INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

May 11, 2004

Number: **200437032**
Release Date: 9/10/04
Third Party Contact: None
Index (UIL) No.: 2055.00-00; 2518-00.00
CASE-MIS No.: TAM-108572-04, CC:PSI:B04

District Director
Manhattan

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Years Involved:
Date of Conference:

LEGEND:

Decedent -
Beneficiary -

Order -
Date 1 -
Date 2 -
Date 3 -
Year 1 -
Year 2 -
State X -
Citation 1 -

ISSUE:

Does Decedent's residuary bequest to Beneficiary, an individual who is a member of a religious order and has taken a vow of poverty, qualify for an estate tax charitable deduction under § 2055(a) of the Internal Revenue Code?

CONCLUSION:

Decedent's residuary bequest to Beneficiary does not qualify for a deduction under § 2055(a).

FACTS:

Decedent and Beneficiary were siblings. On Date 1, Beneficiary, as a member of Order, took Perpetual Vows (vow of poverty) and has been subject to those vows at all times since that date. The vow of poverty taken by Beneficiary states, in pertinent part:

> I, [Beneficiary] make to God in your hands, Reverend Mother Superior, in place of the Most Reverend Archbishop, the simple vows of Poverty, Chastity, and Obedience, for life, according to the Constitution of [Order].

Order is a religious organization described in § 2055(a)(2) to which bequests are deductible under § 2055(a). The Code of Canon Law #668 provides, in part:

> § 4. When the nature of an institute requires members to renounce their goods totally, this renunciation is to be made before perpetual profession and, as far as possible, in a form that is valid also in civil law: it shall come into effect from the day of profession. The same procedure is to be followed by a perpetually professed religious who, in accordance with the norms of the institute's own law and with the permission of the supreme Moderator, wishes to renounce goods, in whole or in part.
>
> § 5. Professed religious who, because of the nature of their institute, totally renounce their goods, lose the capacity to acquire and possess goods; actions of theirs contrary to the vow of poverty are therefore invalid. Whatever they acquire after renunciation belongs to the institute, in accordance with the institute's own law.

Decedent, died testate on Date 3, a resident of State X, survived by Beneficiary. Decedent's will had been executed on Date 2, several years after Date 1. Under the terms of Decedent's Will, Beneficiary was appointed the executrix of Decedent's estate.

Article FOURTH of Decedent's Will provides that, if Beneficiary survives Decedent, Beneficiary may select whatever contents of Decedent's apartment and personal effects as Beneficiary chooses. Any contents and personal effects not selected by Beneficiary will pass to a named third party. If both Beneficiary and the third party predecease Decedent, the contents and personal effects are to be distributed in the same manner as the residuary estate.

Article FIFTH of Decedent's Will states:

> I direct that all the rest, residue and remainder of my estate, both real and personal property, of whatsoever kind, nature and description and wheresoever the same may be situated shall be given to [Beneficiary]. If [Beneficiary] predeceases me, it shall be given to [Order].

Decedent's estate consisted primarily of securities and cash. Beneficiary, serving in her capacity as executrix of Decedent's estate, transferred title to the securities to the name of the Order and transferred cash to the Order. The transfers to Order occurred in Year 1 and Year 2, more than 9 months after Decedent's date of death.

LAW AND ANALYSIS:

Section 2055(a) provides for a deduction from the gross estate for the value of property included in the gross estate, and transferred by the decedent during life or by will, to or for the use of organizations, or for purposes, described in §§ 2055(a)(1) - (5), including under § 2055(a)(2), any corporation organized and operated exclusively for religious purposes. Section 2055(a), in "flush language," further provides that:

> For purposes of this subsection, the complete termination before the date prescribed for filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be a qualified disclaimer with the same full force and effect as though he had filed such qualified disclaimer.

Section 20.2055-2(c)(1) of the Estate Tax Regulations provides that, in the case of a bequest, devise, or transfer made by a decedent dying after December 31, 1976, the amount of the bequest, devise or transfer for which a deduction is allowable under § 2055 includes an interest which falls into the bequest, devise or transfer as a result of either: (i) a qualified disclaimer under § 2518; or (ii) the complete termination of a power to consume, invade, or appropriate property for the benefit of an individual by reason of the death of such individual or for any other reason, if the termination occurs within the period of time (including extensions) for filing the decedent's federal estate tax return and before such power has been exercised.

Section 2046 provides that, for estate tax purposes, disclaimers of property interests passing upon death are treated as provided in § 2518.

Section 2518(a) provides that, if a person makes a qualified disclaimer of an interest in property, the estate, gift, and generation-skipping transfer tax provisions will apply to that interest as if it had never been transferred to such person.

Under § 2518(b), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, provided: (1) the disclaimer is in writing; (2) the disclaimer is received by the transferor of the interest, his legal representative, or the holder of legal title to the property, not later than the date which is 9 months after the later of the date on which the transfer creating the interest is made or the date on which the person refusing the interest attains age 21; (3) the person disclaiming the interest has not accepted the interest or any of its benefits; and (4) as a result of the disclaimer, the interest passes without any direction by the person making the disclaimer and passes either to the spouse of the decedent or to a person other than the person making the disclaimer.

Section 2518(c)(3) provides that a written transfer of the transferor's entire interest in the property which meets the requirements of § 2518(b)(2) and (3) and which is to a person who would have received the property had the transferor made a qualified disclaimer, shall be treated as a qualified disclaimer.

Under § 25.2518-1(b) of the Gift Tax Regulations, if a qualified disclaimer is made, the property is treated, for federal gift, estate, and generation-skipping transfer tax purposes, as passing directly from the transferor, and not from the disclaimant, to the person entitled to receive the property as a result of the disclaimer.

Section 25.2518-2(b) provides that, in order to qualify as a qualified disclaimer, the disclaimer must be in writing and the writing must identify the interest in property disclaimed and be signed by either the disclaimant or by the disclaimant's legal representative. In addition, § 25.2518-2(c)(1) provides that the written disclaimer must be delivered (to the transferor's legal representative, etc.) no later than the date which is 9 months after the date on which the transfer creating the interest in the disclaimant is made.

Under § 25.2518-2(d)(1), a qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Under § 25.2518-2(d)(2), if a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property (e.g., directing the harvesting of a crop, or maintenance of a home) is not treated as an acceptance of such property.

The law of State X, at Citation 1, provides in pertinent part::

(a) For purposes of this section:
(1) The term "disposition" shall include a disposition under a will . . . .

> (b)(1) Any beneficiary of a disposition may renounce all or part of his interest; provided, however, that a surviving joint tenant or tenant by the entirety may not renounce that portion of an interest in joint property or property held by the entirety which is allocable to amounts contributed by him to the interest in such property.
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> (2) Such renunciation shall be in writing, signed and acknowledged by the person renouncing, and shall be filed in the office of the clerk of the court having jurisdiction over the will or trust agreement governing the property of which the disposition would otherwise be made or the court which issued the letters of administration . . . within nine months after the effective date of the disposition. Such renunciation shall be accompanied by an affidavit of the renouncing party that he has not received any compensation in money or money's worth for such renunciation . . . . .
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> * * *
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> (d) Unless the creator of the disposition has otherwise provided, the filing of the renunciation, as provided in this section, has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent. . . .

The person making the disclaimer must, in the written disclaimer instrument, affirmatively and unequivocally renounce his or her right to a property interest in a manner that is not subject to revocation or retraction. Estate of Chamberlain v. Commissioner, T.C. Memo 1999-181. Further, in order to constitute a qualified disclaimer under § 2518, the disclaimer must satisfy the requirements of § 2518, and in addition, must be effective under applicable local law. If the disclaimer is not effective under applicable local law, then the property will in fact pass to the disclaimant. Estate of Bennett v. Commissioner, 100 T.C. 42, 67 (1993).

In general, a bequest to an individual that the individual is required to transfer to a religious order pursuant to a vow of poverty in effect at the time of the decedent's death, does not qualify for an estate tax charitable deduction under § 2055. Under these circumstances, the property does not pass from the decedent to the religious order pursuant to the terms of the testamentary instrument. Rather, the property passes to the religious order from the individual subject to the vow of poverty pursuant to the contractual arrangement between the individual and the order. Rev. Rul. 68-459, 1968-2 C.B. 411; Rev. Rul. 55-759, 1955-2 C.B. 607.

In Estate of Callaghan v. Commissioner, 33 T.C. 870 (1960), the decedent bequeathed shares of her residuary estate to two children who were subject to vows of poverty as members of religious orders at the time the will was executed. The effect of the vow of poverty was to make the beneficiaries incapable of acquiring property by any means and any property acquired by the beneficiaries automatically became property of their respective order. The court concluded that the decedent, who knew that property given to her daughters who were subject to the vow of poverty would pass to the orders,

nevertheless intended to transfer the property to her daughters. The court noted that the clear language of the will indicated that the decedent's intent was to benefit her children primarily and that, if she had wanted to transfer the property to the orders, she could have done so directly. The court, in concluding that the bequest didn't qualify under § 812(d) [the predecessor of § 2055], found that the decedent didn't intend to benefit charity directly and refused to apply a constructive trust argument to the transfer. See also, Estate of Lamson v. United States, 338 F.2d 376 (Ct. Cl. 1964); Estate of Barry v. Commissioner, 311 F.2d 681 (9th Cir. 1962); Cox v. Commissioner, 297 F.2d 36 (2nd Cir. 1961); Estate of Pickard v. Commissioner, 60 T.C. 618 (1973); Estate of McGuire v. Commissioner, 59 T.C. 361 (1972).

In the instant case, as was the situation presented in Estate of Callaghan and the other cases cited above, under the terms of the Decedent's will, the residuary estate passed to Beneficiary, and not to Order. The residuary estate was distributed to Order pursuant to Beneficiary's obligation under the vow of poverty. In accordance with the cited cases and revenue rulings, the residuary bequest does not qualify for the charitable deduction under § 2055.

The estate contends that Beneficiary's vow of poverty, entered into on Date 1, prior to Decedent's death, constitutes a qualified disclaimer which satisfies the requirements of § 2518(a), or in the alternative constitutes a transfer treated as a disclaimer that satisfies the requirements of § 2518(c)(3). Further, as a result of the disclaimer, Beneficiary is treated as pre-deceasing Decedent and consequently, the disclaimed interest passes to Order under the residuary clause of Decedent's Will. Accordingly, the estate concludes that the disclaimed bequest qualifies for the charitable deduction under § 20.2055-2(c)(1)(i).

First, the estate argues that the vow satisfies the requirements of § 2518(b). Specifically, the vow was an "irrevocable and unqualified refusal" to accept the bequest, that was in writing. Further, because Beneficiary is the executrix of Decedent's estate, Beneficiary, as a practical matter, received the disclaimer within the 9 month period after Decedent's death. Finally, Beneficiary's actions as executrix in administering Decedent's estate and transferring funds to Order were the actions taken in a fiduciary capacity and, thus, did not constitute acceptance of the property interests or direction regarding disposition of the interests by the disclaimant.

However, we do not believe that the vow of poverty entered into by Beneficiary on Date 1 constitutes a qualified disclaimer under § 2518. First, the vow did not satisfy the State law requirements for a valid disclaimer. For example, there is no indication that the instrument was filed with the appropriate probate court, as required by State law, or that any other statutory procedural requirements were satisfied. See Citation 1. See also, Estate of Bennett v. Commissioner, cited above, 100 T.C. at 76 (disclaimers renouncing certain trust interests that were defective under state law because not timely filed in court, did not satisfy the requirements of section 2518(b)). Further, the vow

would not have the effect of treating Beneficiary as predeceasing the Decedent for inheritance purposes, such that the property did not pass to Beneficiary. Similarly, the vow did not contain the specific language required to satisfy § 2518(b)(1) and § 25.2518-2(b)(1). The vow is not a written refusal to accept the property interest passing from Decedent and does not describe or designate the particular property being disclaimed, as required by those sections. See, Estate of Chamberlain v. Commissioner, cited above (purported renunciation that failed to designate or describe the particular property disclaimed was not a qualified disclaimer).

The estate argues, in the alternative, that Beneficiary made a transfer of the residuary estate to Order that is treated as a qualified disclaimer pursuant to § 2518(c)(3).

As discussed above, § 2518(c)(3) provides that a written transfer of the transferor's entire interest in the property which meets the requirements of § 2518(b)(2) and (3) and which is to a person who would have received the property had the transferor made a qualified disclaimer shall be treated as a qualified disclaimer.

The applicable legislative history describes the purpose for the enactment of § 2518(c)(3) as follows:

> Section 2518 requires, among other conditions, that the disclaimer be effective under local law to pass title without direction on the part of the person making the disclaimer. As a result, a disclaimer that is ineffective under local law cannot be treated as a qualified disclaimer for purposes of the federal estate and gift tax even if the disclaimant transfers the property to the individual, who under local law would have received the property if there had been an effective disclaimer. . . . In order to provide uniform treatment among states, the committee believes that where an individual transfers property to the person who would have received the property had the transferor made an effective disclaimer under local law, the transfer will be treated as an effective disclaimer . . . .

H.R. Rep. No. 97-201 at 190-191(1981).

This legislative history indicates that the section was intended to apply in situations where the disclaimant could not effectively disclaim under state law, but could satisfy the federal requirements under § 2518; for example, in a situation where under state law, the disclaimer has to be made within 6 months of decedent's death, rather than the 9 month period allowed under federal law. In such a situation, under § 2518(c)(3), if the transferor transfers the property, more than 6 month, but within 9 months, after the decedent's death, to the person who would take the property if a valid state law disclaimer had been executed, and the other requirements of § 2518 are satisfied, then the transfer is treated as a qualified disclaimer.

To put it another way, § 2518(c)(3) applies only if the state law disclaimer was not available to the transferor at the time of the transfer or assignment. Section 2518(c)(3) was not intended to be used in lieu of an available state law disclaimer, where state and federal law are consistent. Any other interpretation of § 2518(c)(3) would make § 2518(a) and (b) superfluous. In Estate of Bennett v. Commissioner, 100 T.C. 42, 75-76 (1993), which supports this interpretation of the application of § 2518(c)(3), the court stated:

> Section 2518(c)(3) assumes that a transfer to the beneficiary has already occurred under local law because a disqualified disclaimer did not avoid the transfer. That beneficiary can still avoid the effects of the disqualified disclaimer by making a written transfer to the person who would have received the property . . . had the beneficiary made an effective disclaimer.
>
> Section 2518(c)(3) should not be viewed as a catch-all provision to save defective or disqualified disclaimers but as an entirely new relief provision under which, after a disclaimer has been disqualified [that is, the disclaimer is not valid under state law], the would-be disclaimant makes an actual written transfer to the person who otherwise would have received the property had the disclaimer been valid under local law. The relief of section 2518(c)(3) was designed to eliminate the gift tax consequences for the beneficiary who had made a disclaimer that was disqualified [not valid under state law] and who then made an actual written transfer to another individual.

In this case, Beneficiary was never foreclosed at any time during the nine month period after the Decedent's death from making a disclaimer that would have satisfied both applicable State X law and § 2518(b). Accordingly, § 2518(c)(3) does not apply in this case.

Further, we do not believe the transfer satisfies the requirements of §2518(c)(3) in any event. First, we note that the assets were actually transferred by Beneficiary to the Order more than nine months after Decedent's death. Further, even assuming Beneficiary's execution of the vow on Date 1 is viewed as the act of transfer, the vow would not satisfy the requirements of § 2518(c)(3). To qualify under § 2518(c)(3), there must be a written transfer from the disclaimant to a named person who would have received the property if a legal disclaimer had been made. In this case, as noted above, the vow does not describe or designate the particular property being disclaimed or purport to assign the property to the order. Estate of Dancy v. Commissioner, 89 T.C. 550, 562 (1987), rev'd on other grounds, 872 F.2d 84 (4th Cir. 1989).

The Decedent's estate also argues that Beneficiary's vow of poverty resulted in the termination of Beneficiary's interest in the residuary bequest. This termination of her interest in the residuary estate constitutes the termination of a power to consume, invade or appropriate, that is treated as a qualified disclaimer under the flush language of § 2055(a), quoted above, and § 20.2055-2(c)(1)(ii).

However, a review of relevant case law, treatises and legislative history indicates that the flush language treating a termination of a power as a disclaimer of the power only applies to powers to consume, invade or appropriate for the benefit of a noncharitable beneficiary that would cause a charitable bequest of a remainder or similar interest to fail to qualify for a charitable deduction under § 20.2055-2(a). The language does not apply to the termination of property interests within 9 months of death. See, Rev. Rul. 76-546, 1976-2 C. B. 290, 291 ("Section 2055(a) of the Code and the regulations thereunder provide for death to operate as a disclaimer *only* with respect to a *power to consume, invade, or appropriate property*; it does not apply to other interests."); Stephens, Maxfield, Lind, Calfee and Smith, Federal Estate and Gift Taxation ¶ 5.05[2][c] (8th ed. 2002)(. . . Congress has not elected to treat the *death* of one who has a property *interest* as a disclaimer of the interest."). See also, Lowndes, Kramer and McCord, Federal Estate and Gift Taxes §16.6 (3rd ed. 1974).

In Merchant's National Bank v. Commissioner, 583 F.2d 19 (1st Cir. 1978), the terms of a testamentary trust provided for income to be paid to a noncharitable beneficiary for life, with the remainder to a qualified charity. The income beneficiary died 5 ½ months after the decedent and the corpus passed to the charity. The estate argued that under the § 2055(a) flush language, the termination of the life tenant's income interest prior to the due date of the estate tax return, is treated as if the life tenant disclaimed the income interest. Accordingly, the estate argued that a charitable deduction should be allowed for the entire value of the trust corpus, without reduction for the noncharitable income interest. The court determined that the flush language did not operate to treat the termination of the beneficiary's income interest as a disclaimer of that interest, as follows:

> Our first question is whether the district court erred in holding that the death of the life tenant before the prescribed filing date of the estate tax return operated as a disclaimer of "a power to consume, invade, or appropriate property". The issue is, more specifically, whether Mildred's interest, a simple life interest, is also "a power to consume . . . ." . . . [T]he legislative history points to a deliberate focus on a power to consume principal in the effort to equate death to a statutory disclaimer. A case involving the estate of Solomon Allinger, had been brought to the attention of the Senate Finance Committee. Hearings Before Committee on Finance, United States Senate, 83d Cong., 2d Sess., on H.R.8300 (Part I), 293-295. The testator had left his residuary estate to a charitable remainder trust, subject however to (a) payments of net income to his wife for her life and (b) a power in the trustee, in its discretion, to expend principal for the life tenant. The wife died within 47 days after testator's death. The problem which the executors faced was that under Merchants National Bank of Boston v. Commissioner, 320 U.S. 256, 64 S. Ct. 108, 88 L. Ed. 35 (1943) and Union Planters National Bank & Trust Co. v. Henslee, 335 U.S. 595, 69 S. Ct. 290, 93 L. Ed. 259 (1949), the mere existence of a broad power to invade principal was held to render the value

> of a charitable remainder so uncertain that no deduction could be allowed. The curative device of what is now § 2055(a) was enacted to permit the death of a beneficiary of such a power before the due date of the estate tax return to have the effect of a disclaimer. The estate has argued that since a mere life interest was also involved in the Allinger problem, § 2055(a) must also refer to an interest in income as well as power to invade the principal. But it neglected to tell us that the Allinger executors specifically acknowledged that the charitable deduction would have to be reduced by the value of the life estate; they took issue only with the doctrine as to powers.

Merchant's National Bank v. Commissioner, 583 F.2d at 21.

In this case, Beneficiary received an outright bequest of property under Decedent's will. The Order was entitled to the property only if Beneficiary predeceased the Decedent. As discussed in Merchant's National Bank , Rev. Rul. 76-546 and the treatises cited above, under the § 2055(a) flush language, the death of the noncharitable beneficiary (or other event) only operates as a disclaimer with respect to powers of invasion, etc. that would otherwise disqualify a charitable remainder or similar bequest. The provision does not apply with respect to an outright bequest to an individual, such as the residuary bequest in this case. That is, in the case of an outright bequest to an individual, payable to charity if the individual predeceased the testator, the death of the individual after the testator's death would not be treated as a disclaimer under the flush language.

Accordingly, we do not believe that the flush language of § 2055(a) applies in this situation, in any event.

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

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