

T&E - Tax Alert October 12, 2007

Estate of Virginia A. Bigelow vs. Commissioner U.S. Court of Appeals for the 9th Circuit No. 05-75957 filed Sep. 14, 2007 [see Tax Court Memo 2005-65 filed March 30, 2005]

The facts are bad for the Estate: an 85 year old widow had transferred beach property to a trust, whose trustee became the general partner of an FLP. The limited partners were the widow and her children, who contributed \$100 for the privilege. The property was encumbered by a mortgage, as well as a line of credit for which the widow remained personally liable. The FLP did not assume the debt; however, the FLP made substantial payments to the lenders. The FLP also covered the growing shortfall between the widow's income and her expenses, treating such payments as undocumented advances on her partnership account. At the time of death, an estate return was filed indicating a combined 37% discount for minority and lack-of-marketability of the partnership interests. The Tax Court decided that there was an implied agreement for the widow to continue enjoying partnership income in order to meet her living expenses. It also decided that the transfer did not meet the "good faith, bona fide sale" exception to IRC 2036(a) as the transfer was to impoverish the widow but for the implied agreement for support.

The 9th Circuit agreed on both counts. However, the Court did agree with the 3rd and 4th Circuits which have rejected the so-called "per se" rule: the Court, instead stated that an inter vivos transfer of real property to an FLP, which inherently reduces the fair market value of the resultant partnership interests, does not *per se* disqualify the transfer from falling under IRC 2036(a)'s exception."

The Court also remarked that one needs more than a proportional exchange, and that a genuine pooling of interests must exist. Gauging the validity of a bona fide transfer must be made "independently of the non-tax related business purposes." The Court thus found for the Commissioner in full. The decision is available on the Court's website located at: [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/340ABB926DF09C948825735600531093/\\$file/05759.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/340ABB926DF09C948825735600531093/$file/05759.pdf) and a copy has been placed on my practice's website at: <http://www.NYNJCT-BV.com/BigelowAppeal9th.pdf>

Do not hesitate to call or e-mail to discuss this or any other valuation issue.

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