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MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL, SAN DIEGO

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation)

SUBJECT: Validity Of Disclaimer Of Joint Tenancy Interest
Taxpayer:

This is in response to your memorandum regarding the above subject. The question you have raised concerns the validity of disclaimers under state law.

LEGEND:

Taxpayer x
Years
Assessment
Amounts $ & $

ISSUE:

Whether a taxpayer can defeat the federal tax lien by filing a disclaimer with respect to property on which he/she was placed in title as joint tenant after the death of the other joint tenant.

CONCLUSION:

As to the property in which the taxpayer initially obtained an interest as a joint tenant, the federal tax lien attached in 1989 based upon the Services's assessment of April 6, 1987. As to the later joint tenancy in which the taxpayer did not accept any benefits subsequent to its creation, the disclaimer filed by the taxpayer on January 12, 1998, did not prevent the federal tax lien from attaching to that property. Although state law determines whether a given set of circumstances creates a right or interest, federal law dictates whether that right or interest constitutes property or a right to property under I.R.C. § 6321.

FACTS:

The Internal Revenue Service (Service) made two assessments of Form 941

employment taxes against the taxpayer as follows:

Period	Amount	Assessment date	Notice of Tax Lien Filing

A parcel of real property located in County was acquired by a grant deed to the taxpayer x's father, and to taxpayer x and his wife, as joint tenants on September 21, 1989. Taxpayer x states that the property was purchased with the sales proceeds of his father's prior residence. The taxpayer x's father lived on the property by himself or with caregivers. The real property is not encumbered and has a current fair market value of approximately $78,000.

On March 1, 1990, a quitclaim deed from taxpayer x and his wife to his father was recorded. The deed recites that no consideration changed hands for the transfer. Taxpayer x claims that this happened because his father became angry with him and demanded that the taxpayer and his wife be removed from the title to the property.

Taxpayer x's father died on September 5, 1995. According to taxpayer x, he found a deed among his father's papers after his father died which was a quitclaim deed from his father which placed title to the property back in joint tenancy with taxpayer x and his wife. This quitclaim deed was executed on March 10, 1990, but was not recorded before the father's death.

The aforesaid quitclaim deed was recorded on November 7, 1995. An Affidavit of Death of Joint Tenant was recorded on January 12, 1996, by taxpayer x's wife. On the same day, taxpayer x recorded a document entitled Federally Qualified Disclaimer and State of Disclaimer with respect to any joint tenancy interest he had in the real property at issue.

LAW AND ANALYSIS:

I.R.C. § 6321 provides that when any person liable to pay federal income tax neglects or refuses to pay the tax after notice and demand, a lien in favor of the United States arises against all property or rights to property of such person, including after-acquired property. The assessments that arose on April 6, 1987, and March 12, 1990, created such tax liens.

As to the tax lien that arose by virtue of the assessment made on April 6, 1987, there is no question that this lien attached to taxpayer x's undivided one-third interest in the jointly held property that was acquired by him in 1989 when his father took title to the residence. When the father purchased the property, he had the deed titled in not only his name but that of taxpayer x and the taxpayer x's wife. At the time of the April 6, 1987, assessment, taxpayer x did not have any interest in the subject property.

However, when he later acquired an interest in that property as a joint tenant in 1989, that interest became an after-acquired one which was subject to the tax lien. Glass City Bank v. United States. 326 U.S. 265 (1945). Accordingly, we agree with your analysis regarding the attachment of the tax lien of $7,919.00 that stems from the initial assessment made on April 6, 1987.

As to the tax lien that arose during the period when the taxpayer had no interest in the property, we do not agree with your conclusion that the timely disclaimer executed under law prevented that lien from attaching to his joint tenancy interest. However, as stated above, we do agree that the earlier tax lien based on the April 6, 1987, assessment, continued to attach to any joint tenancy interest he may have acquired. For purposes of our analysis, we shall disregard the taxpayer's disclaimer under federal law, i.e., I.R.C. § 2518, which concerns the federal gift tax. The assessments in this case are based upon employment taxes.

On March 1,1990, which was prior to the date of the second tax assessment, March 12, 1990, the taxpayer quitclaimed his interest in the real property back to his father. Taxpayer x claims that the lien arising from that assessment did not attach to any interest he had in the property. We have no reason to question the validity of his disclaimer for purposes of law as the facts establish that he followed the requirements of Prob. Code. § 280. 1/ However, we do not believe that the disclaimer is also valid for purposes of preventing the second federal tax lien from attaching to the joint tenancy interest that he renounced.

The advisory memorandum you propose to issue reflects that there exists a lack of any or federal cases applying law which deal with the disclaimer of rights acquired by a surviving joint tenant upon the death of the joint tenant who created the interest. Our research discloses the same result. Nevertheless, by analogy, a similar issue that this office has had to grapple with during the last several years involves the question of whether a renunciation of an inheritance under state law defeats the federal tax lien. To date, the cases have produced varied results and at present, there is a

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1/ § 280. Filing of disclaimers; place; disclaimers affecting realty

(a) A disclaimer shall be filed with any of the following:

* * *

(3) Any other person having custody or possession or legal title to the interest.

(b) If the disclaimer made pursuant to this part affects real property or an obligation secured by real property and the disclaimer is acknowledged and proved in like manner as a grant of real property, the disclaimer may be recorded in like manner and with like effect as a grant of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to the disclaimer with like effect without regard to the date when the disclaimer was filed pursuant to subdivision (a). . . . .

possibility that the issue may ultimately be resolved by the United States Supreme Court, assuming it agrees to accept the taxpayer's petition for a writ of certiorari in Drye Family 1995 Trust v. United States, et al., 152 F.3d 892 (8th Cir. 1998). The government, however, has not acquiesced in that petition. Prior to Drye, the issue had been before several circuit courts of appeal.

In Mapes v. United States, 15 F.3d 138 (9th Cir. 1994), which involved Arizona law, the Ninth Circuit held that because of a timely disclaimer, the federal tax lien did not attach. Due to the lack of administrative importance and the fact that no conflict existed, we did not recommend certiorari. Shortly thereafter, but more than three months after Mapes was decided, the Second Circuit found for the government on the same issue in United States v. Comparato, 22 F.3d 455 (2d Cir. 1994), involving New York law. Subsequently, the Fifth Circuit decided Leggett v. United States, 120 F.3d 592 (5th Cir. 1997) adversely to the government. According to the Fifth Circuit, the Texas disclaimer statute is based on a uniform act similar to acts in other states that follow the Acceptance-Rejection theory. In the Fifth Circuit's view, the outcome in Comparato was based on the manner in which New York courts have interpreted that state's disclaimer statute under the Transfer-Theory and, thus, there existed no conflict. The Fifth Circuit distinguished United States v. Mitchell, 403 U.S. 190 (1971) by pointing out that the wife in Mitchell had an ownership interest in community property which she attempted to renounce but that the federal tax lien had already attached to that interest. This element, the Fifth Circuit found, was missing in Leggett. The government did not request certiorari in Leggett on the basis that the case represented an interpretation of state property law and, thus, there was no conflict among the circuits. In addition, there was a lack of administrative importance to the issue.

The cases prior to Drye, i.e., Mapes, Comparato, and Leggett, all turned on an interpretation of state law and whether the taxpayer had a property interest to which the tax lien could attach. All these cases involved disclaimers of inheritances pursuant to testate succession. Under the Acceptance-Rejection theory, if the taxpayer filed a disclaimer and did not accept any benefit from the intended inheritance, the legal fiction created was that the taxpayer had predeceased the testator with the result that the taxpayer never obtained any interest in the property to which the tax lien could attach. The other theory, the Transfer theory which was followed in Comparato, presupposes that at the moment of death, the taxpayer/beneficiary is vested with a property interest which cannot be divested and to which the tax lien immediately attaches.

In Drye, which involved intestate succession, the issue presented to the Eighth Circuit was whether the federal tax lien attached to the taxpayer's inheritance if he ultimately disclaimed that inheritance under Arkansas law. The appellate court held that "Drye's state law right to inherit his mother's estate is a 'right to property' under § 6321." Opinion at l4. "Once it has been determined that state law creates sufficient interest in the [taxpayer] to satisfy the requirements of the [statute], state law is inoperative."

Opinion at 12, citing United States v. Bess, 357 U.S. 51, 56-57 (1958) and "[w]hether a state-law right constitutes 'property' or 'rights to property' is a matter of federal law." Bank of Commerce, 472 U.S. at 727 (emphasis added). The Eighth Circuit, quoting further from Bank of Commerce, stated "The principle that emerges from these seemingly contradictory statements is that state law determines whether a given set of circumstances creates a right or interest; federal law then dictates whether that right or interest constitutes 'property' or the 'right to property' under § 6321. The concomitant state law consequences of a state law interest or right 'are of no concern to the operation of the federal tax law.'" Id, at 723.

In Mapes, the Ninth Circuit considered the taxpayer's use of the estate's property prior to his disclaimer to be de minimis and, thus, did not constitute an acceptance of benefits from the property. However, according to the Eighth Circuit, even if Drye did nothing, he still had an interest in the estate as the sole heir-at-law. Subject to the administration of the estate, that interest was enforceable and transferable upon the death of the taxpayer's mother and during the nine-month disclaimer period. It was the existence of Drye's right to a share of his mother's estate that allowed him the right under state law to disclaim the estate. In short, "Drye's mere ability to invoke a legal fiction under state law that has the effect of redirecting the succession of the estate reifies his state law interest in the estate." As stated by that appellate tribunal, "Unfortunately for Drye, our inquiry regarding his rights under state law terminates upon identifying this elementary interest. The "relation back" of Drye's disclaimer is therefore of no effect to our analysis."

A critical element of the Drye decision is the court's conclusion that as a matter of federal law, the taxpayer's state right to inherit his mother's estate was a "right to property" under section 6321 because that right had pecuniary value. Other federal tax cases have also dealt with the issue of whether a state right or privilege constitutes property for purposes of the tax lien. See In re Terwilliger's Catering Plus, Inc., 911 F.2d 1168 (6th Cir. 1990) and In re Kimura, 969 F.2d 806 (9th Cir. 1992) (Liquor license was subject to the section 6321 lien because it has independent value and sufficient transferability); Southern Bank v. I.R.S., 770 F.2d 1001 (11th Cir. 1985) (Equitable right of redemption constituted property or right to property under section 6321 because it had pecuniary value) and United v. Stonehill, 83 F.3d 1156 (9th Cir.), cert denied, 117 S. Ct. 480 (1996) (Chose-in-action is property or a right to property under section 6321 in light of its pecuniary value and transferability).

As stated previously, our research fails to disclose any case law concerning the disclaimer issue regarding joint tenancies. Nevertheless, pursuant to law, it is possible to disclaim an interest in a joint tenancy that arose by virtue of the death of another joint tenant as well as to disclaim a right to an inheritance. Prob. Code § § 280 & 282. By analogy, both situations involve the creation of a "right to property." As explained above, the circuit cases prior to Drye dealing with disclaimer of an inheritance have turned on an interpretation of state property law. However, the significance of the disclaimer of the inheritance issue may diminish over time as more courts analogize to United States v. Irvine, 511 U.S. 224, 240 (1994). In Irvine, which was decided three months after the Ninth Circuit decided Mapes, the Court emphasized that, in determining whether a taxpayer possesses an interest in "property" for estate

and gift tax purposes, federal courts are to look to factual realities and not be "struck blind" by state law "legal fiction[s]" that permit renunciations of ownership to be retroactively effective. 511 U.S. at 240. That holding in Irvine provides direct support for the Eighth Circuit's decision in Drye and for the similar decision in Comparato by the Second Circuit. We believe that the correct approach to the issue here is the one espoused by the Eighth Circuit in Drye and this is the view that the Solicitor General's Office has recently set forth in its brief in opposition to certiorari in that case. In the event that the Supreme Court decides not to accept certiorari in Drye, the Ninth Circuit ruling in Mapes would still control.2/ However, that ruling cannot be reconciled with the reasoning of the Court in Irvine, several months later, [redacted]

If you have any further questions, please do not hesitate to contact us on 202-622-3610.

2/ The Supreme Court granted certiorari on April 19, 1999.