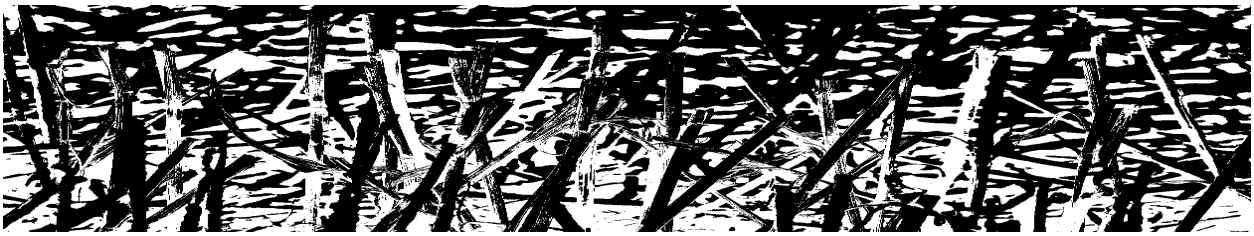

Jack Straw Fortnightly*

purification

Still have not gotten around to writing those two blog posts we mentioned in five comma eight. But we again have an accumulation of items that deserve at least brief mention, and it has been well over a fortnight,[1] so.

And in the meantime your correspondent had posted to the Jack Straw landing page a link to yet another revenue ruling, this time from 1992, which again he had to excerpt from an online copy of the Cumulative Bulletin, about 85 mb, and which again connects with a subject that came up on one of the listservs and might be more appropriate to a blog post.

The question was whether the "stub" income in a QSST, undistributed at the death of the incumbent income beneficiary, must be distributed to her estate or perhaps subject to a general power of appointment in her hands, or whether it was permissible to distribute that income to a successor income beneficiary or a trust remainderman.

Tl;dr, IRS says it's okay to distribute "stub" income to the successor.

The blog post, when we get around to writing it, will talk about the analogy to "stub" income in a QTIP trust and your correspondent's particular history[2] with the 1998 decision of the Tax Court in *Estate of Howard*, which was reversed by the 9th Circuit federal appeals court. And so on.

But again, this is nominally a newsletter, so we will try to focus somewhat on recent developments.

not dead yet

Longtime readers may recall that three years ago -- has it been that long? -- in Jack Straw two comma fourteen we committed almost two thousand words, plus another thirteen hundred in the endnotes, to deconstructing a questionable tax strategy someone was promoting which involved the transfer of nonvoting units in an LLC taxed as a passthrough to a donor advised fund, "and then some."

A couple or three thousand words we will not repeat here. But just briefly: the LLC held marketable securities which it sold, with nearly all the gain passing through to the

exempt org, and then it lent the proceeds into a split dollar arrangement with an ILIT.

Many problems with this arrangement, some more obvious than others, detailed in the linked issue of the Straw.

The particular promoter, whom your correspondent did not identify,[3] was taking pains to distance himself from a high profile promoter of a very similar plan, who had found himself on the receiving end of an action brought by the Justice Department in a federal district court in Florida to shut him down permanently.

Michael Meyer, this promoter said, was a "bad actor." Which is certainly true. Whereas we are using "best practices," he said -- which, however, Jack argued in print still could not validate the strategy.

In later issues of the Straw we have followed the Meyer saga, see especially four comma nine. Meyer had already consented to a judgment enjoining him from pretty much everything that had been his livelihood. And he had paid some amount in settlement of the government's disgorgement claim.

But a few months later, on a separate track, IRS proposed to assess $7 million in penalties against Meyer for promoting an abusive tax shelter. And they built their case in part on responses he had given to requests for admissions in the injunction case.

Meyer filed a motion with the Florida court asking for a protective order, citing Rule 36(b) of the federal rules of civil procedure, which says an admission given during discovery

> is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Sounds pretty clear. Unless maybe a penalty assessment is not a "proceeding." Which the government did actually argue.

But the trial court accepted the government's argument that Meyer was precluded by the anti-injunction act from seeking a protective order against a penalty assessment.

The court did not reach the question, **because the government did not raise it**, whether it might be without jurisdiction to entertain the motion at all in a case that had already been closed for several months.

Meyer, as we noted in four comma nine, then took an appeal to the 11th Circuit, and as we briefly noted in five comma one, presented a credible argument why Rule 36(b) should prevent IRS using his discovery admissions to build a penalty case.

And on September 26 the 11th Circuit actually did reverse the trial court, saying a motion for a protective order is not a "suit" for purposes of the anti-injunction act. And remanded for further proceedings, specifically focused on the jurisdictional question, and expressly in light of the appeals court's own 2021 opinion in *Absolute Activist*.

In its response brief on appeal, the government had belatedly raised

the question of the trial court's jurisdiction to hear the motion, but the appeals court declined to rule on the matter, as it had not been argued below.

There has been supplemental briefing by both parties on remand, and the question has been under submission to the trial court since late January.[4]

update:

In late March, the trial court actually granted Meyer the protective order he was seeking. It has been more than thirty days since that order was entered, and it appears the government is not taking an appeal.

If this newsletter were focused on questions of jurisprudence and appellate procedure, we might expend a few hundred words here on the question whether the appeals court should have gone ahead and reached the jurisdictional question and simply dismissed the appeal.

In *Absolute Activist*, the court did say, citing yet two more of its own prior opinions, that it was "obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking."

Briefly, Jack's argument would be, if the trial court now rules that it did not after all have jurisdiction to entertain the motion for a protective order, and that result is affirmed on appeal,[5] then the substantive ruling on the scope of the anti-injunction act becomes meaningless.

But our focus at the Straw is on substantive questions of wealth transfers and related tax law. Still, Jack will not promise that this is the last the reader will hear of Michael Meyer in these pages.

getting to the point

All this by way of setting up a very brief discussion of a recent Tax Court memorandum decision involving a couple named Lim, who had bought into Meyer's scheme.[6]

But the opinion touches on none of the issues identified in Jack Straw two comma fourteen, linked twice above and linked here again, Jack insists it's a good read.

Instead, the case went off on technical grounds:

- The taxpayers could not document that the purported transfer had even occurred.
- The contemporaneous written acknowledgment referenced a donee that did not yet legally exist.
- The appraisal was not qualified because it was prepared by Meyer himself, in exchange for a fee that was based impermissibly on the appraised value itself.

And so on.

Judge Lauber granted the agency's motion for summary judgment on those questions.

But he did hold open one issue for trial, whether the taxpayers had reasonably relied on the advice of an accountant and a lawyer who apparently were helping Meyer promote his scheme.[7]

At page 8 of the opinion, it is briefly mentioned that the Lims had

sued Meyer "and other defendants" in the Orange County superior court in 2019, but that the case was ultimately dismissed, possibly by settlement. Your correspondent has tracked this down.

The "other defendants" were the lawyers and accountants who had worked with Meyer to set up the arrangement, and the exempt org Meyer had set up as a vehicle to receive the contribution of stock in the Lims' S corp.

The complaint had been removed by Meyer to a federal district court, which almost immediately remanded the case to the state court on the ground that there was no federal question.

The online docket for the Orange County superior court (paywalled) suggests that the motion to dismiss was filed by the plaintiffs, so the dismissal does likely reflect a settlement.

another one bites

Some developments in the *Eickhoff* case, a DOJ action to shut down a rather absurd tax shelter nominally involving a charitable remainder annuity trust. For the backstory see five comma four of the Straw.

In Jack Straw five comma eight we very briefly noted a Tax Court memo decision granting IRS partial summary judgment disallowing the taxpayers a deduction for their contribution of farmland into one of these shelters and determining that the distributions to them from the annuity contracts were taxable as income.

That decision was cited a few weeks ago on the latter question in a reviewed opinion involving multiple CRATs set up by various members of an extended family. In *Gerhardt*, the taxpayers faced the additional problem that the unrealized gain on the property each of them had contributed to fund these trusts was almost entirely section 1245 gain, taxable as ordinary income.

Each of the defendants in the *Eickhoff* litigation is called out by name in the body of this opinion.

For some reason, IRS assessed substantial understatement penalties against only one branch of the family. Before the Tax Court, these taxpayers offered a defense that they had placed reasonable reliance on the advice of tax professionals.

Weirdly, however, they apparently put forward no evidence as to "the qualifications of the advisers, the nature of [the taxpayers'] communications with them, or the quality or objectivity of the advice [they] received." So the court denied the requested relief.

Anyway, back to *Eickhoff*.

The government has secured stipulated permanent injunctions against each of two lawyers who helped promote the scheme, one who drafted the documents and sometimes served as trustee, and another who prepared the 5227s.

The injunctions are not all that narrowly drawn to the facts of the particular case,[8] but they do not go as far as they might.

Each of these lawyers is precluded from

- advising anyone that any of the components of this scheme actually work under the tax law, but also
- advising at all on any question relating to charitable remainder trusts,
- serving as trustee of a charitable remainder trust,
- preparing 5227s, or any other return in any way relating to a charitable remainder trust, or
- misrepresenting to anyone the terms of the stipulated injunction.

It is possible DOJ is relying on the state bar disciplinary process to sort this out, but Jack notes that these stipulations expressly disclaim any admissions of wrongdoing.

In exchange, the government has dismissed its claims for disgorgement against each of these defendants. Still remaining in the case, apart from the principals, is an accountant and his practice entity.[9]

In the meantime, the court has denied as premature a motion by one of the principal defendants to dismiss the government's disgorgement claim against her.

And just as we were (finally) going to press, the government secured a stipulated injunction against one of the two principals.

and another

And we have consent judgments across the board in the *EcoVest* litigation down in Georgia. We had discussed this case briefly in Jack Straw two comma four and again in two comma five, with a passing mention in four comma one. Justice Department action to shut down a network of syndicated conservation easement promoters.

The individual defendant named first in the original caption to this action settled two years ago, accepting a permanent injunction that forbids her to have any further involvement with conservation easements, ever.

Apparently she paid some amount in settlement of the disgorgement claim. But the stipulation included an acknowledgment that the government may not be through with her yet.

And now, in separate orders entered March 20, the court has entered consent judgments to similar effect against the other promoters and against the appraiser who had provided the inflated valuations.

In the case of the appraiser, who has had quite a career providing qualified appraisals and giving valuation testimony in Tax Court proceedings, the injunction pretty much forces him to seek another livelihood.

Again, there is some indication in the stipulations that each of these parties paid some amount in settlement of the disgorgement claims, and again there are acknowledgments that there may yet be further civil or criminal proceedings on the horizon.

the uncertainty principle

On January 09, the Supreme Court denied cert in *Oakbrook Land Holdings*, leaving in place the 6th Circuit federal appeals court opinion

affirming a reviewed Tax Court decision which upheld the validity of the so-called "proceeds" regulation,

thereby leaving in place a conflict with the 11th Circuit in *Hewitt*.[10]

The disputed reg requires that the donee of a conservation or facade easement participate "proportionately" in the proceeds of a judicial extinguishment, and in effect forbids compensation to the transferor for post-contribution improvements.

We covered *Oakbrook* in Jack Straw three comma five, three comma eight, four comma five, and five comma four, and *Hewitt* in five comma one.

All of the briefing to both appeals courts, including several amicus briefs, is posted to the Jack Straw landing page under four comma five.

wrapup

There are several other items gathered in your correspondent's desktop folder labeled "six one," but we will just mention a couple or three briefly here and leave the rest for "six two," which we will try to have out a bit more quickly.

item

In TAM 202309015, released March 03, counsel took the position that a limited liability company taxed as a partnership would recognize ordinary income on its sale of interests in the LLC, as these were in effect inventory, not capital assets.

The reader will not be surprised to learn that the subject taxpayer is a syndicator of conservation easements.

Nearly two pages of redacted discussion of litigation hazards.

item

In *Estate of Block*, a memorandum decision issued March 13, the Tax Court determined that a decedent's estate would not be allowed a deduction for the present value of the remainder interest in a trust that was to pay the greater of net income or a fixed annuity to the decedent's sister, with the remainder over to a community foundation.

The trust instrument did authorize the trustee to amend the trust to bring it into compliance with the requirements of section 664(d)(1), and the trustee ostensibly did reform the trust to delete the "net income" language, but

as IRS argued, and the court agreed, per section 2055(e)(3), the defect here would have required a judicial reformation commenced within ninety days after the estate tax return was due, and that did not occur.

item

Briefing to the 6th Circuit federal appeals court in *Jarrett*, re taxation of crypto staking, is complete.[11]

The taxpayer makes some pretty good arguments why the proffered refund check should not moot the case.

Oral argument not yet set. Prior coverage at five comma three.

and speaking of crypto

Something we will talk about at some length in our next issue, when

we can get to it, is this rather odd project the chief counsel seems to have undertaken to provide subregulatory guidance on several issues involving cryptocurrency through a series of technical advice memos.

Those who want to read ahead can take a glance at TAMs 202302011, 202302012, and 202316008.

And with that, let's just cut it off and start in on six comma two.

scrapings

[1]

Our last previous issue was released December 31, so actually well over four months, almost five.

The title text to the present issue, "purification" was meant to be a reference to the ancient roots of the word "february."

[2]

There is a delicious or boring story about the politics of bar-sponsored state legislation. Names will be omitted.

[3]

And who is by no means alone in promoting this particular scheme.

[4]

The link is to a free.law "recap" of the online docket, to which your correspondent, among others, has posted links to various filings, so the reader is spared the expense of going behind the "pacer" paywall.

[5]

Or if, since the trial court has now ruled against the government on the substantive issue, the government were to take an appeal timely raising the jurisdictional question, etc.

[6]

Some months ago IRS issued a determination letter revoking the exempt status of one of Meyer's vehicles. That letter does reference Notice 2004-30.

Jack says there ought to be several of these by now.

One of the conditions of the stipulated injunction back in April 2019 was that Meyer was forbidden to refer prospects to any of six named organizations, at least one of which is a rather high profile player in this space.

What these six orgs seem to have in common is that while each claims on schedule D of its 990 filings not to be sponsoring donor advised funds,

each reports on schedule R a raft of related nonexempt orgs, taxed either as disregarded entities or as partnerships in which the exempt org is holding a 99.0 pct. interest.

But none of the six has yet been revoked.

[7]

But apparently only with respect to the "qualified appraisal" issue, which would apply only to penalties.

[8]

Nor should they be, says Jack, these lawyers knew what they were doing and should take the consequences. Strong talk considering the source, someone mutters. Jack is willing to have that conversation privately.

[9]

A second lawyer, albeit from the same firm, has entered an appearance for those defendants.

[10]

The government had secured an extension of time to file a petition for cert in *Hewitt*, but ultimately decided not to pursue it.

[11]

Again the link is to the free.law "recap" of the online docket.

And again, Jack urges his readers to support this worthy project.

All three party briefs and an amicus brief from the Center for Taxpayer Rights are posted because your correspondent paid for them.

Jack says, it's only water in a stranger's tear