FEDERAL TAX COURT JURISDICTION AND SUBSTANTIVE TAX LAW: THE LESSONS OF LAURENCE GLUCK AND SANDRA PRUSOCK v. COMMISSIONER

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The recent opinion in Laurence Gluck and Sandra Prusock v. Commissioner, T.C. Memo 2020-6 (May 26, 2020), addresses United States Tax Court (Tax Court) jurisdiction over partnerships' or partners' income tax disputes with the Internal Revenue Service (IRS) and the boundaries of Internal Revenue Code (Code) section 1031. Since the opinion also brings to mind reflections on some recent federal case law developments noteworthy for tax counsel, this article comments on those developments in the context of Gluck.

TAX COURT JURISDICTION OVER PARTNER DISPUTES WITH THE IRS

The taxpayers' travails with the IRS started out innocently. Mr. Gluck wanted to accomplish an everyday kind of forward, deferred like-kind exchange of real estate. Soon June 30, 2012, utilizing a Code section 1031 "qualified escrow account" maintained by an independent, third-party escrow fund holder (Royal Abstract Deferred, LLC), Mr. Gluck relinquished a Manhattan rental condominium by selling it to an unrelated third party. The selling price of $10,214,000 was then wired to the escrow holder.[1] Mr. Gluck and Ms. Prusock were joint return filers. They hoped to defer substantial taxable gain recognition by timely identifying one or more replacement properties that would qualify as like-kind property to the relinquished rental condominium. Mr. Gluck identified 145 East 74th Street on September 5, 2012, and, as had then typically occurred with purchases of expensive real estate in New York City (owing to a since-repealed exception to state and city real estate transfer taxes for sales of limited liability company interests), Mr. Gluck organized 145 East 74th Owner, LLC, a single-member limited liability company (74th, LLC). Thereafter, on November 29, 2012, 74th, LLC executed a contract by terms of which 74th, LLC (a disregarded entity for federal and New York income tax purposes)[2] was expected to timely close on the purchase of a 12.5 percent interest in 145 East 74th Street.

The purchase contract described the replacement property as consisting of an "undivided interest of 12.5 percent as a Tenant in Common" in the property, including the land and the building. One of the exhibits to the contract was a copy of a document titled, "Tenancy in Common Agreement of 145 East 74th Street Owners," dated July 1, 1992, and signed by all of the persons who held interests in the building at that time. Also, on November 29, 2012, 74th, LLC entered into a substantially similar contract with another owner of a 12.5 percent interest in 145 East 74th Street with the same tenants in common ownership property description and tenants in common agreement annexed as an exhibit.

The taxpayers properly included with their 2012 Form 1040 the IRS like-kind exchange disclosure Form 8824. The form disclosed the transactions, describing the replacement property as "145 East 74th Street." Meanwhile, apparently unbeknownst to the taxpayers, their tax return preparer and all of the other taxpayer tax advisors, one "Greenberg & Portnoy" had followed its usual practice of filing IRS Form 1065, U.S. Return of Partnership Income, for 2012. This filing included IRS Form 8825, and listed "145 East 74th Street, New York, N.Y." as its sole rental property. Also forming part of the Form 1065 for 2012 were 15 Schedules K-1, which identified 74th, LLC as owning a zero percent interest in the "partnership" at the beginning of 2012 and a 50 percent partnership interest in it at the end of 2012.[3] The IRS selected the taxpayers' 2012 return for examination, and focused on their section 1031 forward, deferred like-kind exchange disclosures. The IRS linked the disclosure of the replacement property identified by the taxpayers as "145 East 74th Street" with Greenberg & Portnoy's disclosure of its sole rental property as "145 East 74th Street" on its annually filed Form 8825 accompanying its 2011 and/or 2012 Forms 1065. No doubt the revenue agent looked into the background facts and discovered that Greenberg & Portnoy had been filing Forms 1065 since 1967 and self-identifying as a TEFRA (Tax Equity and Fiscal Responsibility Act of 1982) partnership since 2007. Further, they must have found that the "partnership" had owned the subject building (and land) for many years, and over those years issued Schedules K-1 to the then-partners whose identities changed as the years went by on account of deaths, sales, and other transfers.

The IRS notified the taxpayers of a large 2012 tax assessment by mailing them a Notice of Deficiency, which included the imposition of a Code section 6662 accuracy-related penalty. Meanwhile, the taxpayers had disputed a proposed adjustment and penalty up to the National Office of Appeals. Having received the notice, the taxpayers appealed to the Tax Court within the deadline date as per the notice. The Tax Court opinion reflects that Mr. Gluck in fact had acquired two 12.5 percent interests in a New York general partnership, identified by documents in the case record as a New York partnership formed in 1962. Consequently, the Tax Court held that, assuming they had jurisdiction over the dispute, the taxpayers did not satisfy all of the requirements for a forward, deferred like-kind exchange of real estate.[4]

Because the tax year was 2012, the Tax Court parsed the former unified audit and litigation procedures of TEFRA (the "TEFRA Procedures") to reach its decision that It lacked jurisdiction over the petitioners' arguments in support of their having in fact acquired tenant-in-common real estate interests as replacement property.[5] Consequently, an interesting question arises: Would the Tax Court reach the same conclusion based upon the substantially rewritten centralized partnership audit and litigation rules enacted by the Bipartisan Budget Act of 2015 and as amended by the Protecting Americans from Tax Hikes Act of 2015 and the Tax Technical Corrections Act of 2018 ("Centralized Procedures")?[6] This is especially important because the Tax Court jurisdictional issues have taken trial tax counsel by surprise more than once.

First, the IRS did not audit the Greenberg & Portnoy Form 1065 for 2012 or for any other year. Second, it appears that neither the revenue agent nor appeals officer brought to the taxpayers' then-representatives' attention (whether trial counsel or some other taxpayer representative) that the IRS had in mind a "computational adjustment" within the meaning of now-repealed Code section 6231(a)(6) of the TEFRA Procedures.[7] Third, Tax Court deficiency jurisdiction generally was precluded under now-repealed Code section 6230(a)(1) in event of computational adjustments. Fourth, Tax Court Judge Lauber pointed out that the question of whether an organization or arrangement is a "partnership" or some other entity or a form of property ownership and operation (such as tenants in common ownership of real estate or a mere contractual relationship), is a "partnership item" as to which Tax Court deficiency jurisdiction was held to be unavailable to a "partner."[8] His point was apparently that those cases were clues to tax counsel that the Tax Court would ultimately categorize the "partnership" classification as a "computational adjustment."

TEFRA Procedures, Code section 6233(a), reads as follows:

> (a) GENERAL RULE.—If a partnership return is filed by an entity for a taxable year but it is determined that the entity is not a partnership for such year, then, to the extent provided in regulations, the provisions of this subchapter are hereby extended in respect of such year to such entity and its items *and to persons holding an interest in such entity* (emphasis added).

The Centralized Procedures now provide more clearly as follows, at Code section 6221(a):

> (a) IN GENERAL.—Any adjustment to a partnership related item shall be determined, and any tax attributable thereto shall be assessed and collected, and the applicability of any penalty, addition to tax, or additional amount which relates to an adjustment to any such item shall be determined at the partnership level, expect to the extent otherwise provided in this subchapter (emphasis added).

Moreover, Treas. Reg. section 301.6241-1(a)(6)(v)(J) states that a partnership-related item includes "the identity of a person as a partner in a partnership."

Presumably, with regard to any partner or ostensible partner that IRS examiners now audit (assuming they check to find out that the partnership, if eligible, has not elected out of the Centralized Procedures), the IRS examiners should be expected to notify the "partnership representative" (defined at Code section 6223) that a partner audit is taking place that might result in tax classification of the partnership as a tenancy in common.[9] Upon notice, the partnership representative likely will have contractual duties that include notification of the affected partner about the issue. From there, the Centralized Procedures will control the course of the audit and the affected partner's opportunity to take control of the issue, including going to Tax Court. At least the 114th Congress intended that the Centralized Procedures would work this way in practice. Whether there will be many more gruesome outcomes like Gluck is unclear; but there will definitely be quite a few more headaches arising from the Centralized Procedures technicalities.[10]

TAX COURT DETERMINATION OF PARTNERSHIP EXISTENCE FOR TAX PURPOSES

The Tax Court's substantive determination that Mr. Gluck replaced his relinquished real estate with two 12.5 percent general partner interests is also of interest in light of the recent United States Supreme Court (Court) opinion in Simon E. Rodriguez v. Federal Deposit Insurance Corporation.[11] The Tax Court held that Code section 1031 was inapplicable because the persons with interests in 145 East 74th Street had been self-identifying as a "partnership" by virtue of consistently filing Forms 1065, and other documents of record identified "Greenberg & Portnoy" as a joint venture (or it or its predecessor) as a New York general partnership since 1962. Meanwhile, the Rodriguez decision held that, in the absence of congressional authorization, federal common law made by the federal courts is necessary to protect uniquely federal interests. Ergo, in the absence of congressional authorization or uniquely federal interests, the federal courts must look to applicable state law to determine such matters as the character or qualities of property rights, whether there were contributions or other kinds of transfers of property, and other legal factors pertinent to determining the application of the Code. It might be tempting to conclude that"uniquely federal interests" means *all* IRS tax assessment and collection cases. So Rodriguez should be interpreted narrowly within the context of it own facts and as applicable only to other cases where the IRS is a stakeholder. but how the Rodriguez decision will affect future cases is now an open question; so further observations can be made about it.

Rodriguez involved a consolidated group tax-sharing agreement. The issue was which group member should get to keep a $4 million corporate tax refund that the IRS subsequently sent to the common parent. Should the common parent get the refund or should it go to the subsidiary that was the source of a year's consolidated group tax loss? The Tenth Circuit did not apply the relevant state's contract law canons of interpretation, construction, or other jurisprudential principles used to resolve disputes over agreements. Instead, it drew upon In re Bob Richards Chrysler-Plymouth Corp.,[12] and framed the issue this way: Whether the tax-sharing agreement unambiguously deviated from the rule in Bob Richards, so that the group member whose activities resulted in the group overall loss was entitled to the IRS tax refund based on that loss. To the Court in Rodriguez, this amounted to applying "federal common law" to decide the case and that doing so was incorrect.[13] So the Court not only reversed and remanded, it also invalidated the long-standing rule of Bob Richards that the group member realizing the loss generating a tax refund gets to keep the refund absent an agreement to the contrary. The Court didn't have to invalidate the Bob Richards rule to decide the case; but it emphasized that the federal courts, in addressing Code-related issues, need to construe tax-sharing agreements, and by clear implication other contracts, by following the governing state's law.[14] Obviously, the overturning of Bob Richards is likely to have extremely wide application in future cases in which the tax controversy at hand involves issues such as ownership of property, contract interpretation and construction, and other areas of the common law.

The "fact of liability," or as frequently phased by federal tax opinions, the "fixing" of liability, continues to be relevant under Code section 461 for all tax accrual method businesses. See Code § 461(h)(4). in Giant Eagle, Inc. v. Commissioner,[15] the Third Circuit Court of Appeals looked to Pennsylvania contract law to identify the presence of a unilateral contract made by Giant Eagle Supermarkets with patrons participating in its discount gas points program. The court also construed the terms of the unilateral contract by following Pennsylvania contract law to ascertain the point in time at which Giant Eagle's liability for selling gas at a discount became fixed. Based on state common law, the court held that the liability became fixed whenever patrons purchased supermarket items entitling them to reduced gasoline prices at Giant Eagle pumps. The IRS had argued that no fixing of liability and cost to Giant Eagle can occur, following the rationale of General Dynamics v. United States,[16] until the moment a patron buys Giant Eagle gas using his or her Giant Eagle accumulated discount gas points, and that Pennsylvania contract law was irrelevant.[17]

One might reasonably conclude that the Rodriguez opinion calls into question the rationale of General Dynamics, and therefore will have a bearing on the outcome of future cases involving the question of whether or not the taxpayer's liability has become fixed, such that the associated costs can be claimed for the tax period as ordinary and necessary deductions taken into account under the percentage of completion of contract method as costs of goods sold inventory or some other accrual method scenario.

Another aspect of the Rodriguez decision that might influence lower federal tax courts and future Court tax decisions is found in Justice Thomas's dissenting opinion in United States v. Sandra L. Craft.[18] The Craft case raised the issue of whether a tenant by the entireties of real estate possesses property or rights to property to which a federal tax lien can attach under Code section 6321. In 1988, the IRS assessed $482,446 in unpaid income tax liabilities against Mr. Don Craft, Sandra's husband, on account of his failure to file federal income tax returns for the years 1979 through 1986. Later, the IRS filed a federal tax lien under Code section 6321, stating in the text of the lien that it attached to "all property and rights to property, whether real or personal, belonging to" Mr. Craft. At the time the lien was filed, Mr. and Mrs. Craft owned real estate in Grand Rapids, Michigan, as tenants by the entirety. The Sixth Circuit held that the federal tax lien was invalid against the real estate because, under Michigan law, Mr. Craft had no stand-alone interest in a property held as a tenant by the entirety to which an IRS lien would attach.

The majority of the Court phrased the issue as follows: "Whether the interest of respondent's husband in the property he held as a tenant by the entirety constitutes property and rights to property for purposes of Code § 6321." The Court held that resolution of the issue was a question of federal law. The tax liability the IRS sought to satisfy by filing the lien was Mr. Craft's alone. Since Mr. Craft owned property or had rights to property as one of two tenants by the entireties within the meaning of Code section 6321, the lien attaches to cut off or encumber Mrs. Craft's property and rights to property. Case closed.

Justice Thomas's dissenting opinion charges the Court with having created a federal common law of property. After all, the Court held that Mr. Craft possessed individual rights in the tenancy by the entirety sufficient to constitute "property and rights to property" within the meaning of Code section 6321 for the purposes of attachment of a federal tax lien. Justice Thomas believed that precedent, and in particular the Court's earlier decision in Drye v. United States[19] did not justify the holding of the majority. Justice Thomas would have had the Court instead rule that a tenant in a tenancy by the entirety under Michigan law lacks a divisible vested interest in property and control of property with respect to its sale, encumbrance, or other transfer, and also does not possess the ability to devise any portion of the property because it is subject to the other tenant's right of survivorship. See Rogers v. Rogers.[20] Consequently, a federal tax lien aimed at one tenant cannot attach to deprive the prior co-owner of her various state law rights of ownership.

So only in the presence of congressional authorization, or in the presence of uniquely federal interests that need to be protected by federal courts, is resorting to or creating a federal common law appropriate in deciding Code controversies.[21]

Returning to Gluck, Code section 761 and section 7701(a)(2) have long set forth the definition of the term "partnership" expressly for federal income tax purposes. Consequently, Congress has clearly authorized the federal courts to construe and apply the term "partnership" with reference to the evolving federal common law concerning the presence or absence of a partnership for purposes of the Code. This conclusion is clearly reflected in such cases as Commissioner v. Tower,[22] (whether a partnership exists for tax purposes is not dependent on state law), and Commissioner v. Culbertson,[23] (follows Tower), and Burde v. Commissioner.[24] Burde held that three co-owners of a patented invention who had engaged in extensive activity concerning development and marketing of the invention constituted a "partnership" for purposes of Code section 1235 despite their lack of a partnership agreement, the filing of Form 1065, or a business bank account for depositing income and paying expenses. In addition, Treas. Reg. section 1.761-1(a)(1) provides that the term "partnership" is "broader in scope" than the meaning frequently found in state statutes or judicial opinions. It further provides that mere co-ownership of property, which is maintained, kept in repair, and leased does not constitute a partnership. On the other hand, the regulation states that tenants in common may be partners if they actively carry on a trade, business, financial operation, or joint venture and divide or intend to divide the profits. Consequently, Gluck's substantive holding is as sound as can be.

A difficulty with predicting the Court's decision in Rodriguez as portending a shift in the Court's jurisprudence where sections of the Code implicate questions of state common law is the fact that the Court itself is the source of federal common law in many tax cases. This observation finds support by comparing the Court's decision in General Dynamics v. United States[25] with its decision in United States v. Hughes Properties.[26] Both cases involved the question of when a liability becomes fixed for purposes of the accrual method of accounting under Code section 461. Hughes Properties involved a casino operation making available to patrons progressive slot machines. Progressive machines (at the time) had a jackpot that increased over the time since the last jackpot had been won. Also, there was a maximum progressive jackpot amount. At the conclusion of each of its tax years, at midnight on June 30, Hughes Properties accrued registered but yet-to-be-won progressive jackpot amounts as a fixed liability, and claimed the accrued amount as a deduction under Code section 162 as an ordinary and necessary business expense incurred in carrying on a trade or business. The IRS did not dispute that the progressive jackpot payoffs were ordinary and necessary business expenses, but it believed the accrual to be premature because the progressive jackpots had not been paid out and, conceivably, would never be paid out, if an event such as a corporate bankruptcy intervened between the taxpayer's time of accrual and actual payoff.

The Court sided with Hughes Properties by agreeing that the Nevada Gaming Commission's Gaming Regulation section 5.110 required Nevada casinos to record at least once a day the progressive jackpot amount registered on each progressive machine. The Court noted that the regulation was strictly enforced by the Commission. Consequently, the Court held that Hughes Properties' liability to pay the amount on the progressive jackpot as of midnight of the last day of its fiscal year was definitely fixed. The Court stated that "[t]he effect of the Nevada Gaming Commission's regulations was to fix respondent's liability." By contrast with this conclusion, two dissenting Justices (Stevens joined by Burger) would have introduced further the consideration that if Hughes Properties were to surrender its gaming license and/or file for bankruptcy, it could be relieved of its liability to pay then yet-to-be-won progressive jackpot amounts. Interestingly, bankruptcy is a matter of federal law. Consequently, one can discern in the dissenting opinions a federal common law determination.

General Dynamics addressed the issue of whether an accrual basis corporation had a fixed liability under its self-insured employee medical plan to reimburse employees for medical services received before year-end, but not submitted for reimbursement. General Dynamics believed that its liability was fixed under its reimbursement policy whenever an employee or family member received reimbursable medical services, so accrued unpaid reimbursement estimates each year should be treated as Code section 162 ordinary and necessary business expenses. The majority of the Court looked to its own precedent and held that the facts presented a mere estimate of liability based on events that had not occurred before the close of the taxable year, and, therefore, the deduction did not pass the "all events" test of Code section 461 and its regulations. Further, the Court stated that it "disagree[d] with the legal conclusion of the courts below that the last event necessary to fix the taxpayer's liability was the receipt of medical care by covered individuals." Three dissenting Justices, including Justice Blackmun, who wrote the majority opinion in Hughes Properties, criticized the majority opinion for creating a federal common law rule that, for purposes of tax accrual, a claim had to be filed to fix liability. The dissenters would have preferred to follow the lower courts' approach.[27] The Claims Court had noted that the amount of the reimbursement liability could be determined with reasonable accuracy before claims for reimbursement were submitted, because the health insurance industry had made a science out of estimating reimbursement liability before claims were made, but after services were rendered. In addition, the Claims Court rested on the following determination: "[p]laintiffs' liability…was not based on the filing of a [reimbursement] claim; rather, it was fixed under the terms of the self-insured plans upon occurrence of the insured event—the receipt of covered services by the insureds." The upshot of this statement was that, whether the self-insured plan was governed by the law of the given state or was exclusively governed by ERISA, the Claims Court did not rely entirely on the Code in determining the fixing of General Dynamics' reimbursement liability.

CONCLUSION

To sum up the import of the broad subject matter of this article, first, the Gluck opinion illustrates that federal court jurisdiction limitations under the Centralized Procedure regime are something to look into whenever IRS communications involve tax clients who are or possibly might be classified as "partner[s]" as defined in the Code and regulations and in light of the federal common law "partnership" classification cases. Second, the Rodriguez opinion and holding represent a significant federal tax law development. The Tax Court's Gluck decision passes muster because Congress had long ago enacted a nationally uniform federal definition of "partnership" and "partner" for purposes of the Code. Hence, besides the Code and regulations, federal case or common law remains what one will look to in addressing emerging "partnership" or "partner" classification issues. Of course, it is appropriate that those cases take into account state partnership laws if necessary or desirable to reinforce a correct result. Third, assuming Rodriguez' holding passes the test of time and guides how future cases might be decided, it could significantly diminish the precedential weight of many federal tax cases, as well as that of some familiar Supreme Court decisions. This latter conclusion is important to practice situations that lead one to precedents that involve questions of "underlying" state statutes, regulations, case law, and other state law-oriented authority, including the Restatements of the Law, as necessary to review as part of the application of the Code or regulations to the facts. Not that this is something new. Rather, new opportunities for "the defense" are going to emerge in your practice.

Notes

1 Treas. Reg. § 1.1031(k)-1(g)(3) sets forth the definition of a "qualified escrow account" safe harbor from any and all post-transaction IRS allegations that a relinquishing taxpayer had actually or constructively received the relinquished property sale proceeds as a taxable event and later reinvested in a similar type of property.

2 Treas. Reg. § 301.7701-2(c)(2)(i) sets forth the general rule that a single-member limited liability company is a "disregarded entity" for all federal income tax purposes. Of course, there are exceptions, but as a general rule the single-member limited liability company is ignored for income tax reporting and payment purposes. Its sole owner bears those responsibilities.

3 During September 2012, 74th LLC purchased another 25 percent interest in what Mr. Gluck apparently believed was a tenant in common interest in the apartment building. The opinion indicates that this purchase was a transaction unrelated to the Code section 1031 exchange.

4 Code section 1031(e) by clear negative implication rendering partnership interests as ineligible for like kind exchange treatment (an interest in a partnership which has in effect a valid election under section 761(a) to be excluded from the application of all of Subchapter K shall be treated as an interest in each of the assets of such partnership and not as an interest in a partnership); and Treas. Reg. §1.1031(a)-1(a)(1)(iv) being explicit about that (section 1031 does not apply to any exchange of a partnership interest regardless of whether the interests exchanged are limited or general partnership interests) cannot be challenged in federal court other than on frivolous grounds. On appeal from Tax Court decisions, the circuit courts' standard for judging fact-finding and ultimate findings of fact is "clear error." See Code section 7472(a)(1) and see, e.g., United States v. General Motors Corp., 384 U.S. 127, n.16 (1966). The author, anyway, can't see any factual "clear error" in the Tax Court's decision.

5 During the 2000s the author was involved in a number of carefully planned and executed partnership to tenant in common conversions preparatory to Code section 1031 forward, deferred like-kind relinquishments of part interests of rental real estate. Upon his information and belief, preparatory conversions on the relinquishment leg and replacement leg were widespread nationwide. The gruesome outcome in Gluck becomes more real in this light.

6 The Practical Tax Lawyer has recently published two articles focusing on the Centralized Audit Procedures. Robert S. Schwartz, "Centralized Partnership Audit Procedures," volume 33, number 4, p. 20 (September 2019), and Jerald David August, "Tax Controversies and Litigation under the New Centralized Partnership Audit Rules: Are Your Clients Ready?" volume 34, number 2, p. 35 (March 2020) (Part 1), volume 34 number 3, p. 25 (May 2020) (Part 2).

7 "(6) COMPUTATIONAL ADJUSTMENT.—The term 'computational adjustment' means the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item." In addition, TEFRA Procedure section 6231(a)(3) defines the term "partnership item" as follows.: "(3) PARTNERSHIP ITEM.—The term 'partnership item' means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner lever."

8 Blonien v. Commissioner, 118 T.C. 541 (2002), supplemented by T.C. Memo 2003-308; Tigers Eye Trading, LLC v. Commissioner, 138 T.C. 67 (2012), aff'd in part, rev'd in part, and remanded sub nom; Logan Trust v. Commissioner, 616 F. App'x. 426 (D.C. Cir. 2015).

9 In light of section 301.6241-1(a)(6)(v)(J) they should someday be compelled by the courts to do so if not doing so institutionally. Cf., Clay v. Commissioner, 152 T.C. 223 (2019). The Tax Court held that written supervisory approval of penalties must be obtained by an examining agent before the first formal communication of a penalty determination to assess a penalty, or else later IRS penalty assessments are void for lack of IRS compliance with Code section 6751(b).

10 Having read the opinion, one wonders about the transactional circumstances that led to the unhappy outcome. The opinion speculates. Experience in the area leads to some other speculation, as follows:

Mr. Gluck was very intent upon purchasing parts of 145 East 74th Street as replacement property to complement his purchase of another 25 percent. His transactional attorneys or tax accountants, and maybe his real estate agents, identified to him a grey area, tax classification issue of tenant in common ownership of rental real estate versus the presence of a real estate rental general partnership, and if the IRS were to audit his tax return, he could have a problem. He went ahead as he did.

Mr. Gluck wanted to purchase parts of 145 East 74th Street as qualifying replacement property. Neither his transactional attorneys, nor his tax accountants, nor his real estate agents advised him that he was in a gray area. Nor did anyone advise him he was going to be purchasing two likely non-qualifying general partnership interests for federal income tax purposes.

Mr. Gluck wanted to purchase parts of 145 East 74th Street as qualifying replacement property. He and his tax advisors agreed that tenant in common characterization of the interests he was purchasing in the transactional documentation was reasonable in light of the prospective sellers' agreement to that characterization, and there being no tax avoidance or evasion purpose on his part, he should be fine even in the unlikely event of an IRS audit. This scenario is less likely the more those involved knew about the history of ownership and operation of 145 East 74th Street, if at all. What did they know? The Tax Court retained jurisdiction over the penalty imposition aspect of Gluck. If an opinion is forthcoming about "reasonable cause" for penalty abatement, interested readers will find out what or if anything truly had gone wrong.

11 Simon E. Rodriguez v. Federal Deposit Insurance Corporation, 589 U.S. ___ (February 25, 2020).

12 In re Bob Richards Chrysler-Plymouth Corp., 437 F.2d 262 (9th Cir. 1973).

13 In reaching its decision and setting forth its rationale, the Court drew heavily on the Sixth Circuit opinion in FDIC v. AmFin Financial Corp., 757 F.3d 530 (6th Cir. 2014).

14 The Court commented as follows: "Bob Richards made the mistake of moving too quickly past important threshold questions at the heart of our separation of powers."

15 Giant Eagle, Inc., v. Commissioner, 822 F.3d. 666 (3d Cir. 2016).

16 General Dynamics v. United States, 481 U.S. 239 (1987).

17 The IRS memorandum behind its Action on Decision, IRB 2016-40 (October 3, 2016), states that while Chief Counsel intends to follow Giant Eagle with respect to taxpayers whose appeals lie to the Third Circuit, it will not follow the opinion in other circuits. Chief Counsel laments that the Third Circuit did not appreciate the General Dynamics case.

18 United States v. Sandra L. Craft, 535 U.S. 274 rev'g. 233 F.3d 358 (6th Cir. 2000).

19 Drye v. United States, 528 U.S. 49 (1999).

20 Rogers v. Rogers, 136 Mich. App. 125 (1984).

21 Whether Craft goes a step too far beyond Drye is a close question. In Drye, a son rejected receipt of his mother's interstate estate via a disclaimer valid under Arkansas law. The Court held, nonetheless, that the disclaimer could not defeat a pre-existing federal tax lien against the son's "property" or "rights to property" within the meaning of Code section 6321. The Court based its holding in part on Arkansas property law to the effect that the transferee of an expectancy of inheritance could enforce the transfer, and, in part, on Court precedent interpreting the terms "property" or "rights to property" for purposes of Code section 6334's IRS levy coverage and exceptions. With reference to the latter basis, the Court noted that Congress intended the broadest interpretation possible of the terms "property" and "rights to property" for purposes of Code sections 6321, 6322, 6331(a), and 6334(a) and (c). Drye can be interpreted in the light of Rodriguez as a decision reflecting "Congressional authorization" for a federal common law of property and rights to property for purposes of IRS liens and levies. So viewed, Rodriguez is not a contradiction of Drye and its cited precedents. This line of reasoning might become commonplace in future decisions grappling with Rodriguez.

22 Commissioner v. Tower, 327 U.S. 280 (1946).

23 Commissioner v. Culbertson, 337 U.S. 733 (1949).

24 Burde v. Commissioner, 43 T.C. 252 (1964), aff'd., 352 F.2d 995 (2d Cir. 1965), cert. denied, 383 U.S. 966 (April 4, 1966). The Second Circuit upheld the Tax Court. Its opinion makes clear that the presence or absence of a "partnership" for federal tax purposes is a federal question. It is interesting to note that at footnote 8 the Court stated the following: "We do not necessarily imply that as a matter of state law the participation of [the three individuals in question] was insufficient to constitute a joint venture [or partnership]." See Wooten v. Marshall, 279 F.2d 558 (2d Cir. 1960)."

25 General Dynamics v. United States, 481 U.S. 239 (1987).

26 United States v. Hughes Properties, 476 U.S. 593 (1986).

27 See, e.g., 6 Cl. Ct. 250 (1984).