INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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CASE MIS No.:	TAM-100284-03/CC:PSI:B4

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No:

Date of Conference:

LEGEND:

Decedent	=
H	=
Son 1	=
Son 2	=
Painting	=
X	=
Bank	=
Date 1	=
Date 2	=
$m	=
$n	=

ISSUE:

Is Painting, for which an estate tax marital deduction was claimed and allowed on the estate tax return (Form 706) filed by the estate of Decedent's spouse, H, includible in Decedent's gross estate pursuant to the doctrine of duty of consistency?

CONCLUSION:

The doctrine of duty of consistency applies in this case. Accordingly, Painting is includible in Decedent's gross estate.

FACTS:

Decedent's spouse, H, died testate on Date 1, survived by Decedent and H's two children from a prior marriage, Son 1 and Son 2. Decedent, X, and Bank were appointed as co-executors of H's estate.

Under Section IV of H's will, H bequeathed to Decedent a life estate in certain personalty including "all oil paintings. . ." (Section IV property). Upon Decedent's death, all of the property subject to this Section IV life estate was to pass to H's children, Son 1 and Son 2, in equal shares.

Under Section V of H's will, H bequeathed to Decedent a life estate in other personalty including "all furniture, rugs, carpets, draperies, books, chinaware, and household goods and equipment" situated in H's two residential properties (Section V property). Under Section V, Decedent also had the power to "use, consume, sell or otherwise dispose of all or any part of the [Section V property] during her lifetime as she may see fit. . . ." On Decedent's death, the property subject to Section V is to pass outright, in equal shares, to the children of H who survive him. The residue of H's estate is to be divided equally into 3 separate shares, with one of the shares to be held in trust for the benefit of each of Decedent, Son 1, and Son 2. The one-third share passing for the benefit of Decedent was to be held in a trust intended to qualify as qualified terminable interest property (QTIP), described in section 2056(b)(7) of the Internal Revenue Code.

Among the personal property included in H's gross estate were a number of paintings including Painting. Schedule F of Form 706, United States Estate Tax Return (March 1985 Revision), Item 19, lists, "Household furniture, artwork, and miscellaneous personal property. Valued as per attached appraisal." The appraisal attached to the return lists Painting as "Item 198" as follows: "Pastel attributed to [the artist that painted Painting], 35½" x 26" - $m." The executors of the estate determined that, because Panting was identified as a pastel, rather than an oil painting, Painting did not pass under Section IV of the will, but rather under Section V. On the Form 706, a marital deduction was claimed for the value of the Section V property, including Painting, under section 2056(b)(5). Specifically, Schedule M, Item 5, lists, "Household contents and personal effects included in Schedule F, Item 19, passing pursuant to Section V of Will." In addition, on Schedule M, the executors elected to treat the property passing to the QTIP trust for the benefit of the Decedent as qualified terminable interest property under section 2056(b)(7) and a deduction was claimed for the value of that trust. A QTIP election was not made, and a marital deduction was not claimed, for the value of the Section IV property.

Decedent died testate on Date 2. Decedent's two sons and Decedent's attorney were appointed as the co-executors of Decedent's estate. Article VI, Section 6.1(c) of Decedent's will provides, generally, that any estate taxes attributable to the inclusion of property in the gross estate under section 2041 shall be apportioned against such property.

Shortly after Decedent's death, Painting was sold for $n. It has been determined that the Painting is, in fact, an oil painting. Accordingly, Decedent's estate contends that Painting passed under Section IV of H's will rather than Section V, and therefore, Decedent never possessed a general power of appointment over the painting. Accordingly, Painting is not includible in Decedent's gross estate. Decedent's estate acknowledges that the marital deduction claimed for Painting in H's estate was erroneous, and that the painting should have been subject to estate tax in H's estate.

LAW AND ANALYSIS:

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by section 2001, the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse to the extent such interest is included in determining the value of the gross estate. Section 2056(b)(1) provides that a marital deduction is not allowed in the case of a terminable interest passing to the spouse; that is, an interest that passes to the spouse that will terminate or fail on the lapse of time or the occurrence of an event. However, section 2056(b)(5) provides an exception to the terminable interest rule of section 2056(b)(1). Under section 2056(b)(5), an interest passing to the spouse will not be considered a terminable interest if the spouse is entitled to all the income from the property, and the spouse possesses a general power to appoint the property, exercisable alone and in all events, either during the spouse's life time, or at the spouse's 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), QTIP property is treated as passing to the surviving spouse and no part of the property is treated as passing to any person other than the surviving spouse.

Under sections 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, and no person has a power to appoint any part of the property to any person other than the surviving spouse. In order to qualify as QTIP property, the executor must elect to treat the property as QTIP property on the estate tax return.

Section 2041 generally provides for the inclusion in the gross estate of all property to the extent to which the decedent possesses, at the time of death, a general power of appointment with respect to the property.

Sections 2044(a) and (b) provide generally that the value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under section 2056(b)(7).

The duty of consistency, sometimes referred to as quasi-estoppel, is an equitable doctrine that federal courts historically have applied in appropriate cases to prevent unfair tax gamesmanship. Kielmar v. Commissioner, 884 F.2d 959, 965 (7th Cir. 1989). The duty of consistency doctrine is based on the theory that the taxpayer owes the Commissioner the duty to be consistent in the tax treatment of items and will not be permitted to benefit from the taxpayer's own prior error or omission. Generally, the doctrine precludes the taxpayer from taking one position on one tax return and a contrary position on a subsequent return after the limitations period has run for the earlier year, if such contrary position would harm the Commissioner. Cluck v. Commissioner, 105 T.C. 324, 331 (1995).

In order for the doctrine of the duty of consistency to apply in a particular case, three elements must be present: (1) a representation by the taxpayer; (2) reliance on the representation by the Internal Revenue Service (Service); and (3) an attempt by the taxpayer, after the statute of limitation on assessment has expired, to change the representation. Because the duty of consistency is an affirmative defense, the proponent of the doctrine bears the burden of proving that it applies. Cluck v. Commssioner, 105 T.C. at 332.

As described above, the doctrine applies where the same taxpayer makes conflicting representations. However, the duty of consistency can also be applied to bind one person to a representation made by another where the two are deemed to be in privity. Whether there is sufficient identity of interests between the parties to warrant the application of the duty of consistency depends on the facts and circumstances of each case. Estate of Letts v. Commissioner, 109 T.C 290 (1997); Cluck v. Commissioner, 105 T.C at 333-336 (concluding that a husband and wife can have interests so closely aligned that one spouse may be estopped under the duty of consistency doctrine by the prior representations of the other spouse). See also, Beltzer v. United States, 495 F.2d 211 (8th Cir. 1973) (estate beneficiary was bound by representation of value made by the executor-beneficiary of the estate); Griffith v. United States, 27 AFTR 2d 754 (N.D. Tex. 1971); McMillan v. United States, 14 AFTR 2d 5704 (S.D. W. Va. 1964); Hess v. United States, 537 F.2d 457 (Ct. Cl. 1976); Ford v. United States, 276 F. 2d 17 (Ct. Cl. 1960) (estate beneficiaries who were minors at the time the estate was administered were not bound by estate representations as to the value of inherited property).

In Estate of Letts v. Commissioner, cited above, the decedent's husband's will created a marital trust for the benefit of the decedent that was intended to qualify as QTIP property, for purposes of the federal estate tax marital deduction. Decedent's only interests in the trust were a right to receive all trust income, a right to withdraw up to $40,000 per year and a right to receive at the trustee's discretion, distributions of principal for her comfort maintenance and support. In preparing Schedule M of the estate tax return, the executors of husband's estate checked the "no" box, utilized to signify that a QTIP election was not being made. However, the executors claimed a marital deduction for the value of the property passing to the marital trust. Upon the decedent's death, the decedent's estate contended that the marital trust was not includible in the Decedent's gross estate under section 2044, or any other Code section, on the basis that the husband's estate, by checking the "no" box, had not treated the property as QTIP property. Further, other than the power to withdraw $40,000 annually, the decedent had no general power of appointment over the property justifying inclusion under section 2041. The taxpayer further argued that a duty of consistency did not apply between the decedent's estate and the estate of her husband.

However, the Tax Court disagreed and found that there was a sufficient identity of interests between the husband's estate and decedent's estate such that the duty of consistency would apply. Initially, the Tax Court noted that, "[i]t is a basic policy of the marital deduction that property that passes untaxed from a predeceasing spouse to a surviving spouse is included in the gross estate of the surviving spouse." Estate of Letts v. Commissioner, 109 T.C. at 295. The court then concluded:

> There is a sufficient identity of interests between the Estates of James Letts, Jr., and of decedent to trigger the duty of consistency. Decedent and James Letts, Jr. were married. Their estates were a single economic unit. Decedent's husband left his estate to decedent, James P. Letts III, and Joanne Magbee [husband and decedent's children]. Decedent was an executrix of her husband's estate. James P. Letts III signed both returns. JoAnne Magbee is also a coexecutor of, signed the estate tax return for, decedent's estate.

Estate of Letts v. Commissioner, 109 T.C at 298.

In the instant case, we believe that the duty of consistency does apply to bind the Decedent's estate to the representations made by H's estate regarding the qualification of Painting for the marital deduction. Initially, we note that all three elements required for application of the duty of consistency have been satisfied. For purposes of the duty of consistency, a taxpayer's treatment of an item on a return can be a representation that facts exist which are consistent with how the taxpayer reports the item on the return. Estate of Letts v. Commissioner, 109 T.C. at 299. Several representations were made by H's estate on the estate tax return, regarding the treatment of the Painting for estate tax purposes. An appraisal attached to the federal estate tax return, identified Painting as a "pastel". H's estate represented that Painting passed under Section V of H's will. Further, by identifying the property as passing under Section V and claiming a marital deduction for Painting, the estate represented that Decedent possessed a life estate coupled with a general power of appointment with respect to Painting, that qualified Painting for the marital deduction under section 2056(b)(5). Thus, the first element has been met. Estate of Letts v. Commissioner, 109 T.C. at 300.

Further, the Service relied on the representations that Painting passed under Section V of the will, that Decedent had a general power of appointment with respect to Painting, and therefore that the Painting qualified for the marital deduction. The Service relies on a fact if a taxpayer files a return that contains an inadequately disclosed item of which the Service was not otherwise aware, the Service accepts the return, and the time to assess tax expires without an audit of that return. Estate of Letts v. Commissioner, 109 T.C. at 300. In the instant case, there was nothing on the estate tax return to alert the IRS as to any issue presented regarding the treatment of Painting, nor did H's estate provide any facts to show that Painting should have passed under Section IV and was not subject to the marital deduction. Thus, based on the representations made on the estate tax return, the Service allowed the marital deduction with respect to Painting. The Service may rely on a presumption of correctness of a return that is given to the Service under the penalties of perjury. Hughes & Luce, L.L.P. v. Commissioner, T.C. Memo. 1994-559. Further, the time to make an adjustment and assess tax with respect to H's estate has expired. Thus, the second element of the duty of consistency has been satisfied.

Finally, the Decedent's estate now maintains, contrary to prior representations, that Painting was not Section V property and, therefore Decedent did not possess a general power of appointment with respect to Painting and the marital deduction should not have been allowed with respect to the property. Accordingly, Decedent's estate argues that the value of Painting is not includible in Decedent's gross estate. As previously stated, the statute of limitations has expired as to H's estate. Further, Decedent's estate does not dispute that the third element has been met with respect to Painting. Therefore, the third element of the duty of consistency has been satisfied.

Although H's estate and Decedent's estate are different taxpayers, there is sufficient privity between H's estate and Decedent's estate such that Decedent's estate is bound by the representations made by H's estate under the duty of consistency doctrine. Specifically, H and Decedent were married. As the court noted in Estate of Letts, the basic policy rationale underlying the allowance of the estate tax marital deduction is that the property for which a deduction is allowed in the estate of the first spouse to die will be included in the gross estate of the second spouse to die. Thus, H's estate derived a specific tax benefit, a marital deduction, presumptively conditioned on consistent treatment of the assets for which a deduction was allowed in Decedent's estate. Accordingly, for transfer tax purposes, the two estates are treated as a single economic unit. Next, as a practical matter, H's estate and Decedent's estate functioned as a single economic unit, pursuant to which H's estate's property was to be available to the spouse during her lifetime and then pass to Son 1 and Son 2 when she died. Son 1 and Son 2 are the remainder beneficiaries of the interests created under Section IV and Section V of H's will, and the marital trust created under the residuary clause of H's will. The Section V property and the residuary marital trust are also included in Decedent's gross estate. Moreover, Decedent was a co-executor of H's estate. As co-executor, Decedent signed the Form 706 declaring, under the penalties of perjury, that she had examined the return, including accompanying schedules and statements, and to the best of her knowledge and belief, the return was true, correct and complete. Thus, as was the case in Estate of Letts, H's estate and Decedent's estate were in privity, both for purposes of disposing of H's property and for transfer tax purposes.

However, Decedent's estate contends that H's estate and Decedent's estate were not in privity, and therefore, the duty of consistency does not apply. In this regard, the estate notes that Decedent had little involvement with the preparation of H's estate's Form 706, and relied on the other co-executors to make all decisions regarding the Form 706, including the decision to characterize Painting as Section V property.

It has been clearly established by several courts that a co-executor's lack of participation does not preclude the application of the duty of consistency. In Beltzer v. United States, the taxpayer, a co-executor of his father's estate, inherited stock that had been reported on the estate tax return as having a fair market value of $59,713. After the statute of limitations on assessments against the estate expired, the taxpayer sold his shares for $140,000. For purposes of determining gain on the sale of the stock, the taxpayer asserted that the stock had a fair market value of $118,020 on the date of his father's death, despite the fact that he had signed the estate tax return and had received the benefit of the lower reported estate tax value. The taxpayer argued that he should not be bound by the estate's representation of value, because he relied on his co-executor to prepare the estate tax return. The court rejected this argument stating: "A taxpayer, in this situation, innocent or otherwise, who has already had the advantages of a past alleged misstatement – such advantage now beyond recoupment – may not change his posture, and by claiming he should have properly paid more tax before, avoid the present levy." Beltzer v. United States, 495 F.2d at 212-13. See also, Estate of Letts v. Commissioner, 109 T.C. at 298-299; McMillan v. United States, 14 AFTR 2d at 5704.

Alternatively, Decedent's estate contends that privity must exist between Son 1 and Son 2 and H's estate in order for the duty of consistency doctrine to apply. In support of this argument, Decedent's estate relies on Ford v. United States, 276 F. 2d 17 (Ct. Cl. 1960). In Ford, the decedent, a citizen of the United States and a resident of Brazil, owned stock in a Brazilian Corporation, which passed to his two minor children. The Commissioner agreed to the value of the stock reported by the executor, but litigated other issues. After the children reached majority, they sold their stock and in determining the gain to be recognized for income tax purposes, claimed a basis that was substantially in excess of the value at which the stock was included for estate tax purposes in determining the value of the gross estate. The court held that the duty of consistency did not estop the children from asserting that the stock had a value in excess of that reported for estate tax purposes. The court concluded that the children, although beneficiaries of the estate, were not bound by the estate's valuation of the stock because the children were minors at the time of the estate tax proceeding and had no knowledge of what was reported on the estate tax return.

The estate argues that in this case, under the terms of Decedent's will, Son 1 and Son 2 bear the burden of paying any estate tax generated by the inclusion of Painting in the gross estate and, therefore, they are the taxpayers to which the duty of consistency would apply. Similar to the situation presented in Ford, they did not have a fiduciary role in H's estate and did not participate in the preparation of H's or Decedent's estate tax returns.[1] Further, both had a strained relationship with Decedent. Accordingly, Son 1 and Son 2 were not in privity with H's estate.

The estate's reliance on Ford is misplaced. In Ford, the taxpayers involved were the decedent's estate, on the one hand, and the estate beneficiaries on the other, who sold the inherited property and were subject to income tax on the realized gain. In the instant case, as was the case in Estate of Letts, discussed above, the application of the duty of consistency turns on the relationship between H's estate, the taxpayer that made the representation, and Decedent's estate, the taxpayer attempting to change the representation after expiration of the statute of limitations has expired. Son 1 and Son 2, although beneficiaries of the marital property interests that bear the burden of payment of the estate tax, are not the taxpayers in this case. See Hess v. United States, 537 F.2d 457, 464 (Ct. Cl.1976), where the court concluded that the estate beneficiaries, who would bear the burden of payment of any income tax paid by the estate on gain realized on the sale of estate assets, were not the real parties in interest "since neither is the taxpayer here, nor filed the returns in issue, and therefore their interest are only derivative." Thus, neither Son 1's nor Son 2's relationship to the Decedent or their involvement, or lack of involvement, in the tax proceedings, is a necessary element in determining whether the duty of consistency applies in this case.

Moreover, Ford is clearly distinguishable to this case. The taxpayers in Ford were minor children who inherited stock from their deceased father's estate. Neither child was a fiduciary or was legally required to participate in the administration of their father's estate. In this case, Decedent, whose estate is the taxpayer, was an adult, a co-executor, and a beneficiary of H's estate, the other taxpayer. Other courts have also distinguished Ford on a similar basis. Hess v. United States, 537 F.2d at 464 (trustees of the residual trust were also co-administrators of the estate that made the representation as to value on which the Service relied); Beltzer v. United States, 495 F.2d at 213 (Ford distinguished on the ground that taxpayer, an adult, served as co-executor of his father's estate); Griffith v. United States, 27 AFTR 2d 754 (N.D. Tex.

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[1] Son 1 states in an affidavit submitted in conjunction with the request for technical advice that he received a copy of the Form 706 filed by H's estate after it was filed, and after the return was filed, met with an officer of Bank to review matters relating to the partial distribution of his inheritance. There is no indication that the treatment of Painting was ever questioned.

1971) (Ford distinguished on the ground that taxpayer, an adult, served as executrix of her deceased husband's estate); McMillan v. United States, 14 AFTR 2d 5704 (S.D. W. Va. 1964) (Ford distinguished on the ground that taxpayers were adults when they served as co-executor of their father's estate); Estate of Letts v. Commissioner, 109 T.C. at 298 ("[H]ere in contrast to Ford, decedent was an adult, a co-executor, and a beneficiary of the estate of her husband").

As discussed above, under the facts presented here, there is sufficient privity between H's estate and Decedent's estate such that Decedent's estate should be bound by the representations made by H's estate under the duty of consistency doctrine. Accordingly, Painting is includible in Decedent's gross estate.

CAVEAT

A copy of this technical advice memorandum is to be given to the taxpayers. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.