**Office of Chief Counsel**
**Internal Revenue Service**
# Memorandum

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subject: Taxpayer

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LEGEND

Taxpayer (or Taxpayer's Estate)
Institution X
Property A
Decedent
Surviving Spouse
Foreign Country 1
Foreign Country 2
Foreign Country 3
U.S. state
account

ISSUES

Whether as a statutory executor under I.R.C. § 2203, Institution X is liable as a representative within the meaning of 31 U.S.C. § 3713 for the Decedent's estate tax liability to the extent of the cash value of Property A it distributed to the Decedent's surviving spouse.

CONCLUSIONS

This case requires substantial development, and for that reason, no conclusion can be reached now about Institution X's potential liability under 31 U.S.C. § 3713. [redacted]

FACTS

To the extent they have been developed, the facts of this case are as follows. The Decedent was a nonresident alien. He is believed to have been a dual citizen of Foreign Country 1 and Foreign Country 2. At the time he died in Foreign Country 3, the Decedent owned an Institution X account in a United States state containing Property A.

Sometime after the Decedent's death, his Surviving Spouse contacted Institution X to obtain the contents of the account. [redacted]

[redacted]

[redacted]

LAW AND ANALYSIS

The legal question in this case is whether a person who is a statutory executor under I.R.C. § 2203 can constitute a representative within the meaning of the Federal Insolvency Statute, 31 U.S.C. § 3713. [1] The statute is comprised of two sections. In pertinent part, section 3713(a) provides that the federal Government's claim shall be paid first when the estate of a deceased debtor in the custody of an executor or administrator lacks sufficient assets to pay all the debts. This section applies the same rule to insolvent persons that make assignments for the benefit of creditors, commits acts of bankruptcy, or whose property is attached. Section 3713(b) contains the enforcement provision; it makes the representative of the deceased debtor (or the other insolvent persons described in section 3713(a)) who fails to pay the Government's claim first personally liable for that claim to the extent of the funds paid to other creditors.

The relevant federal tax provisions involved in this issue are I.R.C. §§ 2002 and 2203 and Treas. Reg. § 20.2002-1. I.R.C. § 2002 provides that "[t]he tax imposed by [the federal estate tax provisions] shall be paid by the executor." [2] In pertinent part, Treas. Reg. § 20.2002-1 elaborates on this principle in the context of estates of nonresident aliens lacking an executor or administrator and identifies the legal authority for an executor's personal liability for the federal estate tax liability.

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[1] 31 U.S.C. § 3713 provides:

> (a)(1) A claim of the United States Government shall be paid first when—
>
> (A) a person indebted to the Government is insolvent and—
> (i) the debtor … makes a voluntary assignment of property;
> (ii) property of the debtor, if absent, is attached; or
> (iii) an act of bankruptcy is committed; or
> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
>
> (2) This subsection does not apply to a case under title 11.
>
> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

[2] I.R.C. § 2002 does not impose personal liability on the executor for the estate tax liability. Occidental Life Insurance v. Commissioner, 50 T.C. 726 (1968), and Garrett v. Commissioner, T.C. Memo. 1994-70.

> The Federal estate tax imposed … [on] estates of nonresidents not citizens is payable by the executor or administrator of the decedent's estate. … If there is no executor or administrator appointed, qualified and acting in the United States, any person in actual or constructive possession of any property of the decedent is required to pay the entire tax to the extent of the value of the property in his possession. See section 2203, defining the term "executor." The personal liability of the executor or such other person is described in section 3467 of the Revised Statutes (31 U.S.C. § 192) … . [3]

I.R.C. § 2203 defines executor with a significant qualification as follows:

> The term 'executor' <u>wherever it is used in this title</u> in connection with the estate tax … means the executor or administrator of the decedent, <u>or if there is no executor or administrator appointed, qualified, and acting with in the United States, then any person in actual or constructive possession of any property of the decedent</u>. (Emphasis added.)

In a case similar to the known facts of the Taxpayer's account – Institution X transfer, the Tax Court considered whether an I.R.C. § 2203 statutory executor fit within the category of persons who could be held liable under the Federal Insolvency Statute. In <u>Occidental Life Insurance v. Commissioner</u>, 50 T.C. 726 (1968), the decedent was a resident and citizen of Canada, who sold insurance policies for Occidental. After the decedent's death, Occidental held commissions earned on insurance policies that the decedent had sold during his employment. There was no executor or administrator qualified in the United States to represent the decedent's estate, although the decedent's spouse and children were the Canadian executors. Occidental turned over the decedent's commissions to the Canadian executors. The Service asserted liability against Occidental for the portion of the estate tax liability that equaled the assets turned over, and argued that Occidental's status as a statutory executor under I.R.C. § 2203 brought it within the group of persons liable under the Insolvency Statute, then codified as 31 U.S.C. §§ 191 and 192. [4]

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[3] 31 U.S.C. §§ 191 and 192 were prior statutory designations of the Federal Insolvency Statute.

[4] At that time, 31 U.S.C. § 192 provided:

> Every <u>executor, administrator, or assignee, or other person</u>, who pays, in whole or in part, any debt due by the … estate … for which he acts before he satisfies and pays the debts due to the United States from such … estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due … and unpaid … . (Emphasis added.)

In 1982, the Insolvency Statute was redesignated and revised. Specifically, the phrase "executor, administrator, or assignee, or other person" was replaced with the phrase "representative of a person or an estate." The historical and statutory notes to this code section indicate that the change was made for clarity and to eliminate unnecessary words. No authority indicates Congress intended this change to

In a full Tax Court opinion, the court held that the plaintiff's status of statutory executor under I.R.C. § 2203 did not make it an executor for purposes of 31 U.S.C. § 192. The court reasoned that the definition of executor in I.R.C. § 2203 is specifically limited to Title 26, and therefore is immaterial for purposes of the Insolvency Statute. The court cited the principles set forth in King v. United States, 379 U.S. 329 (1964) for determining who should be included in the class of persons subject to liability under the Insolvency Statute. In King, the Supreme Court held that the Insolvency Statute applies to persons who are not only in possession and control of property of an estate (or of an insolvent person) but who are also charged with the duty of applying that property to pay the estate's debts consistent with the creditor's rights and priorities. The Tax Court concluded that Occidental's role and actions did not fit that description. The court further noted that Occidental's actions did not meet another requirement for liability under that provision. Specifically, in turning over the decedent's commissions to the Canadian executor, Occidental merely paid its own debt to the decedent's estate. It did not pay an estate debt to a third party in derogation of the United States' claim, which is the conduct the Insolvency Statute targets. [5] [redacted]

[redacted]

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broaden or restrict the group of persons liable under the statute. Therefore, cases interpreting the pre-1982 codification are relevant to the current discussion.

[5] Further, the Tax Court found that Occidental had no notice of the estate's tax debt to the United States. While knowledge of the debt is not an explicit requirement in the Insolvency Statute, courts have uniformly held that liability under that statute can only apply to persons who knew or should have known about the debt owed to the Government. Want v. Commissioner, 280 F.2d 777 (2d Cir. 1960).

[redacted]

[redacted]

[redacted]

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

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