

THE UNCERTAIN FUTURE OF FAMILY LIMITED PARTNERSHIPS IN ESTATE TAX PLANNING

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I. INTRODUCTION

Over the past few decades, estate planners eagerly employed a remarkable tool to help donors transfer wealth within families and decrease their gift and estate taxes. The family limited partnership, often funded with personal investment assets, ensured that those assets passed, at reduced gift and estate tax values. At the same time, the Internal Revenue Service sought to find the Achilles' heel of family limited partnerships, finally succeeding with its argument that they often ran afoul of §2036 of the Internal Revenue Code. Although the Service and the Tax Court seemingly struck a balance by differentiating between those taxpayers who form partnerships for the sole purpose of reaping the benefits of valuation discounts, and those who legitimately form theirs for investment or business purposes, the Service nevertheless continues to attack family limited partnerships. The past year bore witness to some cases that suggest that the Service is no longer content in challenging only those family limited partnerships fraught with taxpayer abuse and misuse. Other recent cases suggest that the Service is reviving some of its previously unsuccessful arguments, which may now operate to prevent taxpayers from reaping their benefits. As a result, it is increasingly difficult for estate planners to safely predict the outcomes of family limited partnership planning. While prudent planners may still use family limited partnerships to effect their clients' goals, the future of such devices seems bleak.

This paper examines the decline of family limited partnerships in gift and estate tax planning by beginning, in Part II, with a discussion of their origins, including the potential gift

and estate tax advantages that may be made available through valuation discounts. Part III traces the rise of the technique within estate tax planning, and the initial responses and challenges of the Internal Revenue Service. Part IV will explore how family limited partnerships ballooned in popularity and prompted the Service's change of strategy, specifically targeting those taxpayers who used such partnerships only as a means of obtaining valuation discounts. Finally, Part V asks whether family limited partnerships will soon become obsolete in light of new case law and proposals before Congress. The paper concludes that due to the unpredictability associated with the Service's challenge of family limited partnerships, along with the ever-changing judicial climate, the use of family limited partnerships in estate tax planning are likely to become outdated in the near future.

II. THE DAWN OF FAMILY LIMITED PARTNERSHIPS IN ESTATE TAX PLANNING

What are family limited partnerships, and why have estate planners in recent decades encouraged their clients to form them? Family limited partnerships are simply limited partnerships formed under state law, and funded with the business or investment assets of one or more family members. The Revised Uniform Limited Partnership Act requires that a limited partnership have at least one general partner and one limited partner. In a typical family limited partnership structure, the parents (or in some cases grandparents) would take a general partnership interest and divide the limited partnership interests amongst the children or grandchildren. By taking a general partnership interest, the parents can control and manage the partnership. After the partnership is formed and funded, the parents effect a transfer of the underlying assets, to children and other descendants, by transferring the partnership interests.¹

The reason for the formation of so many of these entities seems quite curious to the untrained eye, but a brief look at how the tax base is determined under the transfer taxes sheds

light upon the motives. While the creators of such entities may establish them, in part, to further a variety of nontax motives, the potential valuation discounts which can drastically reduce the value of their donative transfers for federal gift and estate tax purposes are likely to be the lure which draws them in.

In general, §2001(a) of the Internal Revenue Code imposes a federal transfer tax “on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.”² Further, §2501(a)(1) imposes an annual transfer tax “on the transfer of property by gift” from any taxpayer.³ Sections 2031(a), 2032, and 2512(a) of the Code require that the property included in the gross estate, or subject to the gift tax, “shall be taxed on the basis of the value of the property at the time of death of the decedent, the alternate date if so elected, or the date of the gift.”⁴ The “value of the property” refers to the “fair market value” which is generally defined as “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.”⁵ In calculating the entire value of closely-held entities, such as family limited partnerships, there is no specific formula that can be followed. Rather, the appraiser needs to consider the facts and circumstances surrounding the partnership, including but not limited to:

- (a) The nature of the business and the history of the enterprise from its inception.
- (b) The economic outlook in general and the condition and outlook of the specific industry.
- (c) The book value of the stock and the financial condition of the business.
- (d) The earning capacity of the company.
- (e) The dividend-paying capacity.
- (f) Whether or not the enterprise has goodwill or other intangible value.
- (g) Sales of the stock and the size of the block of stock to be valued.
- (h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.⁶

The resulting amount represents the fair market value of the partnership as a whole. It is from this amount that the fractional share of the partnership interest transferred, or held by the decedent at his or her death, is then determined, taking into account various discounts for either a minority interest or lack of marketability.

Importantly, the lack of control or minority discount takes into account that the transferor did not have exclusive control over the partnership.⁷ Whether the transferor was a general or limited partner will also factor into the determination of how much of a discount will be applied.⁸ Other factors may also include his or her ability to vote, managerial powers, and other limitations placed upon him or her.⁹ On the other hand, the lack of marketability discount takes into account that the interest in the partnership is both not precise and is difficult to sell. More specifically, the discount accounts “for a ‘lack of liquidity’ in the interest itself on the theory that there is a limited supply of purchasers of that interest.”¹⁰ Importantly however, this discount applies to both minority and majority interests in the partnership.¹¹ It is these discounts that transferors often seek to take advantage of, since it allows transferors to transfer interests in the partnership for “values less than the proportionate share of the fair market value of the underlying assets.”¹² As estate planners realized that the availability of such discounts could substantially suppress valuation and thereby reduce transfer taxes, family limited partnerships became the go-to tool in the estate planner’s toolbox.¹³

III. THE RISE OF FAMILY LIMITED PARTNERSHIPS IN ESTATE TAX PLANNING: INITIAL CHALLENGES AND TRENDS

Initially, family limited partnerships enjoyed fairly favorable treatment by the Service. For instance, in *Estate of Harwood v. Commissioner*,¹⁴ the Tax Court allowed the decedent’s estate to claim a fifty percent discount on the valuation of retained partnership assets.¹⁵

However, by the 1990's, the Service began viewing those valuation discounts as unwarranted, and attempted to curtail their application.¹⁶ One attack sought to prove that the family limited partnerships lacked economic substance and business purpose and became known as the substance over form doctrine.¹⁷ While the Service used this argument during the 1990's¹⁸ it proved unsuccessful by the turn of the millennium with the decision in *Estate of Strangi v. Commissioner*.¹⁹

Interestingly enough, the Tax Court, sitting in the Fifth Circuit, concluded that the family limited partnership in *Strangi* was validly formed even though no active business was conducted by it and refused to consider the subjective intentions of its creators.²⁰ However, while it rejected the substance over form argument, the court suggested that the Service utilize §2036 as the basis of its future arguments, granting the Service leave to amend to add a claim under §2036.²¹ This would not be the last time that the Tax Court would consider the subjective intentions of the creators of the partnership. Years later, under a §2036 analysis, the Tax Court again would find that the same factor which had been considered insignificant originally, could be used, almost singularly, to disregard the partnership entity, causing the entire value of the partnership to be included in the transferor's gross estate for estate tax purposes.²²

In addition to the failed substance over form argument, the Service used the step transaction doctrine in conjunction with both §2703(a) and §2704(b) to attack the legitimacy of family limited partnerships.²³ Under §2703(a), which operates to disregard any restrictions on property when calculating its fair market value, the Service unsuccessfully argued that family limited partnerships are restrictions on property.²⁴ The Service further unsuccessfully argued that the term "property" in that section "means the underlying assets in the limited partnership and that the partnership form is the restriction that must be disregarded."²⁵ While this court, and

other courts, including the Texas District Court in *Church v. United States*,²⁶ previously struck down this argument, it would seem to find new life almost a decade later in the Tax Court case of *Estate of Holman v. Commissioner*.²⁷

Importantly, the Service also previously used §2704(b) as the basis of its attack. In relevant part, this section states that

[I]f there is a transfer of an interest in a corporation or partnership to (or for the benefit of) a member of the transferor's family, and the transferor and members of the transferor's family hold, immediately before the transfer, control of the entity, any applicable restriction shall be disregarded in determining the value of the transferred interest.²⁸

The Service argued that the partnership agreement either contained an “applicable restriction,” or was an “applicable restriction” itself within the purview of §2704(b) and should therefore be disregarded in determining the value of the interest transferred. This argument proved unsuccessful time and time again; however, it has apparently paved the way for a revival of this line of attack as will be seen.²⁹

During the early to mid-1990's, the Service began to consider the possible application of §2036 to family limited partnerships. In early private letter rulings and technical advice memoranda it was unsure of the strength of the §2036 argument, and concluded that inclusion under §2036 was foreclosed where the transferor owed a fiduciary duty to the other partners. Contrary to today's standards, in Technical Advice Memorandum 91-31-006, the Service decided that §2036 did not apply to include the partnership assets in the decedent's gross estate where the decedent retained interests allowing her to control management of the partnership, and where she transferred her interests just prior to death, retaining only a minority interest.³⁰ Similarly, in Private Letter Ruling 94-15-007, the decedent, as general partner, had exclusive control of management and a consequent fiduciary duty to the limited partners to act in the best

interests of the partnership. Citing to *United States v. Byrum*,³¹ the Service ruled that the interest was not included because the management powers were limited by the fact that the transferor owed a fiduciary duty to the limited partners.³²

During these initial years of challenging family limited partnerships, the Service proved most unsuccessful, giving the proverbial “thumbs up” to estate planners to use this entity to depress transfer tax valuation for their clients. Having chosen the wrong statutory authority for attacking family limited partnerships, the Service was unarmed for what would come. Unknowingly, it also undercut the most effective argument it had, the one based upon §2036, by adding a fiduciary duty exception which could be used by almost any partnership to preclude the application of §2036. Interestingly enough, the Service would soon realize the sage advice of the *Strangi* court and take the opposite position that it had taken in the early Private Letter Rulings and Technical Advice Memoranda; but for now, it seemed oblivious to the potential for attack given by §2036. However, it was not very long until the Service became aware of its folly and its strategy would take a marked turn.

IV. THE ZENITH OF FAMILY LIMITED PARTNERSHIPS: A SHIFT IN IRS STRATEGY AND CONCENTRATION ON ABUSIVE TAXPAYER BEHAVIOR

A. THE GREAT SCHISM OF 1997

Prior to 1997, it became abundantly clear that the family limited partnership floodgates had opened as taxpayers began taking advantage of the Service’s considerable losses. The Treasury Department began to seek assistance from Congress in the area of family limited partnerships and limited liability partnerships, but the legislature declined to help. The Treasury was further rebuffed by Congress when in 1994, it attempted to include family limited partnerships and the transfer tax in the partnership “anti-abuse” Regulations.³³ In 1997, having

lost a flurry of cases on previous theories and unable to secure the help of Congress, the Service reformatted its argument and began a new line of attack.³⁴ While taxpayers continued to form partnerships for the sole purpose of taking advantage of valuation discounts, the Service began solidifying its position with the use of a new §2036 analysis.

Section 2036 operates to include in the decedent's gross estate the value of all property which the decedent transferred, but retained the possession or enjoyment of, the right to income from, or the right to designate who should enjoy the property or income, for the decedent's life or any period which cannot be calculated without reference to the decedent's death.³⁵ Importantly, however, the statute provides a parenthetical exception for any transfer made as a bona fide sale for full and adequate consideration for money or money's worth.³⁶ Where the decedent's estate can prove that this exception applies, the full value of the family limited partnership assets will not be included in the decedent's gross estate, and in all likelihood, the estate will be entitled to take a valuation discount on the value of the partnership assets.

In the 1997 case of *Estate of Schauerhamer v. Commissioner*,³⁷ the Service successfully utilized its renewed §2036 argument. The decedent in *Schauerhamer* had formed three partnerships, one for each of her children, named herself as managing and general partner for each, and funded them with her business holdings. Each child received, by way of gift, both a limited and general partnership interest for their respective partnership.³⁸ The Tax Court, sitting in the Tenth Circuit, ruled that where the decedent's relationship with the transferred assets remains the same after the transfer as before, §2036(a)(1) requires that the value of the assets be included in the gross estate. In finding the assets includible, the court found probative the fact that decedent had retained the property's entire income stream; that there was an implied agreement among the partners that decedent retain economic benefits of the property transferred;

that the income derived from the partnerships' assets had been commingled with her personal assets and income derived from other sources; and that the property was managed the same as it had been in the past.³⁹ Interestingly enough, the entire decision is devoid of any mention of a fiduciary duty exception, evidencing an apparent end to this short-lived and contrived exception.

B. CONCENTRATION ON MISUSE OF FAMILY LIMITED PARTNERSHIPS

After *Schauerhamer*, it appeared that at the very least, the family limited partnership entity would be included in the gross estate under §2036 where there was taxpayer abuse and misuse of the tax system; for instance, where the decedent's relationship with the transferred assets remained the same after the transfer as before, where the decedent retained the entire income stream from the transferred property, and commingled partnership and personal assets. In 2000, the Tax Court, sitting in the Fifth Circuit, again disregarded the fiduciary duties of the decedent and held that §2036 applied to include the partnership in the gross estate in *Estate of Reichardt v. Commissioner*.⁴⁰ There, the court ruled that the assets had remained substantially the same as they had before the transfer and nothing had changed except legal title, evidencing an implied agreement; the decedent had unrestricted control over management; there was no consideration (i.e. children paid nothing to the decedent or partnership for interests); and the children were not involved in management.⁴¹

In *Estate of Harper v. Commissioner*,⁴² the Tax Court, sitting in the Ninth Circuit, likewise ruled that the assets of a family limited partnership were included under §2036. Probative to its finding was the fact that the decedent had created the partnership, naming his two children as general partners and a revocable trust as limited partner, which he controlled as the sole trustee and beneficiary. While he made one child the managing partner, the partnership agreement provided that the general partners were not to act without the express approval of the

limited partner, the trust, essentially allowing the decedent to retain complete control over the partnership. Just before death, decedent transferred 60% of the trust's limited partnership interest to his children. The court found simply that the partnership served as an alternate vehicle for the decedent to provide for his children.⁴³ Nevertheless, as will be seen, such treatment by the court did not seem to curb taxpayer behavior.

Prior to *Estate of Strangi v. Commissioner*,⁴⁴ the question of whether the partnership assets would be included in the taxpayer's gross estate was limited to a §2036(a)(1) analysis. However, in *Strangi*, the Tax Court, sitting in the Fifth Circuit, extended its analysis to §2036(a)(2), finding that the latter section "prevented the use of family limited partnerships for valuation purposes."⁴⁵ The strictures of §2036(a)(2) operate to include in the taxpayer's gross estate, the value of an asset where the taxpayer makes a donative transfer during lifetime but retains the right, either alone or in conjunction with another, to designate who shall enjoy or possess the property or receive the income.⁴⁶ This change made it all the more difficult to comply with the strict mandates of §2036 by forcing transferors to ensure that they do not retain any legally enforceable right (either alone or in conjunction with another) to designate who should enjoy the partnership assets.⁴⁷

In *Estate of Thompson v. Commissioner*⁴⁸ the Service revisited an issue that it had already addressed in a 1991 Technical Advice Memorandum⁴⁹ where a decedent transferred ninety-five percent of his property into a partnership shortly before his death. Ruling in favor of the Service, the Third Circuit found that an implied agreement existed between the decedent and the family partners, resulting in his receiving cash distributions from the partnership where he did not retain sufficient assets to support his costs of living.⁵⁰ This case further evidences a marked change of stance by the Service regarding cases that it had similarly dealt with only a decade ago, finding

here that any fiduciary duty owed by the decedent to the remaining partners was irrelevant and that transfers close to the time of death seem to suggest that an implied agreement existed amongst the parties.

By 2005, the Tax Court, sitting in the Eighth Circuit, in *Estate of Bongard v. Commissioner*⁵¹ announced a new test to be applied in analyzing the bona fide sale prong of the parenthetical exception in §2036(a)(1).⁵² It required that in addition to having an arm's length transaction, there must also be significant and legitimate nontax reasons for creating the partnership.⁵³ Importantly, the court ruled that “[t]he objective evidence must indicate that the nontax reason was a significant factor that motivated the partnership's creation. A significant purpose must be an actual motivation, not a theoretical justification.”⁵⁴ The court then provided a list of factors to be considered in making this determination, many of which had already been considered in the previous decisions above.⁵⁵ Importantly, these factors included “the taxpayer standing on both sides of the transaction, the taxpayer's financial dependence on distributions from the partnership, the partners' commingling of partnership funds with their own, and the taxpayer's actual failure to transfer the property to the partnership.”⁵⁶

A wide acceptance of the analysis developed in the *Bongard* case subsequently lent credence to the Service's theory, and provides yet another example of how the mandates of §2036 have become all the more difficult to adhere to.⁵⁷ Estates now have to overcome additional hurdles when arguing that the transfer fits squarely within the parenthetical exception, making it more difficult to prove that the assets of the partnership should not be included in the decedent's estate under §2036. While the addition of these factors did help ensure that countless transfers would not qualify as a bona fide sale, it nonetheless did not seem to effect the substantial change that the Service was apparently looking for, as taxpayers continued to use

family limited partnerships for the sole purpose of obtaining valuation discounts, as evidenced by the facts in *Estate of Rosen v. Commissioner*.⁵⁸

Notably in *Rosen*, the property was transferred shortly before decedent's death and well after the partnership had been formed; the decedent did not retain sufficient funds to meet her financial obligations; the family limited partnership had no legitimate or significant nontax purpose; it simply changed the form of decedent's beneficial interest in the partnership assets; the decedent's attorney-in-fact stood on all sides of the transaction; management of the transferred assets was the same before and after the transfer; and the assets contributed to the partnership consisted solely of marketable securities and cash.⁵⁹ However, in the subsequent years, including the present one, it has become apparent that perhaps the Service's attempts in removing partnerships from the realm of estate tax planning have become fruitful. As various mechanisms have begin to work together against estate planning counsel and taxpayers alike, the future of family limited partnerships seems bleak.

V. THE TWILIGHT OF FAMILY LIMITED PARTNERSHIPS IN ESTATE TAX PLANNING?

Recent developments in case law and proposals for changes in the law suggest that the future of family limited partnerships as an estate tax planning tool is bleak, at best. Over the course of the next decade, estate planners will likely shift away from their previous reliance on such entities. While family limited partnerships may not yet be obsolete, this is merely the beginning of the end. Eventually, the risks and unpredictability inherent in forming them will outweigh the possible advantages.

In arriving at such a conclusion, it is important to observe the developing trends in recent case law as applied to family limited partnerships as well as the proposals being made to Congress for this upcoming year. For instance, a 2009 Tax Court Memorandum decision, *Estate*

of *Jorgensen v. Commissioner*,⁶⁰ suggests that the Tax Court may include the value of the partnership assets in a taxpayer's estate where the taxpayer has arguably, substantially attempted to comply with the requisites of §2036, thus making it all the more difficult for estate planners to accurately predict the outcome of the partnership strategies. Additionally, the decision of *Estate of Black v. Commissioner*⁶¹ provides an interesting juxtaposing view whereby facts similar to those in the *Jorgensen* case bore opposite results, leading to further unpredictability. Further developments in case law suggest that the Service may have successfully revived the §2703-based argument which had not been seen since it was decisively rejected in the *Strangi* case. Finally, the recent Greenbook proposals before Congress threaten the ability of family limited partnerships to take advantage of valuation discounts.

A. IMPLICATIONS OF *ESTATE OF JORGENSEN V. COMMISSIONER*

Some commentators have posited that the *Jorgensen* case is yet merely another case with “bad facts.”⁶² While some of the facts in the case are indeed unfortunate (for the taxpayer, at least) there seem to be additional facts that bear mentioning for the purposes of the following analysis. The case arose from the creation of two separate family limited partnerships. Mr. Jorgensen consulted with his attorney, Arntson, about forming a family limited partnership, during which time neither Mrs. Jorgensen nor her children were present. JMA1 (the first partnership) was formed, the stated purpose of which was for the parties to pool their assets to invest in securities. The Jorgensens each contributed \$227,644 to the partnership in return for a 50% limited partnership interest. The children and the Mr. Jorgensen were named general partners; however, Mr. Jorgensen made all decisions on behalf of the partnership during his lifetime. The children and the grandchildren were all named either general or limited partners in

the agreement, and each received their interests by gift, since none of them contributed any of their assets to the partnership.⁶³

After Mr. Jorgensen's death, Arntson wrote to Ms. Jorgensen concerning Mr. Jorgensen's estate tax return, her own estate planning objectives, and the possibility of transferring her brokerage accounts to JMA1.⁶⁴ In significant part, he advised her to do so in order to reduce her own estate taxes. The attorney wrote to her again, recommending that she transfer her and the estate's brokerage accounts in order to qualify for the discounts. The attorney, the children, and a spouse of one of the children, decided to form JMA2. Arntson wrote to Ms. Jorgensen again, advising her of this partnership, stating that the purpose of this partnership was to hold high basis assets from which she should make gifts, while the purpose of JMA1 would be to hold low basis assets. After JMA2 was formed, Ms. Jorgensen contributed various assets to the partnership, including \$718,530 from Mr. Jorgensen's brokerage account, acting as executrix on behalf of his estate. In exchange, Ms. Jorgensen received a 79.6947% interest and Mr. Jorgensen's estate received a 20.3053% interest. The children were listed as general partners and the children and grandchildren were listed as limited partners; however, none of them contributed to either of the partnerships.⁶⁵ Although these gifts to the children and grandchildren from Ms. Jorgensen exceeded the annual exclusion, no gift tax returns were ever filed.⁶⁶

The Tax Court, sitting in the Ninth Circuit, found that the situation before it merited an examination to determine the applicability of the parenthetical exception under §2036(a)(1).⁶⁷ The court began by analyzing the first prong of the exception, in order to determine if a bona fide sale had taken place. In doing so, it applied the *Bongard* test to the facts, considering each of the nontax reasons posited by the estate for the formation of the partnerships.

The estate first argued that the partnerships were formed for the purpose of achieving a management succession scheme. The court however, found that this is only a valid and legitimate nontax reason where there is an underlying active business which requires an active management. These partnerships were merely “passive investment vehicles” which did not require any sort of active management. This was evidenced by the fact that although the children were responsible for investment decisions after the death of Mr. Jorgensen, they rarely spoke with their broker and made very few trades.⁶⁸ Also, Ms. Jorgensen had a revocable trust which allowed her children to manage her assets as trustees, and the estate was unable to show how these partnerships would be required to manage her assets in a way that the trust could not.⁶⁹

The estate further asserted that the partnerships were formed for the purpose of financial education and to promote family unity. The court found however, that the evidence demonstrated that Mr. Jorgensen never taught his children about investing, and although they were general partners, the children were never allowed to participate in the management decisions.⁷⁰

Next, the estate posited that the purpose of formation was to perpetuate an investment philosophy and to motivate participation in the partnerships. The court disagreed, ruling that capital preservation and the perpetuation of a “buy and hold” investment strategy are neither significant nor legitimate nontax reasons. While the children received general interests, they were not allowed to participate in the decision-making process and since the grandchildren received limited interests, which precluded them, by operation of partnership law and the partnership agreement, from participating.⁷¹ While the estate also sought to show that the pooling of assets was a purpose of the formation, the court found that this lacked credible evidence as well.⁷²

The estate further argued that the partnerships were formed due to the spendthrift concerns of one child, and possibly minor grandchildren. The court found that while one child, Gerald, was a squanderer, he was a general partner of both partnerships, which meant that although the other general partner would have to agree on distributions, he could nevertheless exert influence over the other general partner. The court reasoned that Gerald's ability to access money in the form of a loan, which he did not make a payment on for two years, suggested that this was not a significant motivating factor, but rather merely theoretical.⁷³ Further, the estate sought to show that the partnerships would help provide for children and grandchildren equally. This was likewise disregarded by the court which found that this could have been accomplished by giving securities directly, and that the partnerships only made it easier for Ms. Jorgensen to give gifts equal to the annual exclusion amount.⁷⁴

In addition to the above findings, the court also found probative in its analysis the fact that valuation discounts appeared to be a significant motivator. This was evidenced in the letter from Mr. Jorgensen's attorney which, because she was not very involved in the formation of JMA2, stated that lowering her taxable estate was a primary factor in creating and funding JMA2.⁷⁵ The court further found probative the disregard of partnership formalities, as neither of the partnerships maintained separate books or records, and as the checkbook remained unreconciled. Further, Ms. Jorgensen used some partnership assets for personal funds and used some personal expenses to satisfy partnership expenses.⁷⁶ Ms. Jorgensen was not financially dependent upon the partnership, however, she required the assets to fulfill her gift-giving desires.⁷⁷ Having found that an implied agreement existed amongst the parties, and having found that the requisites *Bongard* test had not adequately been satisfied, the court ruled that Ms.

Jorgensen had retained possession or enjoyment of the property transferred to JMA1 and JMA2 as the requisites of the parenthetical exception had not been fulfilled.⁷⁸

This Tax Court Memorandum seems to evidence a shift in the court's treatment of family limited partnerships. As evidenced by the aforementioned cases, the Tax Court, throughout the circuits, has typically sought to punish those transferors who transfer all of their assets into the partnership; who fail to retain sufficient assets to cover their costs of living; who continue to manage the assets as though no change had taken place; who commingle personal and partnership assets; and who use the partnership as his/her own personal checking account with no intent to pay back any money taken. For instance, in 1998 and 1999, Ms. Jorgensen wrote checks from the JMA1 account for gifts to family members and repaid a portion of that taken from the JMA1 to JMA2.⁷⁹ It is clear that although Ms. Jorgensen did use some of the partnership assets to fulfill some personal obligations, she also used her personal assets to fulfill partnership obligations in an apparent attempt to remunerate the partnership for any assets that she had taken. She apparently understood that she could not just use this money as her personal checking account without paying it back.

Likewise, this is not a situation where the court, as it has held in the past, would find that the assets had not changed except for legal title. In addition to the change of legal title, the assets had changed with respect to their treatment by the transferor, Ms. Jorgensen. The fact that she knew to return the funds that she had taken from the partnership seems to evidence this since, if the assets had not changed with respect to the transferor, then none of those assets taken would have been repaid.

True, Ms. Jorgensen did use some JMA1 assets to pay some of her taxes and JMA2 assets to pay Mr. Jorgensen's estate administration expenses and expenses related to her gift tax returns

in 1999 and 2002.⁸⁰ However, this was not a case where Ms. Jorgensen needed the partnership assets in order to pay for her costs of living or to pay for any of her personal needs. The evidence in fact suggested that Ms. Jorgensen had retained sufficient assets to cover her costs of living. Although she may have used the partnerships to accomplish some gift-giving needs, this does not seem to rise to the same level of a transferor in need of partnership assets in order to simply survive, or who fritters away the partnership assets as though the transfer had never taken place, such as some of those taxpayers noted above.

Additionally, while the court emphasized that the formalities of the partnership had been disregarded, the evidence in the case suggests that perhaps such formalities were not completely ignored as they had been in the prior cases cited above. For instance, where one of the children wished to access money in the partnership, he was advised that in order to do so, he would be required to take out a loan. While he was shocked to hear this, he did in fact take the loan in July 1999, and made all of the requisite interest payments.⁸¹ At the very least, this evidences the intent to treat the partnership as an actual business entity since the general partner who borrowed the money respected the formalities required by taking out a loan, making interest payments, and eventually repaying the principal of the loan.

Jorgensen indicates that the Tax Court has begun to adopt a broader standard for the inclusion of partnership assets under §2036(a)(1). For example, the court pointed to the payment of estate taxes and administration expenses from the partnership as evidence of an implied agreement. The court cited to the Fifth Circuit case of *Strangi*,⁸² as part of a growing number of circuits that have adopted the position that post-death partnership payments to the decedent's estate will trigger §2036(a)(1). This is likely an extension of the Tax Court's sentiments in the *Estate of Erickson v. Commissioner*,⁸³ where the court, sitting in the Eleventh Circuit, ruled that

the partnership was includable under §2036(a)(1) since an implied agreement existed where the only distributions made to the decedent were post-death. Such treatment of post-death transfers will no doubt continue to make it difficult for partnerships to evade the prohibitions of §2036.

It is also clear from the case that the court placed an enormous amount of emphasis on the importance of arm's length transactions and the negotiation process. It seemed to place more importance on the negotiation process than any other court had done in the past, suggesting that not only the formation and daily operations, but the events leading up to formation, should also follow strict formalities. The opinion suggests that all relevant parties, including family members, third parties, and lawyers alike, should meet around a table to discuss the formation of the partnership and to bargain with one another as to the terms of the agreement, the shares acquired and the property transferred.⁸⁴ While this process is not a monstrous hindrance to forming the partnership for most people, it is yet another hurdle over which the taxpayer must jump if he or she chooses to use this entity as an estate tax planning device.

At least in the realm of §2036, in light of the *Jorgensen* decision it seems as though it is getting increasingly more difficult to implement an appropriate family limited partnership strategy, which adheres to all of the strict rules which are constantly undergoing change by the judiciary and Service alike. While some taxpayers may continue to use family limited partnerships in estate tax planning, many will likely be turned away by these strictures placed upon their use, for fear that any partnership they create would be challenged by the Service. Thus, in lieu of exposing themselves to such challenges and the accompanying embarrassment of a botched use of the family limited partnership technique, many estate planners are likely to forego using such entities in favor of using something more predictable.

FLPs have been the consistent loser in the Tax Court, and with each win, the IRS's position seems to be getting stronger and more infallible. The IRS's reversal

of treatment of FLPs is a result of taxpayers' failure to adhere to and observe partnership formalities. This disregard of formalities on the taxpayers' part has led to what is now almost as certain as death and taxes: individuals who form and transfer property to family limited partnerships can expect the full value of the transferred property to be included in their gross estate under section 2036(a).⁸⁵

B. IMPLICATIONS OF *ESTATE OF BLACK V. COMMISSIONER*⁸⁶

The *Black* case provides an interesting example of where similar facts can result in divergent decisions, thus leading to confusion as to whether family limited partnerships can continue to be effective as estate tax planning tools. Unlike *Jorgensen*, the *Black* case resulted in a rare instance of a taxpayer victory, which merits some additional review.

During his time working for Erie Indemnity Co., Samuel Black Jr. acquired company stock, resulting in him becoming the second largest shareholder. Mr. Black subscribed to a “buy and hold” strategy, similar to that of Mr. Jorgensen above.⁸⁷ In 1988, with his son as trustee, Mr. Black created a trust for each grandchild, and over the years, subsequently transferred nonvoting stock into them. Mr. Black also transferred both voting and nonvoting stock to his son.⁸⁸ Between 1988 and 1993, the stock split several times and appreciated in value, causing Mr. Black to fear that his son and grandchildren would sell.⁸⁹ Due in part to this fear, as well as concurrent family discord, Mr. Black sought to “consolidate and retain the family’s Erie stock” which constituted 13-14 percent of the total Erie stock.⁹⁰ In order to accomplish this goal while simultaneously minimizing estate taxes, Mr. Black created the Black LP on advice of counsel.⁹¹

Sitting in the Third Circuit, the Tax Court ruled that Mr. Black’s transfer of stock to the Black LP constituted a bona fide sale for adequate and full consideration, and therefore, §2036 did not apply.⁹² In reaching this conclusion, the court first applied the *Bongard* test, in order to analyze the bona fide sale prong of the parenthetical exception under §2036(a)(1). The court looked toward the nontax motives surrounding the partnership’s formation as evidence of good

faith, considering each of the estate's proffered nontax motives in turn.⁹³ Notably, the estate asserted that the partnership was formed to provide a long-term centralized management and protection of the stock; to preserve Mr. Black's buy-and-hold investment philosophy; to pool the family's stock; and to protect the stock from creditors and divorce.⁹⁴

Interestingly enough, the court cited to the *Jorgensen* decision in apparent acknowledgement that an "investment philosophy premised on buying and holding individual stocks with an eye toward long-term growth and capital preservation" did not constitute a legitimate or significant nontax reason for the transfer of assets into a partnership.⁹⁵ The court nevertheless found that this set of circumstances was "unique," such as those in *Estate of Schutt v. Commissioner*,⁹⁶ and thereby concluded that Black LP was formed for the significant and legitimate nontax purpose of perpetuating the holding of the stock by the Black family.⁹⁷ In analogizing this case to the *Schutt* case, the court found probative the fact that there was a lengthy and loyal relationship between Mr. Black and Erie; that Mr. Black was concerned about his son's monetary and marital issues; and that Mr. Black was worried about his grandchildren's lack of financial prowess.⁹⁸

The dichotomy between the holding of *Black* and *Jorgensen* appear to be glaring, differentiable only by a unique set of circumstances. While the cases were decided in different circuits, *Jorgensen* was cited in the *Black* case, in an apparent recognition of its essential holding. What follows then, is an interesting result. Citing to a case involving fairly similar facts, the *Black* court suggests that some of those nontax motives previously asserted in *Jorgensen* may actually be permissible where a unique set of circumstances presents itself. The question remains, however, what exactly those "unique" circumstances are. In a way, the case suggests that it may be permissible to use the perpetuation of a buy-and-hold investment strategy

as a nontax motive where the transferor has a personal connection or relationship to the stock. It may also suggest that it may be permissible to use partnerships to protect or solidify the stock when there are legitimate fears of creditors, divorce or fragmentation of the shares, resulting in the loss of a voting block.

What is not clear, however, is the extent to which the transferor must fear that such things will occur, or the extent of the relationship needed between the transferor and the stocks in order to ensure that the nontax purpose will be upheld as legitimate and significant. What arises from the *Black* case is only further confusion for estate tax planners. In a way, a contrary result is created by this case, which is likely to cause estate planners to rethink the application of family limited partnerships to estate plans in the future. In a field where predictability is key, and where taxpayers want to steer clear of litigation, cases such as these certainly muddy the waters. In all likelihood, this lack of predictability for future planning could very well cause estate planners to shy away from using such entities in exchange for more secure techniques that will keep their clients out of litigation.

C. A REVIVAL OF THE §2703 ARGUMENT

While upon entering the new millennium the Service's argument under §2703 had failed to gain recognition by the courts, it has recently been reasserted successfully. Under §2703(a), any options, agreements, or rights to acquire/use transferred property at a price less than that of the fair market value, or any restrictions on the right to sell or use the property, are disregarded when calculating the value of the property. Section 2703(b) however, sets out an exception whereby §2703(a) will not apply to any option, agreement, right, or restriction where certain requirements are met. However, to fall within this exception, it must be a bona fide business arrangement; it must not be a device to transfer the property to members of the decedent's family

for less than full and adequate consideration; and its terms must be comparable to similar arrangements entered into by people in arm's length transactions.

While the §2703 argument had apparently been deemed completely inapplicable in the *Strangi* case, it nevertheless seems to have been revived in the recent case of *Estate of Holman v. Commissioner*.⁹⁹ In fact, this was the first successful Service challenge under this theory in almost eight years, and as a result, could mark the twilight of family limited partnerships in estate tax planning. The *Holman* case dealt with a family limited partnership which had been set up by the petitioners, husband and wife, whereby both served as general and limited partners, and one petitioner's mother served as limited partner, acting on behalf of the children as custodian.¹⁰⁰ Under the terms of the agreement, the general partners were responsible for all management decisions, while the limited partnership's rights with respect to partnership assets were restricted.¹⁰¹ Upon creating the partnership, 10,030 shares of Dell stock, acquired by one of the petitioners, through his job, were transferred into the partnership.¹⁰² The petitioners' articulated purpose in having formed the partnership was "to make a profit, increase wealth, and provide a means for the Family to gain knowledge of, manage, and preserve Family Assets."¹⁰³ Importantly, the partnership lacked a business plan, failed to prepare annual statements, was not listed in the telephone directory, did not pay any employees, and failed to report any income or file income tax returns for three consecutive years.¹⁰⁴

Notably in the *Holman* case, the Tax Court, sitting in the Eighth Circuit, found that the exception in §2703(b) was not met, and therefore, §2703(a) applied to disregard the "restrictions" placed upon the partnership assets.¹⁰⁵ Specifically, the court found that where the partnership was only managing some Dell stock, and where the agreement specifically excluded the limited partners from dealing with partnership assets, that there was no bona fide business

arrangement under §2703(b)(1).¹⁰⁶ This is interesting however, because prior to this case, courts have held that although the term “bona fide business arrangement” is not defined within the statute, a strict construction of the phrase is not necessary since restrictive agreements do not have to concern an “actively managed business.”¹⁰⁷

Following this, the court likewise found that the second prong had also not been met by finding that the agreement, which provided that the parents, as general partners, could redistribute wealth to other limited partners when a child had engaged in a prohibited transfer, operated as a device to transfer limited partnership interests for less than adequate consideration.¹⁰⁸ The court declined to rule on the third prong since the partnership failed the other two prongs.¹⁰⁹

The *Holman* case creates significant uncertainty as to the application of Chapter 14 to FLP arrangements in the future. The court’s analysis does not provide planners with much instruction as a finding that a single prong has not been satisfied under §2703(b) will render the exception inapplicable.¹¹⁰ “A lack of judicial guidance, coupled with the IRS’s inability to pinpoint its statutory or theoretical basis for attacking any particular FLP before filing its deficiency notice, presents challenges to taxpayers using the FLP structure.”¹¹¹

Further, this case stands as a possible landmark for the revival of an argument that was thought to be otherwise defunct. Although this case admittedly only applies to the Eighth Circuit, it is unclear how many other jurisdictions will lend credence to this decision by likewise allowing the Service to make a §2703 argument successfully. This, coupled with the more stringent requirements placed upon family limited partnerships under §2036, will likely cause taxpayers and estate planners alike to begin to forego the use family limited partnerships when it

is unclear if any further arguments which were thought long to be moot, make surface once again.

D. 2010 GREENBOOK PROPOSALS

The recent 2010 “Greenbook” proposals by the United States Treasury Department is also some cause for concern for the future of family limited partnerships in estate tax planning. Specifically, the proposal operates to prohibit transferors of assets into family limited partnerships from enjoying valuation discounts.¹¹² The Greenbook proposes that this change be made as a result of valuation discounts being taken in the past as an abusive attempt to underreport taxes. In an apparent attempt to curb this abusive taxpayer behavior, the Executive branch proposes that certain restrictive provisions of the partnership agreement will be ignored for valuing a transferred interest between members of the transferor’s family.¹¹³

It is further important to note the retroactivity element of this proposal. If passed, this devaluation rule will apply to all entities created after October 8, 1990, possibly jeopardizing those transferors’ estate planning goals who have formed partnerships on or after that date. Further, the proposal apparently seeks to give the Service an argument against family limited partnerships under §2704 new life in order to correct what the Executive branch seems to view as a line of incorrect jurisprudence.¹¹⁴

While this has not yet become law, it is important to note, because if this were ever to become law, it could completely remove the family limited partnership from the estate planner’s toolbox. Although some taxpayers may very well continue to use such entities to achieve their own nontax related goals, such as forming a partnership in order to maintain a business or the array of other nontax reasons noted throughout this discussion, the partnership would no longer be contemplated as an estate tax planning tool.

VI. CONCLUSION

It appears that the use of family limited partnerships for estate tax planning may be coming to an end. While this tool has long been effective in achieving favorable valuation discounts in order to substantially reduce the value of taxpayers' gross estates, it is becoming exceedingly difficult for estate planners and taxpayers alike to conform with the stringent requisites placed upon them. Recent case law suggests that the partnership form will be disregarded in circumstances where the taxpayer's actions are more innocent than that of a taxpayer who is utilizing the entity as a sham, in an attempt to "pull the wool over" the Service's eyes, as had seemingly been the standard in the past. Such cases now impose more stringent tests to avoid inclusion under §2036, and in fact, some cases provide such differing results that estate planners will unlikely be able to predict with any certainty, the result of any Service challenge that may arise in the future. In addition to this, the Service has successfully revived the §2703 argument, thought to be a nonstarter for almost eight years. These factors, combined with the fact that the Treasury now seeks to remove valuation discounts from family limited partnerships, suggests that such partnerships will soon become obsolete as an estate tax planning measure. In a field where predictability is key, many estate planners are likely to forego the use of family limited partnerships in the future, as the success of any family limited partnership before a Service challenge can no longer be accurately predicted. As the climate of the Service, judiciary, and Treasury continue to shift to one of speculation to the use of family limited partnerships, the future of such entities within the realm of estate tax planning seems bleak.

¹ MATTHEW BENDER & COMPANY, INC., PLANNING FOR THE OWNER OF A PARTNERSHIP OR LIMITED LIABILITY COMPANY, 3-44 Modern Estate Planning § 44.37 (2009).

² 26 U.S.C. § 2001(a).

³ 26 U.S.C. § 2501(a)(1).

⁴ Rev. Rul. 59-60, 1959-1 C.B. 237.

⁵ See, e.g., *Id.*; Treas. Reg. §20.2031-1(b); Treas. Reg. §25.2512-1.

⁶ *Id.*

⁷ JONATHAN C. LURIE & EDWIN G. SCHUCK, JR., VALUATION, in ALI-ABA, Estate Planning In Depth 231, 268 (2008).

⁸ *Id.* at 268-9.

⁹ *Id.* at 267.

¹⁰ *In the Estate of Hjersted*, 175 P.3d 810, 817 (Kan. 2008).

¹¹ LURIE & SCHUCK, *supra* note 7, at 257.

¹² Leslie A. Droubay, *The Certainty of Death and Taxes for Family Limited Partnerships*, 7 J. Small & Emerging Bus. L. 523, 525 (2003).

¹³ Alden Koste, *The IRS Fished its Wish: The Ability of Section 2703 to Minimize Valuation Discounts Afforded to Family Limited Partnership Interests in Holman v. Commissioner*, 59 Cath. U.L. Rev. 289 (2009).

¹⁴ *Harwood v. Comm'r*, 82 T.C. 239 (1984).

¹⁵ *Id.* at 268.

¹⁶ LURIE & SCHUCK, *supra* note 7, at 291.

¹⁷ See, e.g., *Gregory v. Helvering*, 293 U.S. 465 (1935); *Frank Lyon Co. v. U.S.*, 435 U.S. 561 (1978). JOHN F. RAMSBACHER, FLP'S AND LLC'S – IS THERE LIFE AFTER STRANGI?, 330 PLI/Est 185, 194 (2004).

¹⁸ *Murphy v. Comm'r*, 60 T.C.M. (CCH) 645 (1990).

¹⁹ *Strangi v. Comm'r*, 115 T.C. 478 (2000); *aff'd Strangi v. Comm'r*, 293 F.3d 279 (5th Cir. 2002).

²⁰ *Strangi v. Comm'r*, 115 T.C. 478, 485-7 (2000); *Strangi v. Comm'r*, 293 F.3d 279, 282 (5th Cir. 2002).

²¹ JOHN F. RAMSBACHER, FLP'S AND LLC'S – IS THERE LIFE AFTER STRANGI?, 330 PLI/Est 185, 194 (2004); e.g. *Strangi v. Comm'r*, 115 T.C. 478, 486 (2000); *Strangi v. Comm'r*, 293 F.3d 279, 281 (5th Cir. 2002).

²² See *Jorgensen v. Comm'r*, 97 T.C.M. (CCH) 1328 (2009).

²³ Droubay, *supra* note 12, at 526-7.

²⁴ See, e.g., *Church v. U.S.*, 85 A.F.T.R.2d (RIA) 804 (2000); *Strangi v. Comm'r*, 115 T.C. 478, 488 (2000).

²⁵ *Strangi v. Comm'r*, 115 T.C. 478, 488 (2000).

²⁶ *Church v. U.S.*, 85 A.F.T.R.2d (RIA) 804 (2000).

²⁷ *Holman v. Comm'r*, 130 T.C. 170 (2008).

²⁸ 26 U.S.C. § 2704(b).

²⁹ See, e.g., *Estate of Jones*, 116 T.C. 121, 128-30 (2001); *Kerr v. Comm'r*, 113 T.C. 449, *aff'd* 292 F.3d 490 (5th Cir. 2002); *Knight v. Comm'r*, 115 T.C. 506 (2000).

³⁰ I.R.S. Tech. Adv. Mem. 91-31-006 (Aug. 2, 1991).

³¹ *U.S. v. Byrum*, 408 U.S. 125 (1972).

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- ³² I.R.S. Priv. Ltr. Rul. 94-15-007 (Apr. 15, 1994); *see* I.R.S. Priv. Ltr. Rul. 95-46-007 (Nov. 17, 1995).
- ³³ RAMSBACHER, *supra* note 21, at 193; *see* Treas. Reg. § 1.701-2.
- ³⁴ *Id.*
- ³⁵ 26 U.S.C. § 2036(a).
- ³⁶ *Id.*
- ³⁷ *Schauerhamer v. Comm'r*, 73 T.C.M. (CCH) 2855 (1997).
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ *Reichardt v. Comm'r*, 114 T.C. 144 (2000).
- ⁴¹ *Id.*
- ⁴² *Harper v. Comm'r*, 85 T.C.M. (CCH) 1641 (2002)
- ⁴³ *Id.*
- ⁴⁴ *Strangi v. Comm'r*, 85 T.C.M. (CCH) 1331 (2003).
- ⁴⁵ Rebecca B. Hawblitzel, *A Change in Planning: Estate of Strangi v. Commissioner's Effect on the Use of Family Limited Partnerships in Estate Planning*, 57 Ark. L. Rev. 595, 624 (2004).
- ⁴⁶ 26 U.S.C. § 2036(a)(2).
- ⁴⁷ Hawblitzel, *supra* note 45, at 625.
- ⁴⁸ *Thompson v. Comm'r*, 382 F.3d 367 (3d Cir. 2004).
- ⁴⁹ I.R.S. Tech. Adv. Mem. 91-31-006 (Aug. 2, 1991).
- ⁵⁰ *Thompson v. Comm'r*, 382 F.3d 367, 376 (3d Cir. 2004).
- ⁵¹ *Bongard v. Comm'r*, 124 T.C. 95 (2005).
- ⁵² LINDA B. HIRSCHSON, ET AL., FAMILY LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES – ARE WE STILL DOING THEM?, 343 PLI/Est 217, 229 (September 10-11, 2007).
- ⁵³ *Id.*
- ⁵⁴ *Bongard v. Comm'r*, 124 T.C. 95, 118 (2005).
- ⁵⁵ *Id.* at 188.
- ⁵⁶ *Id.*
- ⁵⁷ *See, e.g., Rector v. Comm'r*, 94 T.C.M. (CCH) 567 (2007); *Mirowski v. Comm'r*, 95 T.C.M. (CCH) 1277 (2008); *Miller v. Comm'r*, 97 T.C.M. (CCH) 1602 (2009); *Malkin v. Comm'r*, 98 T.C.M. (CCH) 225 (2009); *Black v. Comm'r*, 133 T.C. 15 (2009).
- ⁵⁸ *Rosen v. Comm'r*, 91 T.C.M. (CCH) 1220 (2006).
- ⁵⁹ *Id.* at 16-21.
- ⁶⁰ *Jorgensen v. Comm'r*, 97 T.C.M. (CCH) 1328 (2009).
- ⁶¹ *Black v. Comm'r*, 133 T.C. 15 (2009).
- ⁶² LINDA B. HIRSCHSON, ET AL., FAMILY LIMITED PARTNERSHIPS AND LIMITED LIABILITY COMPANIES – WATCHING THE LAW DEVELOP, 352 PLI/Est 309, 326 (September 14-15, 2009).
- ⁶³ *Jorgensen v. Comm'r*, 97 T.C.M. (CCH) 1328, 2 (2009).
- ⁶⁴ *Id.*
- ⁶⁵ *Id.* at 3.
- ⁶⁶ *Id.* at 4.
- ⁶⁷ *Id.* at 7.
- ⁶⁸ *Id.* at 8.
- ⁶⁹ *Id.* at 9.
- ⁷⁰ *Id.*

⁷¹ *Id.* at 10.
⁷² *Id.*
⁷³ *Id.* at 11.
⁷⁴ *Id.*
⁷⁵ *Id.* at 12.
⁷⁶ *Id.*
⁷⁷ *Id.* at 13.
⁷⁸ *Id.* at 14-15.
⁷⁹ *Jorgensen v. Comm'r*, 97 T.C.M. (CCH) 1328, 4-5 (2009).
⁸⁰ *Id.* at 5.
⁸¹ *Id.* at 4.
⁸² *Strangi v. Comm'r*, 417 F.3d 468 (5th Cir. 2005).
⁸³ *Erickson v. Comm'r*, 93 T.C.M. (CCH) 1175 (2007).
⁸⁴ *Id.*
⁸⁵ Droubay, *supra* note 12, at 542.
⁸⁶ *Black v. Comm'r*, 133 T.C. 15 (2009).
⁸⁷ *Id.* at 7.
⁸⁸ *Id.* at 8.
⁸⁹ *Id.* at 9-10.
⁹⁰ *Id.* at 10-11.
⁹¹ *Id.* at 12-13.
⁹² *Id.* at 53-54.
⁹³ *Id.* at 33-48.
⁹⁴ *Id.* at 35-36.
⁹⁵ *Id.* at 38, *quoting Jorgensen v. Comm'r*, 97 T.C.M. (CCH) 1328 (2009).
⁹⁶ *Schutt v. Comm'r*, 89 T.C.M. (CCH) 1353 (2005).
⁹⁷ *Black v. Comm'r*, 133 T.C. 15, 47-48 (2009).
⁹⁸ *Id.* at 41-47.
⁹⁹ *Holman v. Comm'r*, 130 T.C. 170 (2008).
¹⁰⁰ *Id.* at 174.
¹⁰¹ *Id.* at 176-178.
¹⁰² *Id.* at 179.
¹⁰³ *Id.* at 175-176.
¹⁰⁴ *Id.* at 181-182.
¹⁰⁵ *Id.* at 191, 215-216.
¹⁰⁶ *Id.* at 195.
¹⁰⁷ *Id.* at 192.
¹⁰⁸ *Id.* at 197.
¹⁰⁹ *Id.* at 199.
¹¹⁰ Koste, *supra* note 13, at 311-312.
¹¹¹ *Id.* at 312.
¹¹² General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals, Dept. of the Treasury, 121-122 (May 2009).
¹¹³ *Id.*
¹¹⁴ *Id.*