DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM:

SUBJECT:

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LEGEND

Decedent =

A	=	
Corporation	=	
Date 1	=	
Date 2	=	
Child A	=	
Child B	=	

ISSUE

For purposes of § 20.2031-1(b) of the Estate Tax Regulations, in determining the fair market value of the Corporation stock includible in the Decedent's gross estate, is the Decedent's 50-percent interest includible under section 2033, aggregated with the 44-percent interest subject to Decedent's testamentary general power of appointment and includible under section 2041, and valued as a single 94-percent block?

CONCLUSION

The shares are valued as a single aggregated 94-percent block for purposes of applying the "willing buyer-willing seller" principles of § 20.2031-1(b).

FACTS

The facts as submitted indicate that Decedent's spouse, A, died on Date 1, survived by Decedent. At the time of A's death, Decedent and A each owned 50-percent of the total outstanding voting and nonvoting common shares of Corporation, a closely-held corporation.

A's will provided that if Decedent survived A, then the residue of the estate was to be divided into two trusts, Trust A and Trust B, for the benefit of Decedent. Trust A was intended to qualify for the estate tax marital deduction under section 2056(b)(5), and was to be funded with the maximum amount necessary to reduce the estate tax to zero. The balance of the residue passed to Trust B.

The will directed that Decedent was to receive all trust income from both Trust A and Trust B for life and such principal from both trusts as was necessary for his proper support, care, maintenance, and education. On Decedent's death, the trustee was to distribute the remaining balance of Trust A (including principal and any accrued and undistributed income) "to such one or more persons and entities, including his own estate, and on such terms and conditions, either outright or in trust, as my husband shall appoint by Will, specifically referring to and exercising this power of appointment . . . ." If Decedent did not exercise the general power, the Trust A property was to be added to Trust B. Under the terms of A's will, on Decedent's death, Trust B was to be divided into two separate trusts; one trust was to be held for the benefit of Child A and the other trust was to be held for the benefit of Child B.

Trust A satisfied the requirements of section 2056(b)(5), and an estate tax marital deduction was allowed to A's estate for the property passing to the trust. A's 50-percent interest in Corporation was divided between Trust A and Trust B such that Trust A received a 44-percent interest in Corporation (discussed below), and Trust B received a 6-percent interest.

In A's will, Decedent was designated as the trustee of Trust A and Trust B.

Decedent died on Date 2. At his death, Decedent owned outright shares of voting common stock in Corporation and shares of nonvoting common stock in Corporation. Both blocks constituted 50-percent of the outstanding voting and nonvoting stock in Corporation. In addition, on the date of Decedent's death, Trust A, with respect to which Decedent possessed a testamentary general power of appointment, owned shares of voting stock and shares of nonvoting stock. These blocks each constituted 44-percent of the outstanding voting and nonvoting stock in Corporation. [1]

On the federal estate tax return filed for Decedent's estate, the shares owned outright by the Decedent were reported as includible in his gross estate under section 2033. The shares over which he held the general power of appointment were reported as includible in his gross estate under section 2041.

LAW AND ANALYSIS

Valuation

Section 2031(a) provides that the value of the gross estate shall be determined by including the value at the time of death of all property.

Section 20.2031-1(b) of the Estate Tax Regulations provides that the value of property includible in a decedent's gross estate is its fair market value at the time of the decedent's death. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

[1] Decedent did, in fact, exercise the testamentary general power of appointment by appointing the property to two separate trusts; one trust to be held for the benefit of Child A and the other trust to be held for the benefit of Child B. In addition, under the terms of Decedent's will, the residue of his estate, which included the Corporation stock that he owned outright, also passed to separate trusts (similar to those created pursuant to the exercise of the power); one trust to be held for the benefit of Child A and the other trust to be held for the benefit of Child B.

In Ahmanson Foundation v. United States, 674 F.2d 761 (9th Cir. 1981). the decedent's revocable trust held a controlling interest in all outstanding stock of a closely held corporation consisting of 99 shares of nonvoting stock and one share of voting stock. On decedent's death, the 99 nonvoting shares passed to charity and the one voting share continued in trust for the benefit of decedent's child. The estate argued that because the voting and nonvoting stock passed to different beneficiaries, the voting and nonvoting shares should be valued in the hands of the recipients as two separate blocks. Therefore, the nonvoting shares should be valued separately from the voting shares. The court rejected the fragmentation argument. Rather, the court reasoned that the estate tax is imposed on the privilege of transferring property, not on the privilege of receiving property. Therefore, the interest passing from the decedent at the moment of death "should be viewed in the hands of the testator" and valued as a single block - a complete bundle of 100 shares. Any change in value brought about by the decedent's estate plan (in this case the bifurcation of the voting and nonvoting stock) was not to be taken into account in valuing the stock.

The main focus of the Ahmanson opinion was whether a discount is appropriate if a controlling stock interest owned by the decedent at death is fragmented under the decedent's estate plan. In reaching its conclusion that no discount is appropriate, the opinion is clear that where the decedent owns directly, or indirectly through a revocable trust, 100% of the stock in a closely held corporation, the interest to be valued for estate tax purposes is a single controlling block of stock. See also, Estate of Curry v. United States, 706 F.2d 1424 (7th Cir. 1983), where on facts similar to those in Ahmanson Foundation, the court held:

> The interest that passed in this case was the decedent's interest in an 1160-share bundle of stock, the 800 voting shares of which assured complete control. Plainly, then, to meet the mandate of the Code, those shares are to be valued as part and parcel of the interest. . . .,

706 F.2d at 1427.

We believe there is little distinction between the situations presented in Ahmanson Foundation and Estate of Curry and that presented in the instant case. In Ahmanson and Estate of Curry, the decedent either owned a controlling interest in the corporation outright (Curry) or held virtual ownership through a revocable trust (Ahmanson). In both situations, the court valued the decedent's stock interest as a single controlling block, and disregarded the decedent's testamentary disposition of the interest into fragmented parts. The only distinction between this case and Ahmanson Foundation and Estate of Curry is that, rather than owning all the stock outright or in a revocable trust, Decedent owned a portion of the stock outright and a portion of the stock was subject to Decedent's general power of appointment.

However, as discussed in detail below, the legislative history underlying the predecessor statute to section 2041 and decades of case law make clear that a general power of appointment with respect to property has always been viewed by Congress and the courts as the equivalent of outright ownership of the property. Indeed, under Decedent's power, Decedent could appoint the Trust A property to any person in his discretion including his estate. Thus, Decedent could have united the two stock interests in his discretion. As was the case in Ahmanson and Curry, regardless of whether Decedent chose to dispose of the two blocks as a unit, or dispose of them separately, the stock must be valued for estate tax purposes as a single block of stock. This is the interest that passed at the moment of death. See United States v. Land, 303 F. 2d 170 (5th Cir. 1962).

Section 2041

This result is amply supported by the legislative history underlying the enactment of the predecessor to section 2041, as well as decades of case law interpreting the section, indicating that Congress and the courts have consistently viewed property subject to a general power of appointment as the equivalent of outright ownership.

Section 2041(a)(2) provides that the value of the gross estate includes the value of all property to the extent of any property with respect to which the decedent has at the time of death a general power of appointment created after October 21, 1942. Section 2041(b) provides that the term "general power of appointment" means a power which is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate.

The predecessor statute to section 2041, enacted as section 402(e) of the Revenue Act of 1918, provided that the gross estate was to include any property passing under a general power of appointment exercised by the decedent by will. The legislative history underlying section 402(e) makes it clear that Congress equated a general power of appointment held at death with outright ownership at death and that section 402(e) was enacted to *clarify,* rather than extend, the estate tax provisions (which already provided for the inclusion of property owned outright by the decedent). The legislative history states:

> A person having a general power of appointment is, with respect to disposition of the property at his death, in a position . . . of its owner. The possessor of the power has full authority to dispose of the property at . . . death.

H. Rep. No. 767, 65th Cong. 2d Sess. 21 (1918).

Subsequent to the enactment of section 402(e), many states enacted estate tax statutes that adopted the federal provisions verbatim. In several cases, the Supreme Court was asked to consider section 402(e) and its successor federal statutes in the context of both federal and state estate tax matters. In these cases, the Court repeatedly equated the exercise of a general power of appointment at death with outright ownership of the property subject to the power. The Court reasoned that the economic realities of the decedent's control over the property are such that the decedent could obtain the property for his own estate, and thus dispose of it as his own. For example, in Graves et al., constituting the State Tax Commission of New York v. Schmidlapp et al., executors, 315 U.S. 657, 660 (1942), the Court stated, "For purposes of estate . . .taxation, the [general] power to dispose of property at death is the *equivalent of ownership* . . . It is a *potential source of wealth* to the appointee." [Emphasis supplied.] Similarly, "Decedent's complete and exclusive power to dispose of the [shares] at death was *property in his hands*." [Emphasis supplied.] 315 U.S. at 662. See also, Curry, State Tax Commissioner of Alabama v. McCanless, Commissioner of Finance and Taxation of Tennessee, 307 U.S. 357 (1939), ("The decedent's [general testamentary] power to dispose of the [shares] was *a potential source of wealth* which was *property in her hands*."); Estate of Rogers v. Commissioner, 320 U.S. 410 (1943), ("[The decedent] had complete dominion over this property and disposed of all of it at his fancy.")

Following the Supreme Court's lead, lower courts have consistently held that, for estate tax purposes, a general testamentary power of appointment is essentially identical to outright ownership, because the possessor's control over the disposition of the property is that of an outright owner in fee. Peterson Marital Trust v. Commissioner, 78 F. 3d 795, 800 (2d Cir. 1996), aff'g, 102 T.C. 790 (1994) ("For tax purposes, a general power of appointment has for many many years been viewed as essentially identical to outright ownership of property."); Estate of Kurz v. Commissioner, 68 F.3d 1027 (7th Cir. 1995); Estate of Rolin v. Commissioner, 588 F.2d 368 (2d Cir. 1978); Estate of Murphy v. Commissioner, T.C. Memo 1990-472, (involving powers also exercisable during life).

We emphasize that the courts and Congress reached this conclusion regarding property subject to a general power of appointment because, *as a practical matter*, where an individual possesses the power to appoint the property to his or her estate, the individual's rights with respect to the property, at the moment of death, have all the indicia of outright ownership. Thus, unlike the situation involving property includible in the gross estate under section 2044 considered by the courts in Estate of Bonner v. United States, 84 F.3d 196 (5th Cir. 1996) and Estate of Mellinger v. Commissioner, 112 T.C. 4 (1999), acq., 1999-2 C.B. xvi (discussed below), this is not a situation where the decedent has limited or no control over the property, but is deemed to own the property for estate tax purposes. Rather, in the case of the Trust A property includible in Decedent's gross estate under section 2041, Decedent possessed *actual control* over the property, and this actual control should be recognized for valuation purposes. Accordingly, because Decedent possessed a general testamentary power of appointment over a 44-percent interest, he was effectively the outright owner of the interest as he could freely direct the property to his estate and dispose of the property in the same manner as the assets owned outright. See, e.g., Peterson Marital Trust, supra, 78 F. 3d at 802 where the court stated:

> Mrs. Peterson's "ownership" of the trust corpus through her general power of appointment was not a fiction. She had, at all times, the power to decide what to do with those funds. She could take up to half the property during her life. And she could appoint the rest by will to anyone she chose, including her estate or the creditors of her estate. In other words, every bit of the property was subject to being used for her own benefit.

To the same effect, see Peterson Marital Trust v. Commissioner, 102 T.C. at 800.

Sections 2056(b)(5) and 2056(b)(7)

Further, this position is consistent with the recent litigation concluding that fractional or minority interests in property held in a trust qualifying as qualified terminable interest property (QTIP), includible in the decedent's gross estate under section 2044, is not aggregated for valuation purposes with fractional or minority interests in property owned outright by the decedent. Estate of Bonner v. United States, 84 F.3d 196 (5th Cir. 1996); Estate of Mellinger v. Commissioner, 112 T.C. 4 (1999), acq., 1999-2 C.B. xvi; Estate of Lopes v. Commissioner, TCM 1999-225; Estate of Nowell v. Commissioner, TCM 1999-225. As discussed below, the nature of the surviving spouse's interest in a marital deduction trust subject to a general power of appointment and includible in the gross estate under section 2041 is fundamentally different from the QTIP trust situations previously addressed by the courts.

Section 2056(a) provides that the value of the taxable estate shall, except as limited by subsection (b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse.

Section 2056(b)(1) denies a marital deduction for interests passing to the surviving spouse that are "terminable interests"; that is, interests in property passing to the surviving spouse that will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur, where on termination, an interest in the property passes to someone other than the surviving spouse.

Section 2056(b)(5) provides an exception to this terminable interest rule. Under section 2056(b)(5), an otherwise terminable interest in property passing to the surviving spouse will qualify for the marital deduction, if the surviving spouse is entitled for life to all the income from the property and the surviving spouse has the power to appoint the property in favor of the surviving spouse, or the surviving spouse's estate. The power must be exercisable by the spouse alone and in all events and can be exercisable either during life, or at death.

Section 2056(b)(7) provides another exception to the terminable interest rule in the case of qualified terminable interest property (QTIP). Under section 2056(b)(7), for purposes of section 2056(a), qualified terminable interest property is treated as passing to the surviving spouse, and no part of such property is treated as passing to any person other than the surviving spouse.

In general, under section 2056(b)(7)(B)(i) and (ii) "qualified terminable interest property" means property which passes from the decedent, in which the surviving spouse is entitled for life to all the income from the property, payable annually or at more frequent intervals, and no person has a power to appoint any part of the property to any person other than the surviving spouse.

Section 2044(a) provides that the value of the gross estate shall include the value of any property to which the section applies in which the decedent had a qualifying income interest for life. Under section 2044(b), section 2044 applies to any property if a deduction was allowed with respect to the transfer of the property to the decedent under section 2056(b)(7). Section 2044(c) provides that for purposes of the estate tax and the generation-skipping transfer tax, property includible in the gross estate of the decedent under section 2044(a) is treated as property passing from the decedent.

The legislative history underlying the enactment of the predecessor to section 2056(b)(5) indicates that Congress desired to afford testators the added flexibility of passing property to the spouse in trust, provided the trust met the statutory requirements. The statutory provisions requiring that the spouse receive all trust income and possess a general power of appointment exercisable in all events were designed to ensure that, notwithstanding that the property was held in trust, the spouse was the "virtual owner of the property," and that the property would be included in the spouse's gross estate on her death by virtue of the spouse's general power of appointment. See S. Rep. No. 1013 (Pt.2) , 80th Cong. 2d Sess. 16 (1948); H.R. Rep. No. 201, 97th Cong., 1st Sess 160 (1981); Estate of Howard v. Commissioner, 910 F.2d 633 (9th Cir. 1990).

On the other hand, under the section 2056(b)(7)/section 2044 statutory scheme considered by the courts in Estate of Bonner v. United States and Estate of Mellinger v. Commissioner, Congress eliminated the requirement that the spouse receive a general power of appointment over the trust corpus. The underlying legislative history indicates Congress' concern that if the surviving spouse was granted total control over the disposition of the trust assets (as was required under section 2056(b)(5)), the deceased spouse would be unable to ensure that the trust property would ultimately pass to the natural objects of his or her bounty. Accordingly, section 2056(b)(7) was enacted as a means to ensure that the predeceased spouse controlled the disposition of the trust assets and not the surviving spouse, as was the case with a section 2056(b)(5) trust. H.R. Rep. No. 201, 97th Cong., 1st Sess 160 (1981). Section 2044 operates to include the trust assets in the surviving spouse's gross estate, notwithstanding that the surviving spouse has no ownership interest or control over the trust assets. The practical application of section 2056(b)(7) in conjunction with section 2044 is explained in Estate of Bonner v. United States, as follows:

> [The predeceased spouse] controlled the disposition of her assets, first into a trust with a life interest for [the surviving spouse] and later to the objects of her largesse. The assets, although taxed as if they passed through [the surviving spouse's] estate, in fact were controlled at every step by [the predeceased spouse] . . . At the time of [the surviving spouse's death], his estate did not have control over [the predeceased spouse's] interests in the assets such that it could act as a hypothetical seller negotiating with willing buyers free of the handicaps associated with fractional undivided interests.

Estate of Bonner v. United States, 84 F.3d at 199. See also, Estate of Mellinger v. Commissioner, 112 T.C. at 35-36 ("Furthermore, at no time did decedent possess, control or have any power of disposition over the . . . property in the QTIP trust.")

This application of the section 2056(b)(7)/section 2044 statutory scheme is in stark contrast to the section 2056(b)(5)/section 2041 regime. As discussed above, section 2056(b)(5) places the spouse in the position of "virtual owner" of the trust property with *complete control* over the disposition of the trust. Thus, there is a fundamental difference between the section 2056(b)(5) trust considered in this case, and the section 2056(b)(7) trust previously considered by the courts. In this case, Decedent, as a beneficiary of a section 2056(b)(5) trust, possessed unlimited control over the disposition of the trust assets by reason of the general power of appointment. As discussed above, assets subject to a general power of appointment, historically, have been recognized by Congress and the courts as effectively owned by the power holder. Conversely, a surviving spouse who is a beneficiary of a section 2056(b)(7) trust has no such control. Rather, as the court emphasized in Estate of Bonner, the predeceased spouse retains the control and irrevocably designates the persons to take the property at the surviving spouse's death.

Taxpayer's arguments

The estate argues that the 44-percent interest over which Decedent held a general power of appointment should be valued separate and apart from the 50-percent block that Decedent held outright with the result that the interests would be treated as two separate minority interests, rather than a single controlling interest.

First, the estate argues that aggregation, for valuation purposes, of the stock includible in the gross estate under section 2033 with the stock includible under section 2041 requires specific statutory authority. The estate relies on several "family attribution" cases, where the courts declined to aggregate, for valuation purposes, minority or fractional interests owned by the decedent (and included in the gross estate) with interests owned by other family members. For example, in Propstra v. United States, 680 F.2d 1248,1251 (9th Cir. 1982), the court noted that Congress specifically authorized unity of ownership or family aggregation principles in applying certain Code sections such as sections 267, 318, and 544. The court declined to apply these principles in the estate tax area in computing the value of the decedent's assets "[i]n the absence of similarly explicit directives." See also, Estate of Bright v. United States, 658 F.2d 999 (5th Cir. 1981).

The estate also relies on Estate of Bonner v. United States, (holding that property included under section 2044 is not aggregated with property includible under section 2033) where the court stated, "[a]lthough section 2044 contemplates that the QTIP property will be treated as having passed from [the decedent] for estate tax purposes, the statute does not require, or logically contemplate that in so passing, the QTIP assets would merge with other assets."

In Propstra and Estate of Bright, the courts declined to aggregate the decedent's interests with interests *owned by other family members* that were not transferred by the decedent and were not subject to the decedent's control. Under these circumstances, the courts found that there was no assurance that family members would act in concert in managing and disposing of their interests. Further, the hypothetical willing buyer-willing-seller standard for valuation is to be applied only to the interest actually transferred by the decedent. See, e.g., Propstra v. United States, 680 F.2d 1248,1251 (9th Cir. 1982), ("[T]he property to be valued . . . is that which the decedent actually transfers at his death."); Estate of Bright v. United States, 658 F.2d 999 (5th Cir. 1981), ("[T]he valuation is determined by the interest that passes.") [2]

In the situation presented here, Decedent had total control, and the functional equivalent of outright ownership, over the Trust A stock. Under these circumstances, no specific statutory authority is required to aggregate the two blocks of stock. Rather, we believe there is little practical distinction between the situation presented in Ahmanson, where the single block of stock was held as a unit at the moment of death in decedent's revocable trust, and the situation presented in the instant case, where the stock was held partially in the Decedent's estate and partially in a trust subject to disposition at the decedent's total discretion. There should be no need for any explicit statutory directive to

[2] See also, Estate of Pillsbury v. Commissioner, T.C. Memo 1992-425, where the court found that a fractional interest held in one trust that was included in the decedent's gross estate could not be aggregated with a fractional interest held in a second trust that was neither included in the gross estate nor subject to the decedent's disposition, even though the same trustee administered the trusts. The court found that under the willing buyer-willing seller test, the hypothetical seller is regarded as selling only the interest included in the gross estate.

aggregate the two interests under these circumstances. Rather, the courts' rationale and conclusions in these cases lend support to the Service's position of aggregation under the circumstances here.

Similarly, as discussed above, Estate of Bonner (as well as Estate of Mellinger v. Commissioner, Estate of Lopes v. Commissioner, and Estate of Nowell v. Commissioner) address the section 2056(b)(7)/section 2044 regime where the decedent had no control over the disposition of the trust assets, and on that basis, in the absence of statutory authority, the courts declined to apply aggregation. See, e.g., Estate of Bonner v. United States, 84 F.3d at 199 ("[[T]he predeceased spouse] controlled the disposition of her assets . . . to the objects of her largesse."). In view of the significant difference between the control over the Trust A assets exercisable by the Decedent in the instant case, and the total lack of control exercisable by the decedent in the section 2056(b)(7)/section 2044 situation presented in Bonner, the court's statement regarding the application of section 2044 can hardly be viewed as applying to this case, where the assets are includible under section 2041 by virtue of Decedent's complete de facto control over the disposition of the assets. Indeed, the quoted language relied on by the estate is directly followed by a statement emphasizing the predeceased spouse's retention of control over the disposition of the assets at the surviving spouse's death.

Consequently, the statement in Estate of Bonner should not be viewed as applying to other inclusion sections. For example, it would seem beyond argument that if a decedent distributed minority or fractional interests among multiple revocable trusts, all includible in the gross estate under section 2038, these separate interests would be aggregated for valuation purposes. There would seem to be no need to find any specific statutory authority for this result. See, Estate of Curry v. United States, 706 F.2d at 1429. See also, Citizens Bank & Trust Company v. Commissioner, 839 F.2d 1249 (7th Cir. 1988), aff'g Northern Trust Company v. Commissioner, 87 T.C. 349 (1986).

Finally, from the very inception of the federal estate tax, sections 2041 and 2033 (and their predecessor statutes) have been treated as alter ego provisions. As discussed above, Congress viewed the enactment of the predecessor statute to section 2041 as a clarification of, and an addendum to, section 2033. H.R. Rep. No. 767, supra. The Supreme Court followed through on this Congressional viewpoint by treating the exercise of a general testamentary power of appointment as a transfer directly from the decedent's own hands. Graves et al., constituting the State Tax Commission of New York v. Schmidlapp et al., executors, supra; Curry, State Tax Commissioner of Alabama v. McCanless, Commissioner of Finance and Taxation of Tennessee, supra; Estate of Rogers v. Commissioner, supra.

The estate next cites language in the Tax Court's decision in Estate of Mellinger v. Commissioner where the court, in reaching the conclusion that assets includible under section 2044 are not aggregated with assets includible under section 2031, stated:

> Furthermore, at no time did decedent possess, control, or have any power of disposition over the . . . [property] in the QTIP

> trust. Cf. secs. 2035, 2036, 2041 (requiring inclusion in the gross estate where a decedent had control over the assets at some time *during her life*).

Estate of Mellinger v. Commissioner, 112 T.C. 35-36 (emphasis added.)

The estate infers that the reference to control "during her life" indicates that the Tax Court would not view a testamentary general power, which can only be exercised to dispose of the property at death, as according the decedent sufficient control over the property to justify aggregation. For several reasons, we do not agree.

First, we believe the statement, as it applies to testamentary powers, merely recognizes that in the case of a testamentary power, the power holder has the power to dispose of the assets at death but exercises that power during life by executing the appropriate instrument. Thus, the power holder has lifetime control over the property in the sense that the power holder's control is exercised during life, and becomes effective on death. Many courts have characterized testamentary general powers of appointment as providing the holder with lifetime control. For example, in Fidelity-Philadelphia Trust Co., v. Rothensies, 324 U.S. 108 (1945), the decedent held a contingent testamentary general power of appointment and the Court commented that, "[T]he ultimate disposition of all the trust property was suspended during the life of the decedent." See also, Goldstone v. United States, 325 U.S. 687 (1945) (applying the decision in Fidelity-Philadelphia Trust Co. to a decedent's reversionary interest). In Peterson Marital Trust v. Commissioner, 102 T.C. 790, 800 (1994), aff'd, 78 F.3d 795 (2d Cir.1996), the Tax Court characterized the surviving spouse, as the holder of a testamentary general power of appointment, as having "maintained effective control over the disposition of the property in the marital trust until her death." [3] Thus, we do not believe the quoted language can reasonably be viewed as referencing only inter vivos general powers of appointment.

In any event, it should make no difference for valuation purposes whether Decedent's power could or could not be exercised during his life. By virtue of the testamentary power, at the moment of death, the Decedent possessed complete control over the disposition of Trust A, as well as the stock in Corporation he owned outright. The two blocks should be valued as a unit, because, at the moment of death, these two blocks became subject to disposition by the Decedent as a unit. See United States v. Land, supra.

Finally, the estate argues that in Estate of Nowell the decedent possessed a testamentary limited power of appointment over the trust assets, and, thus, could exercise a degree of control over the disposition of the trust assets at death. Nonetheless, the court did not take this power into account in finding that aggregation was not appropriate. We

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[3] In Peterson, the spouse possessed a right to withdraw up to one-half the corpus during her life and a general testamentary power to appoint the remaining corpus at her death. The court's focus in this statement was on the testamentary power.

recognize that in some situations, a limited power of appointment may afford the holder broad powers of disposition. However, the power holder would not, in any event, be authorized to appoint the property to his or her estate (or his or her creditors) as is the situation presented with a general power.

Thus, there is a significant practical difference between the two kinds of powers, and this difference is reflected in the tax treatment accorded the two powers. For tax purposes, property subject to a limited power is not treated as effectively owned by the power holder, and is not subject to inclusion in the gross estate. Given the nature of a limited power, and the fact that a limited power is not recognized for estate and gift tax purposes as affording the power holder sufficient control to generate any transfer tax consequences when possessed or exercised, the court in Estate of Nowell was justified in treating a QTIP trust subject to a limited power in the same manner as a QTIP trust where the remainder beneficiaries are designated by the first spouse to die. However, as discussed above, it does not follow that the same result should obtain in this case where the Decedent possessed a general power of appointment over Trust A.

[redacted]

[redacted]

Please call if you have any further questions.

By:GEORGE MASNIK
Chief, Branch 4