

New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit

TSB-A-10(2)M
Estate Tax
May 4, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M091015B

Petitioner, [REDACTED] as successor co-trustee, asks whether the value of certain trust property was properly included in decedent's gross estate for New York State estate tax purposes. We conclude that it was. Petitioner also asks whether an exception to this conclusion may be granted based on the subsequent disbarment of the attorney who drafted the relevant trust instruments and deeds. While we are sympathetic to Petitioner's request, there is no basis in the Tax Law for such an exception.

Facts

Decedent was a New York resident at the time of her death. During her lifetime, decedent executed three trust instruments. Decedent was grantor and sole trustee of each of the three trusts. Petitioner was named a beneficiary and was appointed successor co-trustee of each of the trusts. The only property conveyed to each of the three trusts was decedent's personal residence.

The first trust agreement was executed on May 12, 1994 ("1994 Trust"). Under that Agreement, decedent transferred her personal residence to herself as sole trustee. That agreement required the trustee, after paying reasonable trust expenses, to pay all of the net income to or for the benefit of the grantor at least quarterly. Among the powers expressly granted to the trustee was the power to sell, exchange or dispose of trust property. On the same day, decedent also executed a deed conveying her personal residence from herself as surviving tenant by the entirety, to herself as trustee of the 1994 Trust. Petitioner advises that this deed was never recorded.

On August 21, 1997, decedent executed two trust instruments. One instrument was named a "Grantor Retained Annuity Trust Agreement" ("1997 GRAT"), and the other was named a "Qualified Personal Residence Trust Agreement" ("1997 QPRT"). Under the 1997 GRAT, decedent transferred her personal residence to herself as sole trustee. Decedent also retained the right to receive income from the trust at least quarterly until the first to occur of: (1) the date 10 years after the date of the trust agreement; (2) the grantor's death; or (iii) termination of the grantor's interest in the trust by the trustee. The 1997 GRAT further provided that the trustee could terminate the grantor's interest in the trust by distributing to her the fractional share of the trust property that constituted its value determined by Table B of Treasury Regulation Section 25.2512-5(f). This distribution was not made.

The 1997 QPRT agreement also provided that decedent transferred her personal residence to the 1997 QPRT. Similar to the 1997 GRAT, this agreement named decedent as sole trustee and required the trustee to pay income at least quarterly to the grantor. The 1997 QPRT provided that it would terminate on the first to occur of: (1) the date 10 years after the date of the trust agreement; or (2) the grantor's death.

On the same date as the 1997 GRAT and 1997 QPRT were executed, decedent executed a deed conveying her personal residence, from herself as surviving tenant by the entirety, to herself as trustee of

the 1997 QPRT. This deed was recorded. Decedent did not execute a deed conveying the property to the 1997 GRAT.

Decedent subsequently died on May 8, 2007. Petitioner filed a New York State estate tax return for decedent's estate, which included the value of the personal residence in the gross estate, as advised by her return preparer.

Petitioner also submits that, after decedent's attorney prepared the trust documents and deeds described in the petition, he was disbarred for conduct unrelated to his representation of decedent. Petitioner further submits that the documents the attorney prepared did not accomplish decedent's goal of excluding the value of her personal residence from her gross estate.

Petitioner asks the following questions:

1. Was the value of decedent's personal residence properly included in her gross estate for estate tax purposes?
2. Is there any provision of law that would permit decedent's personal residence to be excluded from her gross estate based on attorney malpractice or misconduct?

Analysis

Decedent's personal residence was properly included in her gross estate for New York estate tax purposes. Tax Law section 954(a) provides that "[t]he New York gross estate of a deceased resident means his federal gross estate as defined in the internal revenue code (whether or not a federal estate tax return is required to be filed)." Internal Revenue Code (IRC) section 2031 defines the "gross estate" to include the value at the time of death of all property of a decedent, whether real or personal, tangible or intangible, wherever situated.¹ IRC section 2036 further provides:

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death –

- (1) the possession or enjoyment of, or the right to income from, the property; or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Under each of the trust instruments described above, decedent retained an income interest at the time of her death which caused the value of trust property to be includible in her gross estate. Under the 1994 Trust, of which decedent was sole trustee during her lifetime, she was entitled to the net income of the trust, paid in quarterly installments, for her lifetime. Under the 1997 GRAT, of which decedent was also the sole trustee during her lifetime, she retained the right to receive income from the trust at least

¹ New York's estate tax is conformed to the IRC with all amendments enacted on or before July 22, 1998, with the exception of the unified credit. *See* Tax Law § 951(a). Therefore, all references to IRC provisions in this Advisory Opinion are to the relevant sections in effect on that date. *See* Tax Law Art. 26, Appendix.

quarterly until the first to occur of: (1) the date 10 years after the date of the trust agreement; (2) the grantor's death; or (iii) termination of the grantor's income interest in the trust by the trustee. At the time of her death, the ten year period had not expired, and she had not terminated her income interest. Under the 1997 QPRT, the decedent retained an income interest for ten years after the date of the trust agreement. As with the 1997 GRAT, that ten year period had not expired at the time of decedent's death. Thus, under each of the trust instruments, decedent retained an income interest in the trust property at the time of her death. Because the result for estate tax purposes would be the same under any of the trust agreements, we need not address which of the three trusts controls, or which trust held decedent's personal residence. Consequently, because decedent retained an income interest in the trust property at the time of her death under each of the three trust agreements, the value of the trust property (i.e., her personal residence) was properly included in her gross estate for New York State estate tax purposes.

Finally, although we are sympathetic to Petitioner's circumstances, we find no basis in the Tax Law to exclude the value of the trust property based on the subsequent disbarment or alleged misconduct of decedent's attorney. Petitioner's recourse, if any, is with the attorney who drafted the trust agreements and deeds.

DATED: May 4, 2010

/S/
Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

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