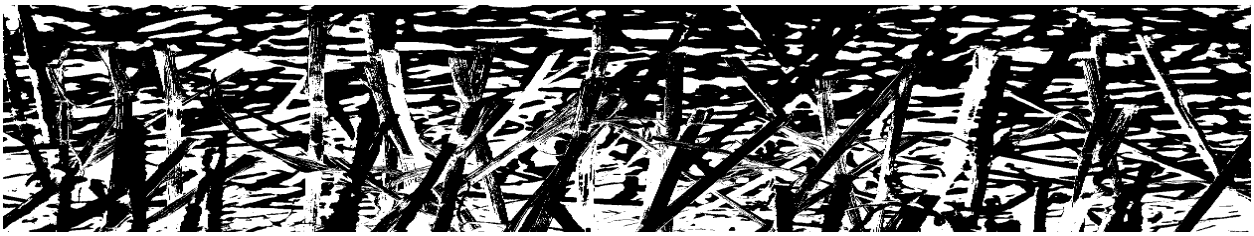

Jack Straw Fortnightly*

askance

Not a whole lot in the way of recent developments, but it has been well over a fortnight, and Jack is anxious to put nib to parchment.

We (meaning, the Greystocke Project) did submit a comment urging the Treasury and IRS **to reinstate the guidance project** on "basis of grantor trust assets at death" under section 1014, which had been added to the priority guidance plan back in fiscal 2015-16 but was **dropped from the current plan** without explanation.

Again, we talked about this in Jack Straw four comma seven, disparaging the suggestion that assets in an IDGT should get a basis adjustment at the settlor's death,

and again in five comma two, linking a letter Daniel J. Hemel, then of the law faculty at Chicago, now at NYU, had written to Rep. Bill Pascrell, chair of the Oversight subcommittee at Ways and Means, on the subject.

Nominally, the comment period closed June 03, but the big players often submit late. The guidance plan year starts July 01, but the published plan tends to drop in September or even later.

original sin

The Statistics of Income division has posted data on individual noncash charitable contributions reported for tax year 2019. Something of a dip from the previous year, which in turn was down considerably from the year before.

But holding rather steady in the **extremely high income ranges**, by which Jack means adjusted gross of ten million or more.

A solid third of the $96.5 billion in reported asset values is attributed to a relative handful of contributions from this one group. Average gift valued at over $800k.

Not quite half this $32.5 billion went to private foundations, and another quarter went to donor advised funds. So it is not as though these folks have given up control of these assets.

And the really fun part is that these contributions represented **close to $28 million in untaxed gains**. Your correspondent makes his livelihood in an industry founded on this anomaly in the tax Code, but he will be among

the first to acknowledge that it is an anomaly.

The link is to a 2016 article in the Columbia Law Journal by Prof. Lawrence Zelenak of Duke Law, which he later expanded into a book.

the dog ate my homework

We have had portability now for a dozen years, but still practically every week IRS is issuing a couple or three letter rulings granting 9100 relief to folks who **"for various reasons"** did not timely file **even a pro forma** estate tax return after the death of the first decedent spouse in order to make the election **by not checking a box.**

And then they wake up when the surviving spouse later dies holding more than twelve point something million or makes lifetime gifts in excess of her own unused exclusion amount.

There were eight of these just the week before last.

The scare quotes a couple paragraphs back are meant to highlight the fact that in issuing these rulings IRS is not making, or at least not reciting, a critical assessment that the requirements of reg. section 301.9100-3(b)(1)(vi) have actually been met, *i.e.*, that the executor had placed **reasonable reliance on a qualified tax professional**, who failed to make, or to advise her to make, the election.

In the early days, these letter rulings expressly recited that there was a tax professional involved, who was **willing to acknowledge that she had screwed up.**

But since at least 2014, these rulings have recited only that some unspecified "information and representations" submitted by the taxpayer met the requirements of the reg.[1]

And they are redacting the date of death, so the public is not informed how many years we are allowing these folks to line up their ducks.

Back in 2017, IRS issued a revenue procedure saying, y'know what?, if you file the return late, **but within two years** after the death of the first decedent spouse, we don't even care whether you relied on a tax professional, just scribble "Rev. Proc. 2017-34" across the top and you are good.

Which **amounts to an automatic extension** of a zero tax return in the estate of the first decedent spouse, giving you **an extra nine months** to square things away.

And Jack will assure the reader he has seen the 2017 rev. proc. used for exactly this purpose.

But wait, Jack, what are you even talking about. What kind of post mortem tax planning can you do with an estate that is below the filing threshold.

Well, for example.

With the advent of portability, per Rev. Proc. 2016-49, a QTIP election in an estate below the filing threshold is **no longer treated as a nullity**. And per reg. section 20.2056(b)-7(b)(4), the QTIP election can be made **on a late filed return.**

And inclusion in the survivor's estate **will effect a basis adjustment** at her later death.

If you miss the two year mark, IRS has been happy to continue to accept the user fee to grant 9100 relief.

But as of July 08, the deadline has been extended to five years. Just scribble "Rev. Proc. 2022-32" across the top. Not pretending anymore.

And just as they did when they issued the 2017 rev. proc., IRS will close any pending ruling requests that would fall within the five year rule and refund the user fee.

Jack has a problem with this,[2] and it has to do with the fact that we are within five years of the supposed sunset of the temporary doubling of the exclusion amount.

So we are opening the door to people with maybe tens of millions of dollars to engage in these **post mortem manipulations**, through and even beyond the date the sunset might yet occur, touch wood.

nostalgia

Speaking of QTIP elections.

A few weeks back, during our inexcusable hiatus, there was a letter ruling, PLR 202223010, allowing an executor to make late elections to treat as QTIP property allocated to two trusts, one of which would absorb the decedent's remaining GST exemption.

A simple case of the executor having listed these assets in the wrong field on schedule M of the 706. We see maybe half a dozen of these per year.

But what struck Jack here was that under the terms of the trust instrument, absent the QTIP election, the property would have been allocated to a trust in which the surviving spouse **did not have a qualifying income interest**.

A "Clayton" QTIP, in other words, so called because that was the name of the taxpayer in the first of three federal appeals court decisions reversing the Tax Court on this question, *i.e.*, whether a trust could qualify as QTIP if the qualifying income interest was contingent on the election.[3]

Eventually the Tax Court had had enough, and they caved in *Clack* (1995), albeit not without several dissents and several judges concurring in the result only because the case would have been appealable to one of the circuits in which there was already an adverse ruling.

IRS did not take an appeal, and had in fact already revised reg. section 20.2056(b)-7(d)(3) to expressly allow for the "Clayton" QTIP -- going so far as to allow estates for which the statute of limitations had not yet closed to make the election and claim a refund.[4]

The theory of the appeals court decisions in *Clayton* and its progeny is that the policy underlying section 2056(b)(7) is not to protect the surviving spouse, but to assure that the subject property is taxed in one estate or the other.

Even Jack is not that cynical.

odds and ends

We have answers on file from every defendant in the *Eickhoff* case, which has to do with this "marketed structure" that was supposed **to trap realized gains** inside a charitable remainder annuity trust.[5]

Across the board, the defendants are asserting that disgorgement is not an available remedy, and one of the defendants has filed a motion to dismiss arguing the point in some detail.

For its part, the government has moved to strike some of the affirmative defenses raised by the various defendants, including laches, estoppel, and statutes of limitation.

And on another front, we have cross appeals from the result in *CIC Services*, which we covered in Jack Straw four comma nine, five comma four, and five comma five.

Jack is skeptical the 6th Circuit federal appeals court will reinstate Notice 2016-66, which identified microcaptives as a "transaction of interest," largely because he thinks IRS did not advance its strongest arguments to the trial court.

But he is also skeptical the taxpayer will succeed in preventing IRS from using the information it gathered from participants and material advisors while the Notice was in force.

Still, it will be awhile before we find all that out. The wheels of justice grinding exceeding fine and all that.

anecdotal

[1]

Under penalty of perjury, and nominally "subject to examination,"

but if you accept the late filed zero tax 706, there is no further scenario in which these representations would ever come under meaningful examination.

If it later turns out that the surviving spouse should be allowed something less than the full amount of the unused exclusion amount claimed, the fact that she maybe should not have been allowed to file the zero tax return late will be the least of her worries.

[2]

Of course, Jack is a well known crank.

[3]

The other two being *Robertson* (8th Cir. 1994) and *Spencer* (6th Cir.1995). *Clayton* was decided by the 5th Circuit in 1992.

[4]

In fact, IRS had issued a favorable private letter ruling on the question back in 1986 (apologies to Lexis for stepping on their copyright).

[5]

We discussed the Chief Counsel advice memo that preceded this litigation back in Jack Straw three comma seven, and the complaint itself in five comma four.

And in five comma five, we took credit for the government correcting an error in the complaint as initially filed.

Jack says, what you believe is what you see