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BASIS FOR JOINT TENANCY PROPERTY

— by Neil E. Harl

The battle over the portion of value of property owned in joint tenancy (or tenancy by the entirety) receiving a new basis at death moved a notch closer to resolution with a 1998 Tax Court case. In that decision, Hahn v. Commissioner, the Tax Court agreed with five earlier cases that a surviving spouse may be entitled to a new income tax basis in 100 percent of the date of death value of property held in joint tenancy with a predeceased spouse.

Facts of Hahn

In Hahn v. Commissioner, the husband in 1972 had signed a subscription agreement to purchase shares in a corporation representing an apartment. The shares were issued in 1973 to the husband and wife in joint tenancy. In 1991, the husband died with the wife becoming the sole owner of the shares. The federal estate tax return included 100 percent of the value of the shares in the husband’s estate. That amount, of course, was covered by the 100 percent federal estate tax marital deduction. On later sale of the shares, the wife claimed an income tax basis equal to the date of death value ($700,000) plus transfer fees, commissions, transfer taxes and an amount for asbestos removal for a total basis of $758,412. On audit, the Internal Revenue Service took the position that only 50 percent of the date of death value was includible in the husband’s estate and received a new income tax basis.

The Tax Court agreed with the taxpayer that the full amount of value at death was properly included in the husband’s estate and received a new basis at death.

Reason for new basis

Before 1977, joint tenancy property was subject to federal estate tax in the estate of the first to die except to the extent it could be proved that the survivor contributed to its acquisition. The burden of proving the survivor’s contribution was placed on the estate. This became known as the “consideration furnished” rule. A point of central importance in Hahn v. Commissioner and the other cases is that whatever portion of asset value is included in the gross estate also receives a new basis at death.

In 1976, the provision creating the “consideration furnished” rule was amended to create a special rule for joint tenants who were husbands and wives married to each other. Under that rule, one-half the value was included in the estate of the first to die without regard to which spouse furnished the consideration to acquire the jointly-held property. The 1976 amendment applied only to joint interests "created after December 31, 1976." The provision was again amended in 1978 to authorize an

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elevation to treat joint interests created before 1977 as qualified joint interests subject to the 50 percent inclusion rule. A 1981 amendment eliminated the requirement that the creation of the joint interest be treated as a gift for the 1976 “fractional share” rule to apply.

The question is whether the “consideration furnished” rule continues to apply in the case of deaths after 1981. If that rule can be invoked for deaths after 1981, the entire value of jointly held property may be includible in the estate of the first to die (with that amount covered by the federal estate tax marital deduction), and with 100 percent of the jointly held property receiving a new income tax basis.

The court in Hahn v. Commissioner followed the seminal case of Gallenstein v. United States, which involved real property acquired in 1955 by a husband and wife in joint tenancy with the husband, as the first to die, dying after 1981. The Gallenstein court (and the other courts considering the question) concluded that Congress had not repealed the “consideration furnished” rule for husband-wife joint tenancies either expressly or by implication. Thus, as the court concluded in Hahn v. Commissioner, the “fractional share” rule “does not apply to spousal joint interests created before January 1, 1977.”

Thus, the “consideration furnished” rule continues to be applicable to joint interests created before 1977 with 100 percent of the value of property includible in the estate of the first to die except to the extent consideration by the survivor is proved.

In what husband-wife situations does the “consideration furnished” rule apply?

The “consideration furnished” rule, as in effect before the 1976 and later amendments, provided that the gross estate included the value of all property held at the time of the death of the first joint tenant to die except to the extent attributable to the consideration in money or money’s worth furnished by the surviving joint tenant. Thus, it would appear that, for joint interests created by a husband and wife before 1977, the “consideration furnished” rule may be applied regardless of the type of property involved. It is noted that a taxpayer cannot elect whether or not to include jointly owned property in an estate simply by failing to meet the burden of proof in order to receive a new basis for income tax purposes.

Finally, it is worth noting that the “fractional share” rule cannot be applied to joint interests created before 1977 under the reasoning of Hahn v. Commissioner and its predecessors. If assets had declined in value, and death of the first to die would result in a step down in basis, the “fractional share” rule would result in a less advantageous result for the survivor in the event of sale if the survivor could not prove contribution at the death of the first to die.

FOOTNOTES


3 Id.

4 See Gallenstein v. United States, 975 F.2d 286 (2d Cir. 1992); Patten v. United States, 116 F.3d 1029 (4th Cir. 1997); Anderson v. United States, 96-2 U.S. Tax Cas. (CCH) ¶ 60,235 (D. Md. 1996); Baszto v. United States, 98-1 U.S. Tax Cas. & 60,305 (M.D. Fla. 1997); Wilburn v. United States, 97-2 U.S. Tax Cas. (CCH) ¶ 50,881 (D. Md. 1997).


6 Id.

7 I.R.C. § 2056.


9 Treas. Reg. § 20.2040-1(a)(2). See Estate of Hatchett v. Comm’r, T.C. Memo. 1989-637 (estate met burden of proof to extent of one-quarter of value that was attributable to surviving spouse’s inheritance from parent).


11 See n. 5 supra.

12 See n. supra.

13 See I.R.C. § 1014(a).


18 I.R.C. § 2056.

19 I.R.C. § 1014(a).

20 See n. 5 supra.

21 975 F.2d 286 (6th Cir. 1992).

22 See n. supra.

23 See n. 5 supra.

24 Hahn v. Comm’r, n. 5 supra.


27 Madden v. Comm’r, 52 T.C. 845 (1969), aff’d, 440 F.2d 784 (7th Cir. 1971).

28 See n. 5 supra.

29 See n. supra.