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Guest Article

A Disclaimer Story: 'If You Don't Ask, You Don't Get'

By Jeffrey A. Baskies

While I was growing up, my dad would often say: "If you don't ask, you don't get." I think if you give him a chance, he still says it. This article is about some creative lawyers who asked for a private letter ruling - we'll see what they got.

A Primer On Disclaimer Law

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As a starting point for this discussion, take a minute to review the rules on disclaimers. Section 2046 of the Internal Revenue Code of 1986, as amended, provides in general that disclaimers upon death are treated in the same manner as provided in Sect. 2518.

Section 2518 provides that if a person makes a "qualified disclaimer" with respect to any property, that person is treated as if he or she predeceased

the transferor of the property, and the disclaimed property is treated as if it had never been transferred to the disclaiming person at all for purposes of the federal transfer taxes (gift, estate and generation-skipping transfer taxes).

A "qualified disclaimer" is defined in Sect. 2518 as an irrevocable and unqualified refusal by a person to accept an interest in property, if and only if:

- The disclaimer is in writing;
- The writing is received by the transferor of the property (or his or her legal representative) no later than nine months after the date of the transfer creating the interest in the property the person is disclaiming (unless the recipient is under the age of 21, in which case it is must be received nine months after he or she reaches the age of 21);
- The person disclaiming must not have accepted the interest being disclaimed or any of its

benefits; and

- The person may not direct the passage of the disclaimed assets (they must pass either to the transferor's spouse or someone other than the person disclaiming, without any action or direction by that person).

The Treasury Regulations promulgated under Sect. 2518 further provide that a qualified disclaimer cannot be made if the disclaiming person has accepted the property or any of its benefits, either expressly or impliedly, prior to the date of executing the disclaimer. Treas. Reg. 25.2518-2(d)(1) lists acts which are deemed indicative of acceptance, including:

- Using the property;
- Accepting income from the property; and
- Directing others to act with respect to the property.

The PLR

The facts of a recent PLR issued by the IRS (PLR 200503024) are as follows:

On date 1, husband and wife opened a joint brokerage account with rights of survivorship. On date 2, husband died.

Approximately one month after husband's death, on date 3, wife directed the stockbroker to transfer title of the brokerage account to her name. The brokerage did so.

Over the next seven months, wife gave various instructions to the stockbroker. She directed that certain securities in the account be sold and that others be purchased. She also withdrew cash from the account periodically.

On date 4, shortly before the expiration of the ninth month after husband's death, at the direction of her law firm wife disclaimed her survivorship interest in the brokerage account (apparently the assets were needed to fund a credit shelter-type plan). The disclaimer was recorded and a copy sent to the broker.

The Ruling

Armed with the primer on disclaimer law and the facts as presented in the PLR, ask yourself: do you think wife could validly disclaim an interest in that brokerage account?

Obviously, since I am writing about this ruling, you already know the outcome, which was a decision favorable to the wife. The IRS ruled that wife's written disclaimer within nine months after her husband's death was a qualified disclaimer.

However, the Service also said that assets attributable to wife's contributions to the account (which in this case were about 50 percent of the total), cash proceeds from any securities sold at wife's direction and not used to obtain more securities, and securities wife directed the broker to purchase were excluded from the disclaimer.

To reach its conclusion, the Service ruled that merely changing title on the account to wife's name did not constitute acceptance. Further, even though wife withdrew cash, the Service said that didn't constitute acceptance of the benefits of the account.

It ruled: "The cash and securities are severable assets. Wife may accept and benefit from the

cash withdrawals and make a qualified disclaimer with respect to the remaining assets in the brokerage account. See, Sec. 25.2518-3(d), Example 17."

Securities that wife directed sold or purchased were deemed accepted by her. Obviously, funds withdrawn by her were also deemed accepted.

Conclusion

This disclaimer story is a good reminder that creative lawyering can lead to positive results for clients. Seeing the fact pattern and being familiar with the law on disclaimers, the easy answer would have been, "Sorry, but you can't disclaim that account now." The lawyers in this case, however, did not give up, and by using a crafty argument they helped their client achieve a better end.

I would have initially guessed that a brokerage account is a thing and you either accept its benefits or not. But the Service apparently sees the underlying assets as being subject to a disclaimer and allows them to be set apart one by one for purposes of determining if the benefits have been accepted.

The moral of the story: if everyone just assumed something could not be done, nobody considered that there may be an alternative way to reach a result, and these lawyers never asked, then we might never have known what we could do. Remember: "If you don't ask, you don't get."

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