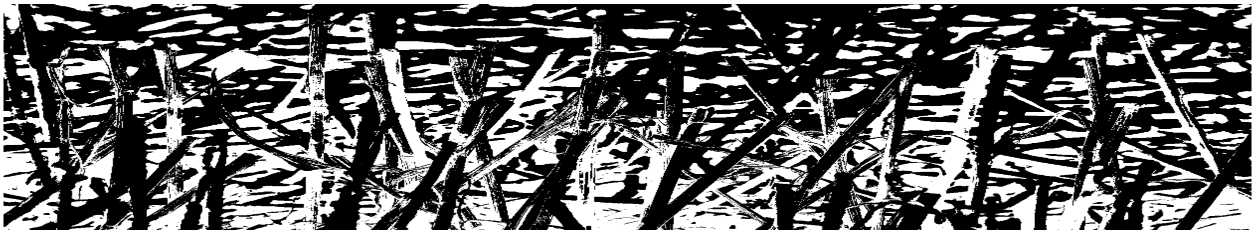

Jack Straw Fortnightly*

substitute

Your correspondent has more than once mentioned in these pages that he looks forward to sitting down in front of the laptop with a cup of coffee early each Friday morning and reading through the week's release of private letter rulings.

These days he is grinding the beans fresh and pouring over through a dripper. With a paper filter, which removes diterpenes from the brew.

Much as he did love the french press. An espresso at the local roaster has been out of the question for a couple of years now.

A couple of weeks ago two rulings caught his attention.

the benefit of hindsight

In PLR 202206013, the Service allowed a (b)(1)(A) org to revoke retroactively its election under section 501(h), the "safe harbor" for lobbying expenditures.

This despite the express provision of the statute that the revocation of this election **cannot take effect until** the following tax year.

Somehow EO counsel treated this as a "regulatory" election, for which the agency can grant relief from a missed deadline if the taxpayer "reasonably relied on a qualified tax professional [who] failed to make, or [to] advise the taxpayer to make, the election," and if the taxpayer is not using hindsight in light of changed facts that make the election advantageous.

Absent the election, a (b)(1)(A) org is subject to the more amorphous rule that "attempting to influence legislation" cannot be more than an "insubstantial" part of its activities.[1]

The election quantifies the expenditure limits on both direct and "grassroots" lobbying by reference to the org's exempt purpose expenditures. Smaller orgs might spend as much on lobbying as twenty percent of the amounts they spend on their exempt purposes. The marginal amount declines as exempt spending increases, until we hit a hard limit at $1 million per year.

There is an excise tax of 25 percent of the amount by which lobbying expenditures exceed these limits in any given year. If an org spends more than 150 percent of the limit in each of four consecutive years, it can lose its exempt status. But only if they have an election in place.

Why an org might want to revoke an election is if it was planning to spend somewhat north of the statutory expenditure limit on lobbying in a particular year and avoid the excise tax, but still be able to argue the expenditure was "insubstantial" under the more amorphous rule.

Why it would be important to ask IRS to allow the revocation to take effect retroactively is if it had already made the expenditures in the current year or had committed to make them before the start of the following year.

So we have what looks like maybe a problem with hindsight.

The precise sequence of events here is masked by the redactions from the ruling as released, but the letter does conclude that "affidavits and board meeting minutes" support the idea that the org intended "from the onset" to revoke the election timely.

Jack would prefer that the ruling expressly state that those board minutes preceded the filing deadline.

faint praise

But what about reasonable reliance on a qualified tax professional, one might ask.

The org did seek advice from a tax professional, back when it might still have been timely to revoke the election for the year at issue. Were they given wrong advice? Here is what the letter ruling says, quote:

> In an affidavit, the tax professional acknowledges that he may have inadvertently misstated or unclearly stated the timing for the revocation, leading to X's misunderstanding.

Jack is not persuaded.

what is the sound of

And then in PLR 202206008 we have on the one hand an unremarkable ruling that a judicial modification to a testamentary trust that does not shift a beneficial interest to a lower generation would not cause the trust to lose its grandfathered status as exempt from the generation-skipping transfer tax.

So unremarkable that it is arguably within a "no rule" position IRS has had in place since 2007 for scenarios similar to those given in examples under reg. section 26.2601-1(b)(4)(i)(E), in this case example 7.

And then on the other hand we have what should also have been a reasonably straightforward ruling that giving the nonskip beneficiary a general power to appoint a specified portion of the trust remainder at her death would cause estate tax inclusion only as to that portion.

But here somehow things got a little confused.

What the ruling literally says is that there would be inclusion only to the extent the child actually exercised the power. That is simply not what section 2014(a)(2) says. If the child is holding a general power, the property subject to that power is includible in her estate whether she exercises it or not.

But one supposes the parties understood what was meant here.

the backstory

How this situation arose is a bit of a puzzle. Maybe we need a second cup of coffee.

As drafted, the trust was to pay net income to the testator's child for her life, with the remainder at her death outright to her descendants, *per stirpes*, or if none, then to the heirs of the testator's spouse.[2] During the child's life, the trustee had nominally[3] absolute discretion to distribute principal among the beneficiary class.

Some kind of controversy, not clearly explained in the text of the ruling, had arisen among the beneficiaries, apparently in connection with the trustee having decided it would be a good idea to give the child a testamentary general power to appoint "certain assets" of the trust at her death.

The stated purpose for doing this was "to keep trust assets in the hands of [the testator's] descendants" after the child's death and "to minimize transfer taxation" on trust assets. Objectives the trustee said might not otherwise be realized "due to family dynamics, including separation and divorce, as well as changing tax laws."

Of course, giving the child a general power to appoint to whomever would not assure that the appointed property would pass to descendants of the testator, so ordinarily we would be talking about a power that would be "general" for purposes of section 2041(a)(2), but otherwise "limited" in the sense that word is used in nontax contexts.

Typically this would be accomplished by limiting the exercise to descendants, but allowing an exercise for the child's creditors or creditors of her estate, which you do not expect will divert much or anything.

An exercise in favor of descendants of the testator might remove at least that portion of the trust assets from the transfer tax regime for several more generations. Also you get a basis adjustment to the date of her death, at least until "changing tax laws" might sweep that away.

But it also might favor some lines of descent over others.

qui bono

If we are to accept the text of the letter ruling as accurately stating the facts, the power here would be exerciseable in favor of the child's estate. How this assures that trust assets stay in the hands of the testator's descendants is unclear.

Not surprisingly, the plan met with resistance from two of the remainder beneficiaries, one of them also as virtual representative of his minor children. These would pretty much have to be descendants of the income beneficiary, as descendants of the testator's spouse are subject to a rather remote contingency and would likely not have standing to object.

Probably one or both of these beneficiaries are involved in the "family dynamics" mentioned above, in particular "separation and divorce," which might risk a diversion of trust assets outside the testator's line of descent.

But they did ultimately agree to allowing the incumbent beneficiary, presumably their parent, a "general" power to the extent of her unused exclusion amount.[4]

uptick

The section 7520 rate for March 2022 will be 2.0 percent, up forty basis points from where it has sat since December, and the highest rate in just over two years.

If this turns out to be an upward trend over the next few months, charitable gift planners will have until the end of April to take advantage of the 1.6 percent rate for February.

A lower rate provides stronger leverage for charitable lead annuity trusts. It also affords a larger deduction for a gift annuity, but allocates a larger portion of the payout to ordinary income.

you didn't build that

A case we have not been following because Jack knows next to nothing about cryptocurrency is *Jarrett*, pending in the middle district of Tennessee.

At issue is whether Tezos tokens the taxpayer acquired through a process called "staking," as distinct from "mining," are income. The taxpayer says he is like a baker, and he does not recognize income until he sells the bread.

The government denies that the taxpayer has "created" these tokens, but has not yet articulated its counter theory.

From the little he dimly understands, Jack suggests "staking" may be more analogous to an investment or a loan, with the fresh tokens being a return on the "stake."

This is a refund claim, the taxpayer having initially paid the tax and then filed an amended return. The extremely modest amount at stake suggests this is a test case.

And apparently the government is not ready with its arguments, because they have offered a refund, which the taxpayer has refused.

The question now is whether the refund offer has rendered the case moot. The government will be filing a motion to dismiss, and a briefing schedule will be set tomorrow.

We mention all this because whether cryptocurrency is a capital asset in the hands of a particular holder matters in the context of receiving these as charitable gifts.

in the hole

As of a few weeks ago, the "Accelerating Charitable Efforts" Act has been introduced in the House.

The proposed legislation would radically alter the landscape for donor advised funds, in ways we could get into in detail if Jack thought there was any chance it would be enacted anytime soon.

The identical bill has been languishing in the Senate since last June, and Jack does not expect to see any action in either chamber during the current session.

But the ideas are in the ether.

and finally

In this morning's Federal Register we have proposed regs construing the required minimum distribution rules as reconfigured by the so-called "Secure" Act, included in the appropriations measure enacted in December 2019.

Comments will be due ninety days after publication, *i.e.*, May 25.

detritus

[1]

A private foundation is subject to an excise tax on the first nickel it spends on lobbying, which can quickly escalate to a confiscatory tax and is generally understood to be a flat prohibition on such spending.

[2]

Throughout the text of the ruling, the testator is referred to as the "grantor," an inaccuracy Jack the insufferable pedant finds grating.

[3]

Of course, Jack insists that a trustee's duty to treat the beneficiaries impartially will inevitably limit her discretion.

See, *e.g.*, Jack Straw one comma one, where we began four years ago.

[4]

In an e-mail exchange with your correspondent, Clary Redd of Stinson remarked that the amount potentially subject to this power is "wildly uncertain," given the scheduled sunset after 2025 of the recently doubled exclusion amount and the various legislative proposals to reduce that amount earlier and/or to much lower amounts.

Given that uncertainty, he characterized the arrangement as "bizarre." Jack does not disagree.

Clary also suggested there might be a side arrangement committing the testator's child to exercising the "general" power in thus and such a manner.

Jack is skeptical, as such an arrangement might be a realization event in itself.

Jack says, other echoes inhabit the garden