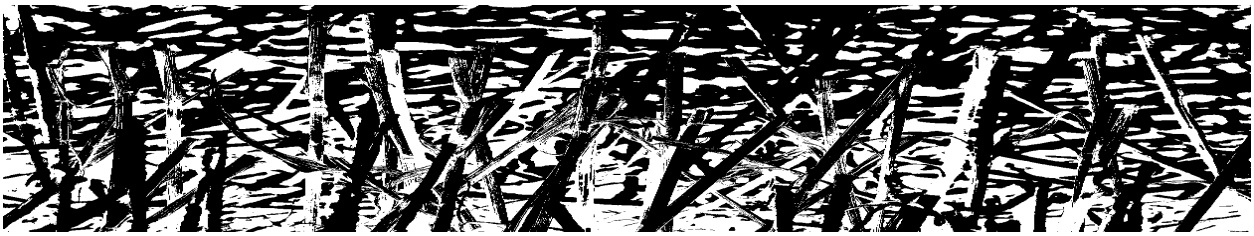

Jack Straw Fortnightly*

perennial

It has been only five weeks since our previous issue. Cutting the lag time by about one-third, but still not quite "fortnightly."

We want to get this issue out before the Supreme Court rules in *Americans for Prosperity*, which will require at least few column inches. The Court is down to the last few days of the current term, and they still have a dozen opinions to release.

The 7520 rate is holding at 1.2 pct. for a third month, and current yields on mid-term Treasuries are climbing into ranges we have not seen since just before the pandemic struck.

Your correspondent recently had an article published on Bloomberg Tax Daily on the nonfungible token as the subject of a charitable gift. Some other speaking engagements on the horizon, and much daily slogging in the trenches, which is always good.

another green world

There was a bit of a stir in the sector a couple weeks back when the Biden administration released its "greenbook" revenue proposals for fiscal 2022, and all of a sudden[1] we are looking at not only a proposed repeal of the basis adjustment at death,

or more accurately as it turns out, **treating death as a realization event** -- you do get the basis adjustment, but at the cost of paying a gains tax --, which we had sorta heard about,

but now **also lifetime gifts.**

"I must have that in the other ear," he said.

There would be exceptions for transfers to a spouse or outright to charity, and an exclusion for the first million, but literally what is being proposed here is **to treat a lifetime gift as a realization event.** [2]

And specifically, because it is not outright, **a transfer to a split interest trust** would be treated as a realization event, to the extent of the present value of the noncharitable interest, lead or remainder.

This stuff is of course already featured in the Van Hollen bill, floated back in March as a

"discussion draft" but still not filed. But until now we had not heard it from the administration itself.[3]

The Van Hollen bill also features a further exception for a transfer to a "grantor" trust other than a 2702 trust. Such a transfer would be treated as complete only **upon actual distribution** to someone other than the settlor **or on the toggling off** of "grantor" status.

Nongrantor trusts would have recurring realization events every 21 years. The exception for transfer to a spouse would end at her death or the earlier triggering of section 2519.

Jack says he would be surprised if much or any of this gained traction in the current session. You would need not only budget reconciliation but discipline within the Manchin/Sinema ranks to get this kind of thing through, he says.

And if you are not going **to skewer the sacred cow** itself, says Jack with his characteristic bluntness, if you are going to continue to allow a deduction at fair market value for the outright contribution of appreciated property, offsetting ordinary income, while treating that transfer as a nonrecognition event,

> at least as obvious a "loophole" as the basis adjustment at death, says Jack,
>
> then what exactly is the policy objective of taxing a transfer to a split interest trust? particularly where the noncharitable interest is retained by the settlor.[4]

Certainly this would tend to discourage lifetime giving by at least some segment of the donor class. One can expect the lobbyists for the sector to turn out in force.

and another one bites

The Texas legislature has extended the its rule against perpetuities to three hundred years. This again despite a state constitutional prohibition against perpetuities.

The word "again" here signifying that legislatures in North Carolina, Arizona, Nevada, Wyoming, possibly some other states that nominally have similar state constitutional prohibitions have nonetheless abrogated the rule. As have at least a dozen other states.

And again the proponents are bankers, while any opponents are lawyers in smaller practices who have perhaps a less self interested take on the subject. In some other states the state bar has gotten involved, which Jack says is distasteful.[5] Actually he uses somewhat stronger language.

A scattered history of your correspondent's fixation on this subject is gathered under the Greystocke Project tab on his website. An early chapter is linked here. One small victory for the Project is mentioned here.

The Sanders bill would limit the exemption of a multigenerational trust from the generation-skipping transfer tax to fifty years. The Obama greenbooks linked above had proposed ninety years. There is nothing at all on the subject in the Biden greenbook for fiscal 2022.

scraps

[1]

Or so it seemed. Actually these proposals are lifted almost verbatim from the last two "greenbooks" released by the Obama administration, for fiscal year 2016 and again for fiscal 2017. Nothing new here. It is just that folks did not take any of this seriously when the Congress was controlled by the other party.

Actually, Ron Aucutt did write a rather energetic piece for ACTEC noting among other things that if some of the wording were taken literally we would be taxing capital contributions to partnerships. See footnote [2], below.

[2]

There are some other disturbing features of the "greenbook" summary, notably the idea that a contribution of appreciated property to fund a partnership would be treated as a realization event, which would be a radical departure from the basic premises of subchapter K.

Richard Rubin over at the WSJ paraphrases an unnamed Treasury official as saying this is not the intent. But if not, it is difficult to discern what is the intent. We already have rules concerning disguised sales and diversification.

Jack says wait for legislative text.

[3]

The greenbook proposals would take effect January 01, 2022. The Van Hollen bill would be effective retroactively to January 01, 2021.

We are not getting into a discussion just now on the constitutionality of retroactive tax legislation, except to say probably, with a quick cite to *Carlton*, 512 U.S. 26 (1994).

Okay, Jack insists on saying that while some might argue *Carlton* should be limited, if not to its idiosyncratic facts *per se*, then at least to the scenario in which the retroactive legislation is correcting an omission or oversight in prior legislation, that is not how the majority opinion actually reads, as the late Justices O'Connor and Scalia each pointed out in separate concurrences in the result only.

Anyway, we can get into those arguments later if something is actually enacted that purports to be retroactive in its effect.

[4]

Possibly when we do see legislative text, there will be an exception for an interest retained by the settlor. This would be analogous, in the case of a remainder trust, to how the transfer of appreciated property to fund a gift annuity is presently taxed, *i.e.*,

if the transferor is herself the annuitant, her gain on the bargain sale element is recognized ratably over the expected return multiple. But if the annuity is payable to a third party, she recognizes the gain immediately. The Van Hollen draft, in

its present form, does not disturb that arrangement.

[5]

Rule 6.4 of the ABA model rules of professional responsibility require a lawyer who participates in "an organization involved in reform of the law," and who knows that the interests of a client "may be materially benefited by a decision in which the lawyer participates," to disclose that fact, though she need not identify the client.

Over the years, your correspondent has sat on any number of legislative drafting committees for the organized bar in some state in the lower midwest, including in particular as relates to the present discussion a committee that was drafting legislation effectively abrogating the rule against perpetuities as applied to trusts.

To which your correspondent did object, but he was greatly outnumbered. He was able to salvage a rule against perpetual accumulations, which is at least something.

And your correspondent will report that although it was obvious to him that the prevailing view on the committee was informed by client interests, albeit for the most part generalized, these were not even acknowledged, much less "disclosed."

The typical ABA committee submission to the Treasury commenting on one or another tax issue will recite that no committee member who is actually being paid by a client to lobby on one or more of the matters under discussion participated in drafting those portions of the submission. Jack says this is a rather low bar.

Jack says, certain streets have certain corners