



December 17, 2004
(Re-issued December 17, 2009)
Pennsylvania Inheritance Tax
No. INH-04-011
Taxability of a Revocable Living Trust/Inheritance Tax

ISSUE:

Is the funding of a trust subject to Pennsylvania Inheritance and Estate Tax?

CONCLUSION:

Where the decedent retained a life interest in the trust principal as well as the income, the contribution and any accumulated income as of the date of death are taxable assets included in the value of her Estate. 72 P.S. § 9107(c)(5).

FACTS:

The facts are as follows: Decedent, (A), died testate in January, 2004. In November, 1997, decedent created and funded a trust. Counsel for the Estate represents that before her death, (A) had transferred nearly all of her assets to the trust. The sole beneficiary of the trust was (A). The trustee was decedent's niece, (C). (C) also serves as the Executor of the Estate, and is a beneficiary of the residual estate.

The trust purports to be an irrevocable trust. The trustee was directed to pay to the settlor of the income of the trust during her lifetime. The settlor was retained right to distributions of the principal. Part I of the trust document states:

- A. During my lifetime all of the income generated by the trust assets shall be paid to me or for my benefit to my creditors on a monthly, or more frequent basis in the discretion of the Trustees.
- B. The Settlor expressly retains the right, at any time and from time to time, by a notice in writing signed by herself and filed with all trustees:
 - 1. To withdraw from the principal of the trust within each and any calendar year commencing with the year ending December 31, 1998 cash or property not in excess of the sum or value of \$15,000.00.
 - 2. Independently of withdraws made under subparagraph 1. above, to withdraw from the principal of the trust within each and any calendar year commencing with the year ending December 31, 1998, cash or property not in excess of the sum or value of \$25,000.00 provided that my trustee consents to said withdraw and provided further that no withdraw requiring such consent shall diminish the value of the trust principal then remaining below the total sum of \$100,000.00.
 - 3. My trustee shall have the absolute discretion to pay any additional amount from the principal of the trust within each and every calendar year, for my support and/or extraordinary medical expenses not covered by any

health insurance.

4. It is an express condition and term of this trust that any of the powers which the settlor reserves to herself are to be subject to exercise by any other person, or under any process of law for her benefit, or for the benefit of her creditors by any other person or court whatsoever.

DISCUSSION:

Based upon the above referenced facts it is the opinion of this Office that the value of the trust is a taxable asset of the decedent's Estate because decedent impliedly reserved for her life the possession, enjoyment and right to income from the property transferred. 72 P.S. § 9107(c)(5).

When analyzing implied reserved life interests, the courts have looked to the intent of the parties. Here, (A) put the entire value of her estate into the trust. In *Karr Estate*, 20 Fiduc. Rep. 2d 232, 234 (O.C. Montg., 2000), the court held that where after the transfer the decedent had no property and she could demand payments from the trustee, the contribution was included in the estate.

In the trust agreement, the settlor retained the right to invade the principal of the trust.[1] The settlor merely had to notify the trustee in writing of her need for the principal and the trustee had to comply with the request.

"Could the decedent have compelled the trustee to make distributions to her for her 'proper support, comfort maintenance, and well-being.' While Courts normally will not interfere with the discretion of a trustee, they will if there is an abuse of discretion. *Short Estate*, 6 Fiduc. Rep. 538 (Phila. O.C. en banc, 1956) would the failure of the trustee to make a distribution for these purposes have been an abuse of discretion? We believe so." *Karr Estate*, 20 Fiduc. Rep. 2d 232, 234 (O.C. Montg., 2000.)

Since the decedent retained a life interest in the trust principal as well as the income, the contribution and any accumulated income as of the date of death are taxable assets included in the value of her Estate. 72 P.S. § 9107(c)(5).

[1] In section B of the trust agreement, the text of which is cited above.

ISSUES:

1. Whether a revocable living trust, the corpus of which contains real estate located in Pennsylvania is subject to Pennsylvania Inheritance Tax where the trust settlor retained the right to terminate the trust and/or remove assets from the trust at any time prior to her death?

2. Whether the estate of a Texas resident is required to file a Pennsylvania Inheritance Tax Return where the estate contained real estate located in Pennsylvania and held in a revocable living trust?

CONCLUSIONS:

1. A trust corpus, containing Pennsylvania real estate, is subject to Pennsylvania Inheritance Tax where the settlor retained certain rights over the real estate until her death.
2. A Texas estate is required to file a Pennsylvania Non-Resident Inheritance Tax Return where the estate contains property located in Pennsylvania and that was held by the decedent until her death.

FACTS:

Decedent died in February, 2004, a resident of Texas. In May, 2002, Decedent purchased real estate and conveyed the real estate to her Revocable Living Trust, to be administered by a number of trustees, including her son. This transfer occurred in June, 2002. The trust contained provisions that allowed the Decedent the right to “amend, alter, revoke and/or change any part of this trust and withdraw all or part of the Trust Estate.” The trust also allowed Decedent the ability to collect a management and rental fee from those individuals that occupied the premises.

Decedent died and the real estate remained part of the trust corpus, to be distributed to Decedent’s children, her testamentary heirs. At issue is whether the real estate is subject to Pennsylvania inheritance tax.

DISCUSSION:

The Inheritance and Estate Tax Act of 1991 states that a transfer whereby the transferor expressly reserves for her life, or any period which does not in fact end before her death, the possession or enjoyment of, or the right to the income from the property transferred, is subject to tax. 72 P.S. § 9107(c)(5). Further, the Act defines taxable property of the estate to include “all real property . . . of a nonresident decedent . . . having its situs in this Commonwealth, including property held in trust.” 72 P.S. § 9102.

Here, the Decedent transferred real estate into a revocable living trust. The trust permitted the Decedent to occupy the real estate, collect rents from the real estate, and did not restrict the Decedent’s ability to borrow against the real estate.

Consequently, the Decedent retained rights in the Pennsylvania real estate, which properly subjects the property to Pennsylvania Inheritance Tax. Accordingly, the Estate shall file a Non-Resident Pennsylvania Inheritance Tax Return and report the fair market value of the real estate as of Decedent’s date of death, to be taxed at the lineal rate of tax, four and one-half percent.