

## **T&E - Tax Alert November 26, 2007**

Estate of Frazier Jelke III vs. Commissioner U.S. Court of Appeals for the 11<sup>th</sup> Circuit No. 05-15549 filed Nov. 15, 2007 [reversing in part T.C. Memo 2005-131 filed May 31, 2005]

This decision reversed a tax court decision involving the discount for Built-In Capital Gains tax related to a minority interest in a C corporation invested primarily in a portfolio of marketable securities. The tax court had agreed with the Service's appraiser in calculating the BIG tax benefit by spreading it over the apparent average life of the portfolio, itself based on a small historical annual turnover of 6%. The Estate, on the other hand, took a discount equal dollar for dollar to the BIG tax. The Appeals court agreed with the estate and reversed.

The reasons given for the appeals court's majority include: present valuing the tax benefits does not reflect the reality of the portfolio; the Dunn case which requires the assumption of liquidation - despite the minority status and the fact that it was not contemplated here; the court's preference for a "snap shot" approach; the speculative nature of the exact timing of securities sales; the fact that a tax liability would not be ignored by a buyer.

The case was not a total win for the tax payer, however, as the appeals court affirmed the lack-of-control and lack-of-marketability discounts selected by the tax court: the estate wanted 20% and 35%, the Service 5% and 10%, and the tax court had selected 10% and 15%, respectively. On that subject, the appeals court affirmed the tax court.

This now places 4 appeals circuits on the side of taking a dollar for dollar deduction for Built-In Capital Gains tax in a C corporation: 2<sup>nd</sup> [Eisenberg;] 6<sup>th</sup> [Welsh;] 5<sup>th</sup> [Jameson;] 5<sup>th</sup> [Dunn; and now 11<sup>th</sup>.

The decision can be found at:

<http://www.ca11.uscourts.gov/opinions/ops/200515549.pdf> A copy has been placed on my practice's website at <http://www.NYNJCT-BV.com/Jelke11thCappeal.pdf>

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

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