

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

TSB-A-10(3)M
Estate Tax
August 5, 2010

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M091229B

A petition filed by the [REDACTED] (petitioner) asks whether the value of New York real property in a Qualified Personal Residence Trust (QPRT), which was created and funded by a nonresident decedent and which is included in the nonresident decedent's estate for federal estate tax purposes because of the decedent's death during the initial term of the trust, is subject to New York estate tax.

We conclude that the New York real property is subject to New York's estate tax.

Facts

On December, 17, 2003, [REDACTED] (the "Donor") transferred by deed an undivided one-half interest in New York real property ("the New York real property") to a Qualified Personal Residence Trust (the "QPRT"). The Donor was a Michigan resident in 2003 and at the time of her death. Under the QPRT, the Donor retained the right to reside in the Property until the seventh anniversary of the creation of the QPRT. The transfer to the QPRT by the Donor was reported on a federal gift tax return for 2003. The transfer was a completed gift for federal gift tax purposes and for state law purposes. The conveyance was complete in 2003, and the property was not deeded back to the Donor before her death or to her estate after her death. The Donor died on March 29, 2006. Under the terms of the QPRT, if the Donor died during the initial term, as she did, the Trustee is directed to distribute the Property as the Donor appointed in her Last Will and Testament. If she failed to exercise her general power of appointment, the Trustee is directed to distribute the Property to the Donor's then living children.

Analysis

Section 960(a) of the Tax Law provides that a tax is imposed on the transfer, from any deceased individual who at his or her death was not a resident of New York State, of real and tangible personal property having an actual situs in New York State and either (i) includible in his or her federal gross estate, or (ii) which would be includible in his or her New York gross estate pursuant to section 957 (relating to certain limited powers of appointment) if he or she were a resident of New York State. Section 2036 of the Internal Revenue Code ("IRC") provides that for federal estate tax purposes, the gross estate includes 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 case of a bona fide sale for an 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 the 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.

Such transfer of property is known as a transfer “with retained life estate” and, pursuant to section 2036, the transfer is not considered to be fully effective until death where the decedent retained possession or enjoyment of income derived from the property at the time of the decedent’s death. In TSB-A-00(1)M (*Northern Trust Bank of Florida*, dated June 5, 2000), the Department held that where a decedent transferred New York real property to a QPRT, retained an interest in the property for a specified period, and died prior to that period ending, the value of the real property transferred to the trust was subject to New York estate tax. That reasoning of that advisory opinion applies here and thus the value of the New York real property transferred to the QPRT is also subject to New York estate tax.

Petitioner disputes this conclusion. According to petitioner, New York’s estate tax is based on “transfers” by a decedent of property (citing Tax Law section 960[a]) and here, petitioner claims, the decedent did not transfer the New York real property at her death, so no New York estate tax should be due. In support of its argument, petitioner points out that the New York real property was transferred to the trust in 2003, at which time the transaction was complete and subject to Federal gift tax. This argument is unavailing. The language in section 960(a) parallels language in IRC section 2001(a), which states that the Federal estate tax is “imposed on the *transfer* of the taxable estate of every decedent (emphasis added).” Notwithstanding this language, the value of the New York real property is still included in the decedent’s Federal gross estate under IRC section 2036 because of the decedent’s retained interest in the property.¹ As the Supreme Court has noted, “[t]he general purpose of [section 2036 is] to include in a decedent’s gross estate transfers that are essentially testamentary – i.e., transfers which leave the transferor a significant interest in or control over the property transferred during his lifetime” (*United States v. Estate of Joseph P. Grace*, 395 US 316, 320 [1969]). New York’s estate tax is conformed to the Federal estate tax (Tax Law section 951[a]). Accordingly, the New York real property that the decedent conveyed to the trust is also included in the decedent’s New York gross estate.

DATED: August 5, 2010

/S/

Jonathan Pessen
Director of Advisory Opinions
Office of Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.

¹ At the Federal level, the gift tax paid by the decedent in conjunction with the transfer of the New York real property to the trust reduces the Federal estate tax liability of the estate (IRC section 2001[b][2]).