

FLP Planning Is Still Viable

Former auditor offers a renewed look at how the Internal Revenue Service identifies and develops issues in family limited partnership audits

By Richard A. Behrendt

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Fewer estates are now subject to federal estate taxes, thanks to the \$5 million federal estate tax exemption. Internal Revenue Service data indicates that only 8,239 estates larger than \$5 million filed a federal estate tax return in 2009, the most recent year for which data is available.¹ In sharp contrast, more than 108,000 federal estate tax returns were filed nationwide as recently as 2001.

However, the smaller number of estate tax returns filed for deaths in 2011 and 2012 will be subject to a heightened level of government scrutiny as IRS auditors comb through a declining inventory of estate tax returns to audit. In particular, the estate tax returns filed for decedents who owned an interest in a family limited partnership (FLP) or similar discounted entity are now virtually guaranteed to receive a thorough examination.

Against this backdrop of increased IRS scrutiny of FLPs, a renewed look at how the IRS identifies and develops issues in FLP audits is warranted. In the following analysis, I'll attempt to draw on several dozen FLP audits I conducted during my tenure as an IRS auditor from 1994 through 2006. (Note that the official title of an IRS auditor for estate and gift tax returns is an estate tax attorney.)

Initiating the Exam

Generally, FLP cases are assigned to journeymen IRS auditors who have at least five years of audit experience. These cases are among the most difficult field examinations, often requiring a year or more of factual development and research.² Throughout the examination process, the auditor's objective is to identify issues that may support an assertion of Internal Revenue Code Section 2036, the rule governing the transfer of assets with a retained life estate, to disregard the FLP for federal estate tax purposes.

An examination of an estate tax return that includes an FLP audit issue is typically initiated by mailing a five- to 10-page request for additional information to the taxpayer's representative. The auditor may request any of the following items that weren't attached to the original estate tax return:

- All correspondence, including emails, letters and memos discussing, recommending or explaining the estate tax savings or benefits of forming a partnership (or other discounted entity).³
- All billing records pertaining to any legal work performed for the decedent during the period beginning 12 months prior to the formation of the partnership and ending on the date-of-death.⁴
- The original partnership agreement and all amendments.
- If the general partner is a corporation or a limited liability company (LLC), the articles of incorporation or operating agreement of the general partner and all amendments.
- Date-stamped certificates of limited partnership or similar documents prepared to meet state law requirements for the formation of the partnership.
- Date-stamped letters of authorization to create a partnership brokerage account and transfer securities to the partnership account.
- Letters of confirmation that securities were transferred to the partnership.
- Complete monthly brokerage statements for all assets transferred to the partnership, covering two years prior to formation of the partnership, through the funding of the partnership and continuing through the date of the request for additional information.

- Complete monthly bank statements for all partnership accounts covering the period of formation of the partnership through the date of the request for additional information.
- All records of partnership meetings and copies of all meeting minutes.
- All of the tax returns prepared and filed on behalf of the partnership during its existence.
- A complete list of the decedent's recurring monthly expenses covering the period starting with the formation of the partnership and continuing through the date of death.
- Complete medical records of the decedent for up to two years prior to the partnership formation through the date of death.

It wouldn't be uncommon for this litany of requested items to yield several bankers boxes full of additional documents. On rare occasions, an auditor will also request an interview with one or more of the decedent's surviving family members. As invasive as some of these requests may seem (particularly the request for medical records), they're authorized under the broad investigative powers conferred upon the IRS to examine books and witnesses.⁵

In the FLP audits I oversaw during my tenure at the IRS, it was rare that I wouldn't be able to cobble together a handful of "bad facts" to support an argument that IRC Section 2036 applied in any given case. Tax practitioners often fail to anticipate that no matter how strongly they coach or advise the client and family members to adhere to the formalities and bona fides of an arm's length relationship in all dealings with the entity, it only takes a few incidents of seemingly innocuous

irregularities for the IRS to build a case that a transfer didn't meet the requirements for the bona fide sale exception to Section 2036.

Section 2036

By the mid-1990s, the IRS became concerned that FLPs were gaining popularity as the preferred technique for reducing federal estate taxes. Initially, the IRS asserted multiple theories to disregard FLPs, including common law doctrines such as gift-on-formation, step-transaction, lack of economic substance, substance over form, as well as IRC Sections 2036 and 2038 and the special valuation rules of IRC Sections 2703 and 2704. By the early 2000s, however, the IRS' effort against FLPs became more tightly focused on Section 2036.

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Section 2036 provides:

(a) **General Rule.** The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

The Tax Court's application of Section 2036 in FLP cases has evolved over the

last 10 to 15 years. In early FLP cases, the court began its Section 2036 analysis by inquiring whether the decedent had retained the use or enjoyment of, or income from, the property transferred to the FLP. It was only after the use or enjoyment inquiry was completed that the court went on to inquire whether the bona fide sale exception to Section 2036 was applicable. (In the first FLP case decided by the Tax Court under Section 2036, *Schauerhamer v. Commissioner*,⁶ the court focused exclusively on the retained use or enjoyment analysis and didn't discuss the bona fide sale exception.) Even as *Strangi v. Comm'r* made its way back and forth between the Tax Court and the U.S. Court of Appeals for the Fifth Circuit from 2000 through 2005, the analysis focused primarily on the "retained the use or enjoyment of" inquiry, with discussion of the bona fide sale test appearing only as an afterthought. A pivotal change occurred when the court reversed the ordering of its Section 2036 analysis and began leading with the inquiry whether the bona fide sale exception to Section 2036 applied to a subject case. The court initially adopted this approach in *Stone v. Comm'r*,⁷ but it was in *Bongard v. Comm'r* that the court fully embraced the efficiency of beginning its analysis with the bona fide sale test.

This *Bongard* framework of Section 2036 is a two-pronged analysis, with each prong further divided into two respective subparts. Under this structure, lifetime transfers of property to an FLP are includible in the transferor's gross estate under Section 2036 if:

- the transfer was not
 - a bona fide sale
 - for adequate consideration, and

- the decedent retained
 - the use or enjoyment of the transferred property, or
 - control over the transferred property.

The first prong provides an exception to the general rule of inclusion found in the second prong. If the facts and circumstances support a determination that the transfer satisfies the bona fide sale for adequate consideration exception, the transaction is removed from the ambit of Section 2036, and there's no need to further inquire whether the decedent retained the use or enjoyment of, or control over, the transferred property. Conversely, if it's determined that a transfer doesn't satisfy the bona fide sale exception, the Section 2036 analysis will continue, with the inquiry shifting to whether the decedent retained the use and enjoyment of, or the control over, the transferred property.

In practice, the adequate consideration issue is merely a sub-category of the broader bona fide sale inquiry. If each initial partner receives an ownership interest in the FLP proportionate to his capital contribution, adequate consideration is satisfied, but the transaction must still qualify as a bona fide sale. If ownership interests aren't proportionate to capital contributions, the transaction won't qualify as a bona fide sale.⁸ In other words, the absence of adequate consideration will be problematic in an FLP controversy, but its presence doesn't substantively help circumvent Section 2036.

Also, while Section 2036(a)(2) could theoretically trigger inclusion of the transferred property in the decedent's gross estate if the decedent retained even a thin sliver of the general partnership or other controlling interest in entity, it

seems unlikely that the IRS will rely exclusively on Section 2036(a)(2) to disregard the transfer of the interest in the partnership or other entity. Instead, the decedent's retention of some or all of the controlling interest will be treated as secondary to an argument that Section 2036(a)(1) is applicable.

Accordingly, we may pare Section 2036 down even further to its root elements as the following two-part test. Lifetime transfers of property to an FLP are includible in the transferor's gross estate under Section 2036 if:

- the transfer was not a bona fide sale, and
- the decedent retained the use or enjoyment of the transferred property

This streamlined two-pronged application of Section 2036 represents something of a synthesis in the Tax Court's evolving application of Section 2036 to FLP controversies. Since it appears reasonably likely that the court will continue applying Section 2036 in this manner, an analysis of each separate component of this two-prong analysis may be instructive.⁹

Bona Fide Sale

The good news for taxpayers and practitioners is that starting the Section 2036 analysis with the bona fide sale provides an opportunity for an early exit from the ambit of the statute. The bad news is that the Tax Court has set the bar rather high regarding what facts and circumstances surrounding the formation, funding and administration of the entity will support a finding that the taxpayer has satisfied the bona fide sale test. In *Bongard*, the court stated that the bona fide sale test will be satisfied if the record shows that:

- there was a legitimate and significant non-tax reason for creating the partnership;

- the non-tax reason was a significant factor that motivated the partnership's creation; and
- the significant non-tax reason was an actual motivation, not just a theoretical justification.

This standard harkens back to the traditional business purpose doctrine of *Gregory v. Helvering*,¹⁰ which has been described as “an instinctive judicial attitude that a transaction should not be given effect for tax purposes unless it serves a purpose other than tax avoidance.”¹¹

It can be argued that it's an example of judicial fiat for the Tax Court to read business purpose into the bona fide sale exception, but the reality is that the IRS will follow the standard established by the court in *Bongard* and its progeny. The facts and circumstances surrounding the planning, formation, funding and administration of the entity will determine whether the bona fide sale exception is satisfied, and the task of establishing legitimate and significant non-tax purposes for creating the entity will be especially challenging when the entity is funded primarily or exclusively with marketable securities and other liquid assets.

FLPs that are created for substantive non-tax purposes should have no trouble clearing the hurdle of the bona fide sale test. In so doing, they will avoid inclusion of the transferred assets in the decedent's gross estate at undiscounted values under Section 2036. In contrast, FLPs created solely to obtain valuation discounts on passive investments will continue to face IRS scrutiny. Moreover, boilerplate language in the governing instrument purporting that the entity was created for non-tax purposes shouldn't be expected to carry the day.

Purported non-tax purposes that tend to appear more theoretical than actual include:

Centralized management. This may be an unpersuasive non-tax purpose for forming an FLP if the record indicates that the assets transferred to an FLP could have been managed just as efficiently in a common trust. In *Rosen v. Comm'r*, the Tax Court concluded, “As to petitioners' claim that the LRFLP was formed to create centralized management, decedent had centralized management through the Lillie Investment Trust. The Lillie Investment Trust held almost all of decedent's assets and allowed her (or a successor) to manage and control her assets in full.”¹²

Furthermore, centralized management will ring particularly hollow as a non-tax motive for forming an FLP if the partnership is funded entirely with passive assets. Thus, in *Rosen*, the court added, “efficient management might count as a credible non-tax business purpose, but only if the business of the FLP required some kind of active management as in *Kimbell*. In that case, the Fifth Circuit concluded that the working interests in the decedent's oil and gas properties required active management, which the partnership enhanced because it allowed the participant family members to pool resources, reduce administrative costs and protect the family concern in case the decedent's son, who possessed the business expertise, grew too ill to manage the business.”¹³

Recently, the court in *Mirowski v. Comm'r* accepted centralized management as a legitimate non-tax purpose for forming a discounted entity; however, *Mirowski* might prove to be more of an anomaly than the “good facts” case that it was hailed as by several commentators.

I may be speculating, but it seems quite possible that the IRS in *Mirowski* failed to collect crucial evidence during the critical stage of developing its factual case at the examination level of the audit process. The auditor may have believed that this case was a slam-dunk Section 2036 case when the following timeline was revealed. As indicated in the published opinion, the decedent executed an agreement to create a single-member LLC on Aug. 27, 2001; was admitted to a hospital on Aug. 31, 2001; transferred more than \$60 million in marketable securities to the LLC on Sept. 5–7, 2001; gifted a 16 percent interest in the LLC to each of her three daughters on Sept. 7, 2001; and died “unexpectedly” on Sept. 11, 2001.

On the surface, this timeline seems to point to a classic “death-bed” transaction, which may have lulled the auditor into thinking that obtaining a copy of medical records wasn’t necessary. This oversight may have been a critical mistake, allowing the estate’s representatives to persuade the court that the decedent’s death was unexpected. The court concluded that, “At no time before September 10, 2001, when Ms. Mirowski’s condition unexpectedly deteriorated significantly, did Ms. Mirowski, her family or her physicians expect her to die and that consequently at no time did Ms. Mirowski and her daughters discuss or anticipate the estate tax and similar transfer taxes and other estate obligations that would arise only as a result of Ms. Mirowski’s death.”¹⁴

A skeptic would ask: If Mirowski’s death was unexpected, what compelled lawyers to bring stacks of legal documents to her hospital room to implement a complicated strategy to create an LLC, transfer over \$60 million dollars worth of

assets to the entity and immediately gift 48 percent of the discounted LLC units to her three daughters, incurring nearly \$12 million in gift taxes in the process?

Again, this is pure speculation, but if the auditor had obtained copies of the decedent’s complete medical records, the government may have been able to make a stronger case that Mirowski’s medical outlook was much more serious when she was admitted to Johns Hopkins Hospital on Aug. 31, 2001.¹⁵ Without medical records, the government wasn’t able to develop a strong nexus among the following facts: (1) Mirowski had been diagnosed with diabetes in 1989, (2) she developed foot blisters while wearing tight shoes on a walking tour through Europe in early 2001, (3) after the foot blisters turned to ulcers, her physician informed her that amputation was among the possible treatments if the ulcers failed to heal, (4) she informed her physician that amputation was out of the question, and (5) she subsequently died of sepsis (blood poisoning). The government’s failure to establish a direct correlation between these facts and the creation, funding and gifting of the LLC is where the government’s Section 2036 case was lost.

Creditor protection. This is among the most frequently cited non-tax reasons for forming an FLP, but it may not succeed as a legitimate, non-tax motive for forming an FLP for two reasons. First, the IRS may reject creditor protection as a non-tax purpose for forming the FLP if there is no factual record indicating that the decedent had any substantive reason to be concerned about creditors. As the court stated in the *Rosen* case, “As we understand petitioners’ factual position as to this claim, the LRFPL was formed so that

someone could not sue decedent and foreclose on her assets for payment of a judgment against her. From a factual point of view, however, the record is devoid of persuasive evidence that the LRFLP was formed with any such intent. Nor do we find that Feldman informed either of decedent's children, before they signed the LRFLP agreement, that the LRFLP was meant to limit the liability of decedent or any other limited partner. While Feldman stated that decedent, like any other individual, always faced the risk that she could be sued on account of her actions, we are unpersuaded by this statement of mere general applicability that limiting decedent's personal liability was an actual purpose for forming LRFLP. Instead, we hear that statement as nothing more than a theoretical justification for the formation of a limited partnership."¹⁶

In *Bigelow*, the decedent was bedridden and a resident of an assisted living facility when the partnership was formed. This led the Ninth Circuit to determine that the decedent had no "genuine exposure to liability that might have validated the partnership formation for a non-tax purpose."¹⁷

Second, several reported bankruptcy decisions have called into question the basic premise that an FLP (or LLC) provides any creditor protection at all to its limited partners.¹⁸ Careful drafting that adds additional layers of protection in the partnership agreement might negate this latter point, but that would do nothing to address the former point, that is, creditor protection falls flat as a non-tax purpose if there's no factual record indicating that the transferor reasonably anticipated having substantive creditor concerns.

Gifting. Although a reasonable argument can be made that an FLP facilitates gifting, particularly in the situation in which a donor is making gifts to a large pool of donees that might include grandchildren and even great grandchildren, gifting doesn't appear to rise to the level of a non-tax purpose that would satisfy the business purpose test. This stance led the Tax Court to note in *Rosen* that, "As to petitioners' claim that the LRFLP was formed to facilitate decedent's gift giving and to preserve the value of her gifts, even if gift giving were an actual reason for the LRFLP's formation, it is not a significant nontax purpose that could characterize the transfer of decedent's assets to the LRFLP as a bona fide sale."¹⁹

The U.S. Court of Appeals for the Ninth Circuit was even more dismissive of gifting as a non-tax purpose for forming an FLP in *Bigelow*: "Gift giving is considered a testamentary purpose and cannot be justified as a legitimate, non-tax business justification."²⁰

Again, the Tax Court accepted gifting as one of three legitimate non-tax purposes for forming the entity in *Mirowski*,²¹ but *Mirowski* may be an anomalous case for reasons stated above.

Retained Use or Enjoyment

If the bona fide sale exception to Section 2036 hasn't been triggered, the next hurdle will be whether the decedent retained the use or enjoyment of the transferred property. The IRS isn't required to establish that there was an express agreement for retained use or enjoyment of the transferred property. Rather, an implied agreement inferred from the facts and circumstances is enough to sustain the application of Section 2036(a)(1).

Motivated IRS auditors will cast a wide net when tackling the factual development needed to support an assertion that there was an implied agreement among the partners that the decedent retained the use or enjoyment of the transferred property.

The following red-flag issues will determine whether Section 2036 is applicable to a decedent's transfer of property to an FLP.

- Was the transferor in advanced age and/or declining health at the time of the formation and funding of the FLP?
- Were all, or nearly all, of the transferor's assets transferred to the FLP, so that there were insufficient assets outside of the partnership to pay recurring living expenses?
- Were any personal-use assets placed in the partnership?
- Was there a lack of genuine pooling of assets by the initial partners?
- Was there a lack of meaningful negotiation between the partners regarding the terms of the partnership agreement during the planning stage?
- Were there any unreasonable or unexplained delays in the funding of the partnership?
- Were partnership assets ever commingled with the decedent's personal assets?
- Were any non-pro rata partnership distributions made during, or after, the decedent's lifetime?
- Were any partnership distributions made in violation of the terms of the partnership agreement?
- Was there a lack of substantive change in the investment policy after the partnership was created and funded?

If a decedent doesn't own an interest in the discounted entity, the IRS can't apply Section 2036.

- Was there a lack of recorded partnership meetings and/or minutes?
- Were there correspondence, emails, notes, memoranda or illustrations indicating that the formation of the FLP was motivated by efforts to reduce or eliminate estate tax?
- Were direct or indirect distributions made from the partnership to pay estate taxes and administrative expenses?

As the affirmative answers to these questions accumulate, the more evidence there will be of an implied agreement that the decedent retained the use or enjoyment of the transferred property, and the harder the IRS will push an assertion of Section 2036(a)(1).

Recommendations

The impact of federal estate taxes can often be mitigated for the moderately wealthy by using non-controversial strategies, such as a regular gifting program, irrevocable life insurance trusts and qualified personal residence trusts. For high-net-worth clients who are willing to accept the heightened level of audit scrutiny anticipated under the current \$5 million estate tax exemption amount, FLP planning is still a viable strategy for reducing federal estate taxes, but more care than ever is needed in implementing the plan.

The best practice in FLP planning may be to create the entity, fund it and immediately remove all ownership interest in the entity from the client's estate. As long as the decedent who transferred property to the FLP doesn't own an interest in the discounted entity at death, the IRS can't apply Section 2036, which is an estate tax rule, to pull the transferred assets back into the decedent's gross estate at their undiscounted values. For example,

a married couple can remove nearly \$15 million of discounted partnership interest from their combined estates under the current exemption amount by reducing the fair market value of the partnership by a combined 33 percent discount for lack of marketability and lack of control.

Additional steps that can minimize the audit risk inherent in FLP planning include:

- **Sales to intentionally defective grantor trusts.** As an alternative to gifting an ownership interest in a discounted entity during lifetime, the interest may be sold to an intentionally defective grantor trust (IDGT) in exchange for a promissory note. Again, the key here is that no ownership interest in the discounted entity will be includible in the decedent's gross estate, which precludes the application of Section 2036.²²
- **Adequate disclosure of lifetime gifts.** Prior to 1997, the IRS could propose adjustments to lifetime transfers as part of an audit of the transferor's estate tax return, even if the lifetime transfer had been reported on a gift tax return filed more than three years prior to the transferor's death. Under the Taxpayer Relief Act of 1997, IRC Section 6501(c)(9) was amended to provide that the three-year statute of limitations on reported gifts doesn't begin unless the gift is "adequately disclosed" on a gift tax return. However, providing adequate disclosure of the gift precludes the IRS from taking a "second look" at the disclosed gifts, either on a subsequent gift tax return, or on the donor's federal estate tax return, after the three-year statute of limitations on the gift tax return has lapsed. Complying with the adequate disclosure requirements found in the final regulations under Section 6501 will protect the three-year statute of

limitations on reported lifetime transfers of an interest in an FLP, as well as other hard-to-value assets.

- **Qualified appraisals.** Commissioning a qualified appraiser to value the transferred interest in the discounted entity, whether the interest is transferred during lifetime or at death, is critically important. If there aren't enough "bad facts" to trigger inclusion of the transferred assets under Section 2036, the IRS may still challenge the size of the combined discounts for lack of control and marketability. The appraiser should be accredited with the American Society of Appraisers or have similar credentials, and all valuation reports should be prepared in accordance with the Uniform Standards of Professional Appraisal Practice.²³
- **Pragmatic dealings with IRS.** During the course of any estate or gift tax audit, there are at least three reasons to cooperate with the IRS and respond timely to reasonable requests. First, this may help move the audit toward a pragmatic resolution of unresolved issues. Second, Treasury Department Circular No. 230 mandates that attorneys, accountants and enrolled agents must adhere to certain duties and restrictions to practice before the IRS.²⁴ Third, in the rare gift or estate tax case that leads to a Tax Court trial, dealing with the IRS in a cooperative manner shifts the burden of proof to the IRS on all factual matters.²⁵
- **Settling an FLP case at the examination level.** Technically, IRS auditors aren't authorized to "settle" cases at the examination level of an IRS audit. The official charge of an auditor is to develop issues, propose adjustments and transfer "unagreed" cases to the Appeals Division. If an "impartial" appeals officer can't settle the case, it

will be docketed for review in the U.S. Tax Court. In practice, however, more pragmatic estate tax auditors should be open to discussions that might lead to a resolution of all disputed issues at the examination level. In my 12 years as an auditor, there were fewer than 10 cases I couldn't resolve in examination, but I also knew of colleagues who would be unwilling to budge on proposed adjustments and would routinely send cases to the Appeals Division. My goal was to make good use of limited government resources by efficiently closing cases without the involvement of the Appeals Division, let alone the expense and delay of a Tax Court proceeding. As with any negotiated controversy, if both sides believe there's risk if a case goes to trial, a compromise is likely to be in everyone's best interest.

If FLP planning is part of an overall strategy to minimize the impact of

federal estate taxes, practitioners and high-net-worth clients should recognize that the IRS will be closely scrutinizing estate and gift tax returns reporting transfers of these entities. Taking some of the steps outlined above may help taxpayers withstand the heightened audit scrutiny that's anticipated.

About the Author

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1. See Tax Stats at irs.gov/taxstats.
2. Auditors typically receive estate tax returns nine to 12 months after the return has been filed, often leaving less than two remaining years on the three-year statute of limitations to assess additional tax under Internal Revenue Code Section 6501.
3. Illustrations quantifying how much federal estate tax can be saved using a family limited partnership places the taxpayer's representative in the difficult position of asserting that the FLP was formed for non-tax purposes.
4. Billing records can be particularly problematic for the estate if the records indicate that efforts to form the partnership followed closely upon a diagnosis of a life-threatening illness.
5. IRC Section 7602.
6. Schauerhamer v. Commissioner, T.C. Memo 1997-242.
7. Stone v. Comm'r, T.C. Memo 2003-309.
8. The U.S. Court of Appeals for the Fifth Circuit may have created some confusion on this issue, laboring through a lengthy analysis of the adequate consideration test in *Kimbell v. United States*, 371 F.3d 257 (5th Cir. 2004).
9. The court has occasionally departed from the Bongard framework, such as in *Malkin v. Comm'r*, T.C. Memo 2009-212.
10. *Gregory v. Helvering*, 293 U.S. 465 (1935).
11. Boris I. Bitker and James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* (5th ed. 1987), at par. 14.51.
12. *Rosen v. Comm'r*, T.C. Memo. 2006-115.
13. *Ibid.*
14. *Mirowski v. Comm'r*, T.C. Memo 2008-74.
15. Obviously, government requests for a deceased taxpayer's medical records will seem like an intrusion into the most delicate taxpayer privacies, but it's often a necessary part of the factual development of a federal estate tax audit. As an anecdote, in one estate tax audit I conducted, I not only obtained complete medical records indicating the taxpayer's declining health leading up to a particular transaction, but also I requested an actual tissue sample from the decedent's archived medical file to be analyzed by a medical expert I had hired for the government. The issue in that case was whether there was a less than 50 percent probability that the taxpayer would have survived more than one year from the date of the transaction in question. Under Treasury Regulations Section 25.7520-3(b)(3), the actuarial factors of Section 7520 may not be used to determine the present value of an annuity, income interest, or reversionary interest if an individual who's a measuring life is "terminally ill" at the time of the transaction, so that there's at least a 50 percent probability that the individual will die within one year.
16. *Rosen*, supra note 12.
17. *Bigelow v. Comm'r*, T.C. Memo 2005-65 .
18. See e.g., *Movitz v. Fiesta Inva., LLC (In Re Ehmann)*, 319 Bankr. 200 (Bankr. D. Ariz. 2005).
19. *Rosen*, supra note 12.
20. *Bigelow v. Comm'r*, No. 05-75957 (9th Cir. 2007).
21. *Mirowski*, supra note 14.
22. Recently, in *Pierre v. Comm'r*, T.C. Memo 2010-106, the Tax Court considered an Internal Revenue Service challenge to the sale to an intentionally defective grantor trust strategy, with only a nominal valuation adjustment resulting in the government's favor.
23. See *Kohler v. Comm'r*, T.C. Memo. 2006-152, for an example of how an appraiser's lack of credentials (in this case, the government's appraiser) may influence the outcome of a valuation case.
24. Circular 230 is codified at 31 CFR Part 10.
25. See *M.D. Litchfield Est.*, T.C. Memo 2009-21.