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**The “Gallenstein” Rule:**
Slowly Slipping Away

-by Neil E. Harl*

Most legal rules exist until the rule is repealed, the rule comes to the end of its stated term or is held to be unconstitutional. But one, the so-called “Gallenstein” Rule, which has been in existence only for 26 years, is slowly slipping into oblivion. That rule, the indirect product of the 1976 amendment of joint tenancy rules, did not emerge until 1991 when the case of Gallenstein v. United States was decided by the Federal District Court of the Eastern District of Kentucky and the case was later affirmed by the Sixth Circuit Court of Appeals.

**How the rule developed**

Before 1977, under the “consideration furnished” rule, joint tenancy property was subjected 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 proof under the pre-1977 rule fell heavily on wives who argued in 1976 hearings that it was an unfair burden, that their contributions to the activity of the husband and wife were often unrecognized and insisted that the tax should be borne equally between husbands and wives. The Congress agreed and amended the statute governing the issue to require that one-half of the joint tenancy asset would be taxed at the first of a couple to die and the other half would be taxed at the survivor’s death. The amendment was effective for estates of decedents dying after December 31, 1976.

The “fractional share” rule was thought to be the governing rule for husband and wife joint tenancies, both as to federal estate tax liability and to the income tax basis determination after the death of the first joint tenant to die.

**The death of Mr. Gallenstein**

The Gallensteins acquired farmland in 1955 in joint tenancy with the husband providing the consideration. No gift was reported in connection with the transaction. Mr. Gallenstein died in 1987 and the Form 706 was filed reporting the property value under the “fractional share” rule – one-half was included in the gross estate and one-half received a new basis at death.

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By the time of Gallenstein’s death, the property had become valuable development property and was sold by Mrs. Gallenstein, the surviving joint tenant and the surviving spouse, after her husband’s death. It was discovered that one-half had been included in her husband’s estate and that half received a new income tax basis. The other one-half was traceable back to the date of acquisition in 1955.

Upon consultation with her tax advisors, the estate filed an amended federal estate tax return, reporting the full value of the farmland in the gross estate and then filed a claim for refund for the tax on the reduced gain for federal income tax purposes. Both the District Court and the Sixth Circuit Court of Appeals agreed with the estate.7 Did not that maneuver increase the federal estate tax for the estate? No, because of the then-available federal estate tax marital deduction of 100 percent of the value of property passing to the spouse as the surviving joint tenant.

After the successful District Court decision, the Sixth Circuit, as noted, the Fourth Circuit Court of Appeals, and the Tax Court have held that the consideration furnished rule may be applied to joint interests created after 1954 and before 1977 where the decedent died after 1981.8

The Tax Court Hahn decision,9 is especially notable because of the acquiescence by the IRS of the case which gives nation-wide authority to the case.

So why is the opportunity to use Gallenstein “slipping away”?

To take advantage of the concept requires that a couple have acquired property after 1954 and before 1977. Unless the Congress loosens the requirements, the lapse of time will eventually bar eligibility for the unusual concept that occurred without specific Congressional action.

ENDNOTES

5 See 5 Harl, Agricultural Law § 43.02[2][c][iii] (2017).
6 Id.
7 Gallenstein v. United States, 91-2 U.S. Tax Cas. (CCH) ¶ 60,088 (E.D. Ky. 1991), aff’d, 975 F.2d 286 (6th Cir. 1992).