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ESTATE OF NOORDIN M. CHARANIA, DECEASED, FARHANA CHARANIA, MEHRAN CHARANIA and ROSHANKHANU DHANANI, ADMINISTRATORS,	)	
Petitioners,	)	
v.	)	Docket No. 16367-07
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

OPENING BRIEF FOR RESPONDENT

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ESTATE OF NOORDIN M. CHARANIA, DECEASED, FARHANA CHARANIA, MEHRAN CHARANIA and ROSHANKHANU DHANANI, ADMINISTRATORS,	)	
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COMMISSIONER OF INTERNAL REVENUE,	)	
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OPENING BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

This is a case for a redetermination of a deficiency in estate tax of the Estate of Noordin M. Charania, Deceased, in the amount of $2,070,000.01 and an addition to tax, pursuant to I.R.C. § 6651(a)(1), in the amount of $511,758.93.

This case was submitted fully stipulated at the Session of the Court presided over by Judge Mary Ann Cohen in Boston, Massachusetts, on October 20, 2008. The evidence consists of a Stipulation of Facts and attached exhibits. The Court ordered the parties to file simultaneous opening briefs on or before January 5, 2009, and simultaneous reply briefs on or before

February 19, 2009. A computation under T.C. Rule 155 will not be necessary in this case.

QUESTIONS PRESENTED

1. Where 250,000 shares of stock were registered in the name of Noordin M. Charania, Deceased (Decedent), at his date of death, and the estate returned the value of only 125,000 shares on the asserted basis that the shares were community property, whether the estate should be increased to include the value of the remaining 125,000 shares, since all 250,000 shares were the separate property of Decedent.

2. Whether petitioners are liable for an addition to tax under I.R.C. § 6651(a)(1) for the late filing of the estate tax return.

RESPONDENT'S REQUEST FOR FINDINGS OF FACT

1. A United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706-NA) was filed for the estate of Decedent with the Internal Revenue Service (Service). This Form 706-NA was mailed to the Service on April 29, 2004. (Stip., pars. 1, 2, 3; Exs. 1-J, 2-J, 3-J)

2. On February 22, 2007, respondent issued a notice of deficiency to the Estate of Noordin M. Charania, Deceased, Farhana Charania, Statutory Executor, asserting respondent's determined deficiency in the amount of $2,070,000.01 and an addition to tax, pursuant to I.R.C. § 6651(a)(1), in the amount of $511,758.93. (Stip., par. 4; Ex. 4-J)

3. At the time the petition in this case was filed on July 20, 2007, petitioner Farhana Charania (Farhana), administrator of Decedent's estate, had a legal residence of 7 Admiral Square, Chelsea Harbour, London SW10 OUU, England. (Stip., par. 6)

4. At the time the petition in this case was filed on July 20, 2007, petitioner Mehran Charania (Mehran), administrator of Decedent's estate, had a legal residence of 11 Bryanston House, Dorset Street, London W1U 6QU, England. (Stip., par. 7)

5. At the time the petition in this case was filed on July 20, 2007, petitioner Roshankhanu Dhanani (Mrs. Dhanani), administrator of Decedent's estate, had a legal residence of Van Eyklei 2, 2018 Antwerp, Belgium. (Stip., par. 8)

6. The subject case is appealable to the United States Court of Appeals for the First Circuit. (Stip., par. 9)

7. Decedent was born in 1930, in Kampala, Uganda. (Stip., par. 10)

8. Decedent was a citizen of the United Kingdom. (Stip., par. 11)

9. Mrs. Dhanani was born in 1934, in Uganda. (Stip., par. 12)

10. Mrs. Dhanani is a citizen of the United Kingdom. (Stip., par. 13)

11. Decedent and Mrs. Dhanani were married on February 18, 1967, in Uganda. (Stip., par. 14)

12. Decedent and Mrs. Dhanani did not sign a marriage contract at any time before or after their marriage. (Stip., par. 15)

13. Uganda is a former British protectorate which became independent from Britain on October 9, 1962. (Stip., par. 16)

14. At the time of Decedent and Mrs. Dhanani's marriage on

February 18, 1967, Uganda was an independent republic. (Stip., par. 17)

15. Decedent and Mrs. Dhanani had two children, their daughter Farhana, born in Uganda, and their son Mehran, born in Belgium. (Stip., par. 18; Ex. 8-J)

16. While he lived in Uganda, Decedent was the sole proprietor of a company called Transit Congo which acted as an agent for a Belgian shipping company called CMB. Before that he worked in Uganda for a local petrol station, for a local bank as a bank teller, and for an Italian transportation company. (Stip., par. 19)

17. In July, 1972, all people of Asian, i.e., Indian, descent in Uganda were given a deadline by the regime of Idi Amin of three months to leave the country. Decedent and his family left Uganda permanently in October, 1972, and moved to Belgium. (Stip., par. 20)

18. When Decedent and Mrs. Dhanani left Uganda, all of their assets within Uganda were seized by the government, they did not own any securities or other assets outside of Uganda, and they left Uganda with only a few items of personal property. (Stip., par. 21)

19. When Decedent and Mrs. Dhanani left Uganda, they did

not intend to return. Once Decedent and Mrs. Dhanani established their residence in Belgium, where Decedent was employed, where he lived for almost thirty years until his death, and where Mrs. Dhanani continues to live, they intended to stay there indefinitely. (Stip., par. 22)

20. After relocating to Belgium, Decedent and Mrs. Dhanani did not execute any documents in Belgium requesting that their marital property regime be changed to a community property regime. (Stip., par. 23)

21. After he left Uganda and while he lived in Belgium, Decedent continued to be self-employed as an agent for the Belgian shipping company CMB. (Stip., par. 24)

22. Mrs. Dhanani worked in Uganda for the Aga Khan Education board. Mrs. Dhanani did not work in Belgium. (Stip., par. 25)

23. Decedent executed a will on June 17, 1985. Decedent left his property one-third each to Mrs. Dhanani, Farhana, and Mehran. (Exs. 6-J, 8-J)

24. Decedent purchased 50,000 shares of Citicorp stock on August 4, 1997, for $135.00 per share. (Ex. 11-J)

25. Decedent's Citicorp shares were held in safekeeping in an account in the name of Mr. Noordin M. W. Charania at Belgian

Bank in Hong Kong (Belgian Bank). (Ex. 11-J)

26. On or about October 21, 1998, Decedent's 50,000 Citicorp shares were converted into 125,000 shares of Citigroup, Inc. (Citigroup) stock. (Ex. 13-J)

27. As of July 16, 1999, Decedent owned 187,500 shares of Citigroup, consisting of Decedent's prior shares plus a stock dividend of 62,500 shares, all held in Decedent's account at Belgian Bank. (Ex. 14-J)

28. On or before April 9, 2000, Belgian Bank became known as Fortis Bank. (Ex. 12-J)

29. At some time after July 16, 1999, Decedent acquired 62,500 additional Citigroup shares. (Ex. 10-J; Entire Record)

30. Decedent died on January 31, 2002, in Edegem, Belgium. (Stip., par. 27; Ex. 7-J)

31. Decedent was survived by Mrs. Dhanani, Mehran, and Farhana. (Stip., par. 30)

32. At the time of decedent's death, 250,000 shares of Citigroup common stock were registered in the name of Decedent. (Stip., par. 32; Ex. 10-J)

33. On Decedent's date of death, the 250,000 shares of Citigroup stock remained in safekeeping in Decedent's account at Fortis Bank. (Stip., par. 33; Exs. 10-J, 15-J)

34. Decedent's account at Fortis Bank was identified in the records of Fortis Bank as the account of "Noordin Mohamed Waliji Charania, deceased, Holder of British Passport No. XXXXX4982." (Ex. 10-J)

35. The value of 250,000 shares of Citigroup common stock on January 31, 2002, Decedent's date of death, was $47.16 per share, or $11,790,000.00. (Ex. 1-J)

36. The value of 250,000 shares of Citigroup, Inc., common stock on July 31, 2002, was $33.25 per share, or $8,312,500.00. (Stip., par. 43; Ex. 1-J)

37. On February 12, 2002, and September 5, 2002, Johan Kiebooms (Kiebooms), a notary public in Antwerp, Belgium, certified that Decedent and Mrs. Dhanani were of British nationality. (Stip., pars. 28, 29; Exs. 8-J, 9-J)

38. Although Farhana was born in Uganda, Kiebooms certified that Farhana was of Belgian nationality. (Exs. 8-J, 9-J)

39. On October 31, 2002, Stephen Fields, a person authorized to practice before the Service, mailed Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes, to the Service on behalf of the estate of Decedent. In this Form 4768,

the estate applied for an extension of time to file an estate tax return until April 30, 2003. (Ex. 16-J)

40. In the Form 4768, the estate also requested an extension of the time to pay the estate tax until October 31, 2003. However, the estate did not make a payment of estate tax with the Form 4768. (Stip., par. 39; Exs. 5-J, 16-J)

41. The estate's request for a six month filing extension until April 30, 2003, to file the estate tax return was approved by the Service. (Exs. 5-J, 16-J)

42. No further filing extensions were requested by the estate or approved by the Service. (Entire Record)

43. The Service did not approve the estate's request for a one year extension to pay the estate tax. (Exs. 5-J, 16-J)

44. Ms. Nele Daem (Daem) is petitioners' Belgian legal adviser. Other than the fact that Daem is licensed to practice law in Belgium, Daem's credentials are not contained in the record. (Exs. 21-J, 22-J, 23-J; Entire Record)

45. On November 6, 2002, Daem wrote to SA Fortis Bank Asia HK regarding the Citigroup common stock of Decedent. Daem asserted that the 250,000 shares were the community property of Decedent and Mrs. Dhanani. (Ex. 21-J)

46. On November 13, 2002, the estate made a payment in the

amount of $1,150,732.33. (Ex. 5-J)

47. On December 18, 2003, Decedent's surviving spouse executed the Charania Qualified Domestic Trust Agreement (QDOT) between Mrs. Dhanani, as settlor, and Farhana, Mehran, and Gregory D. Testerman (Testerman), as trustees. In the QDOT, the parties asserted that the Citigroup shares were the community property of Decedent and Mrs. Dhanani under the laws of Belgium. (Stip., par. 40; Ex. 17-J)

48. In a letter dated April 9, 2004, the Service attempted unsuccessfully to contact petitioners regarding the fact that no estate tax return had been filed for Decedent's estate. (Stip., par. 41; Exs. 16-J, 18-J)

49. The estate elected the alternate valuation date of July 31, 2002. (Ex. 1-J)

50. The estate tax return returned as Decedent's gross estate in the United States on Form 706-NA, Schedule A, 125,000 shares of Citigroup common stock, with a value on the alternate valuation date of $4,156,250.00. (Stip., par. 44; Ex. 1-J)

51. On Schedule A attached to Form 706-NA, petitioners stated, "At the decedent's death 250,000 shares of Citigroup Inc. common stock stood in his name. Under Belgian law the decedent and his wife, Roshankhanu Dhanani, each held a one-half

community interest in these shares. Accordingly, a one-half interest, or 125,000 shares, is included in the gross estate of the decedent." (Ex. 1-J)

52. On Form 706-NA, petitioners reported that the total estate tax due was $1,148,217.00. (Ex. 1-J)

53. The Service made an assessment against the estate on June 21, 2004, in the amount of $1,156,341.49, consisting of estate tax plus accruals. (Ex. 5-J)

54. A late filing penalty in the amount of $289,085.37 was assessed on June 21, 2004 by the Service with respect to the amount of estate tax due per the return. However, this late filing penalty was abated by the Service. (Ex. 5-J)

55. In the notice of deficiency, respondent asserted an addition to tax under I.R.C. § 6651(a)(1) in the amount of $511,758.93 with respect to the deficiency in estate tax determined after examination of the estate tax return. This addition to tax is in dispute notwithstanding the earlier abatement of the $289,085.37 late filing penalty assessed on June 21, 2004. (Exs. 4-J, 5-J; Entire Record)

56. The addition to tax under I.R.C. § 6651(a)(2) asserted in the notice of deficiency for failure to pay estate tax, in the amount of $7,115.33, was abated by the Service on February

25, 2008, and is not in dispute. (Exs. 4-J, 5-J; Entire Record)

57. The subject case was examined by Internal Revenue Service Estate Tax Attorney Geoffrey C. Thomas, Esq. (Thomas). (Exs. 22-J, 23-J)

58. Petitioners' former attorney Walter J. Kilmer, Jr., Esq. (Kilmer), sent copies of letters by Daem dated July 25, 2006, and August 11, 2006, to Thomas. Daem asserted in these letters that the account holding the shares at issue was the community property of Decedent and Mrs. Dhanani. (Exs. 22-J, 23-J)

59. Daem stated in her July 25, 2006, letter that her opinion was "limited to Belgian law as applied by the Belgian courts." (Ex. 22-J, Daem letter, p. 1, sec. 2)

60. Daem stated in her July 25, 2006, letter that her opinion was "given on the basis that all matters relating to it will be governed by, and that it (including all terms used in it) will be construed in accordance with, Belgian law." (Ex. 22-J, Daem letter, p. 1, sec. 2)

61. In her July 25, 2006 letter, Daem made the assumption that the shares at issue "were not obtained by gift or inheritance or by any other means that would cause the assets to be considered as separate property under Belgian law." (Ex. 22-

J, Daem letter, p. 2, sec. 4.3)

62. Daem did not address in her July 25, 2006, letter whether the fact that Decedent and Mrs. Dhanani had a common British nationality had any bearing on her conclusion that the shares were community property. (Ex. 22-J)

63. Daem noted that under Belgian law, it is possible for spouses to amend their matrimonial status after marriage. (Ex. 22-J, Daem letter, p. 3, sec. 5.3)

64. Daem acknowledged in her July 25, 2006, letter that Decedent and Mrs. Dhanani had never signed marriage articles, or changed or specified their matrimonial status. (Ex. 22-J, Daem letter, p. 2, sec. 4.2)

65. In his letter to Thomas dated July 25, 2006, Kilmer asserted that Daem's opinion was consistent with "principles of private international law." Kilmer cited Restatement of the Law, Conflict of Laws 2d, § 258, under which the law of the state of domicile would be given greater weight "[i]n the absence of an effective choice of law by the spouses." (Ex. 22-J, Kilmer letter)

66. Kilmer's July 25, 2006, letter did not address whether the spouses' failure to change their original matrimonial status after moving to Belgium was an effective choice of law by the

spouses. (Ex. 22-J, Kilmer letter)

67. In her letter dated August 11, 2006, Daem posed a hypothetical that Decedent and Mrs. Dhanani had signed marriage articles. Daem stated that if the spouses had signed marriage articles establishing a system of separate property, Belgium would recognize this choice. (Ex. 23-J, Daem letter, p. 2, sec. 4)

68. Thomas requested assistance in this case from the United States Law Library of Congress concerning matrimonial property regimes under Belgian conflicts law. (Ex. 25-J)

69. Thomas received a report dated September 12, 2006, prepared by Nicole G. Atwill (Atwill), Senior Foreign Law Specialist, Law Library of Congress. (Ex. 25-J)

70. Atwill has been employed as a Senior Foreign Law Specialist with the Law Library of Congress from June, 1997, to the present. In this position, Atwill performs research and analysis regarding the laws of France and other francophone countries for Congressional Members, Committees, and staff of the United States Congress, Federal agencies, and United States courts. (Ex. 36-J, Atwill Curriculum Vitae)

71. Atwill received a *License en droit, carrieres juridiques et judiciares* (equivalent to a J.D.) in 1973 from the

University of Grenoble School of Law, France, and an L.L.M. in Civil Law in 1974, also from the University of Grenoble School of Law. Atwill also received a Master of Comparative Law (American Practice) degree in 1984 from the National Law Center, George Washington University. (Ex. 36-J, Atwill Curriculum Vitae)

72. Atwill is a member of the District of Columbia Bar and the Virginia State Bar. (Ex. 36-J, Atwill Curriculum Vitae)

73. Atwill's research indicated that "Since 1954, Belgian courts mostly had based the matrimonial property regime on personal law and therefore, as it resulted, from the interpretation of article 3-3 of the Code Civil, the courts utilized the national law of the parties." (Ex. 25-J, Atwill report, p. 1)

74. Atwill's research indicated that the *Cour de Cassation*, Belgium's Judicial Supreme Court, had ruled in a 1980 case that "when spouses do not chose [sic] the law governing their marital property, and where the parties have a common nationality, their common national law is applicable to their legal marital property regime." (Ex. 25-J, Atwill report, pp. 1-2)

75. Atwill's research indicated that the *Cour de Cassation*

had ruled in 1993 that the determination of applicable law to property of spouses married without a contract is "considered definitively established" as of the time of the marriage." (Ex. 25-J, Atwill report, p. 2)

76. Atwill noted that a Code of Private International Law had been enacted, effective in October, 2004. Under that law, where the spouses had not made a choice of law, the first option for the applicable law is that of common habitual residence after the marriage; the second option is the law of common nationality if there is no common residence; and the third option is that of the law of the state where the marriage took place. (Ex. 25-J, Atwill report, pp. 2-3)

77. The Code of Private International Law was not in effect on the date of Decedent and Mrs. Dhanani's marriage, or on any date while Decedent and Mrs. Dhanani resided in Belgium. (Entire Record)

78. Atwill opined that in 1967, "the common national law was applicable to the matrimonial property regime when the parties had a common nationality." Thus, British law would apply in this case. (Ex. 25-J, Atwill report, p. 3)

79. Daem contacted Prof. Dr. Han van Houtte (van Houtte) in approximately March, 2007, regarding the legal status of the

account containing the shares at issue. Van Houtte's credentials are not included in the record. (Ex. 24-J; Entire Record)

80. In his letter to Daem dated May 3, 2007, Van Houtte noted that as of Decedent's date of death, the new Belgian conflict of law code, *Wetboek Internationaal Privaatrecht* [International Private Law Code], was not in effect. Therefore, the property rights in the shares were governed by the prior law of common nationality. (Ex. 24-J, p. 2)

81. Van Houtte further opined that under British law, "conflict of laws matrimonial property is governed by the law of the spouses' domicile (*domicile of marriage*)." (Ex. 24-J, p. 2 (emphasis in original))

82. According to Van Houtte, under English matrimonial property law, "the assets of spouses do not become common matrimonial property if no agreement to that effect has been concluded. Under this principle, Mrs. Dhanani would not own in her own right half of the assets on [sic] the bank account." (Ex. 24-J, p. 2)

83. Van Houtte asserted that "English law is apparently not settled on the issue of whether the rights of the spouses are regulated once and for all by the law of the domicile of

marriage." (Ex. 24-J, p. 3)

84. Van Houtte cited an English case, De Nicols v. Curlier, [1900] A.C. 21, which recognized the doctrine of immutability of the matrimonial regime. (Ex. 24-J, p. 3)

85. Van Houtte stated that the leading treatise on English conflict of laws, Dicey, Morris and Collins on The Conflict of Laws, 14th ed. London 2006, noted the inequity of the application of the doctrine of immutability to refugees. (Ex. 24-J, p. 3)

86. On September 3, 2008, respondent requested further assistance in this case from the United States Law Library of Congress. The Law Library of Congress furnished a report by Atwill and a report by Foreign Law Specialist Hanibal Mulugeta Goitom (Goitom) to respondent on September 30, 2008. The Law Library of Congress also furnished a report by Senior Foreign Law Specialist Clare Feikert (Feikert) to respondent on October 3, 2008. (Exs. 36-J, 37-J)

87. In her report dated September 30, 2008, Atwill stated that her research indicated that a Belgian court would "look first to British conflict of laws rules to determine which jurisdiction's law should be applied" to the ownership of the shares at issue. (Ex. 36-J, Atwill report, p. 4)

88. Atwill also noted that Belgian law permits a couple to change their original matrimonial regime by affirmative acts prescribed in the Belgian Civil Code. According to Atwill's research, a couple must make an inventory of all their assets and prepare a document setting forth their respective property rights before a notary. The couple must appear together in person "in the court of first instance of their conjugal residence." The court will then consider the request in chambers. If the request is denied, there is a one month appeal period. Within two months after a request is approved, the clerk of the court must notify the state where the marriage took place that the matrimonial regime has been amended. (Ex. 36-J, Atwill report, p. 5)

89. Feikert has been employed as a Senior Foreign Law Specialist at The Law Library of Congress from May, 2002, to the present. (Ex. 37-J, Feikert Curriculum Vitae)

90. In her position as a Senior Foreign Law Specialist, Feikert performs research and analysis of the laws of the United Kingdom and other British Commonwealth jurisdictions for the United States Congress, the United States Supreme Court, and various government agencies. (Ex. 37-J, Feikert Curriculum Vitae).

91. Feikert's duties also include the preparation of articles about recent developments in British law for a monthly Congressional publication, selection of British legal materials to be acquired by the Law Library of Congress, and assistance with persons using the library on researching British law. (Ex. 37-J, Feikert Curriculum Vitae)

92. Feikert received a Bachelor of Laws and International Relations degree with Honors (equivalent to a J.D.) from the University of Lincolnshire and Humberside, Lincoln, England, in May, 2000. She also received an LL.M. degree in International Legal Studies from American University, Washington College of Law, Washington, D.C. in May, 2002. (Ex. 37-J, Feikert Curriculum Vitae)

93. Feikert addressed the issue of whether Belgian or British law would apply in this case. (Ex. 37-J, Feikert report)

94. Feikert noted that the leading doctrines regarding the effect of a change in matrimonial domicile on property rights are the doctrine of mutability and the doctrine of immutability. (Ex. 37-J, p. 5)

95. Feikert noted that the leading case supporting the doctrine of immutability under English law is the 1900 case of

De Nicols v. Curlier, [1900] A.C. 21, "in which the House of Lords decided that 'the matrimonial regime applicable to the parties was not affected by the change of domicile,'" referencing Dicey, Morris & Collins on the Conflict of Laws, 14th ed. 2006. (Ex. 37-J, p. 5)

96. Feikert stated that according to Dicey, an even older English case, Lashley v. Hog, (1804) 2 Coop temp Cott 449, 4 Pat 581, HL, which was distinguished by the House of Lords in De Nicols, was decided on the basis of the law of succession, not on the law of marital property. (Ex. 37-J, p. 6)

97. Goitom is a Foreign Law Specialist in the Eastern Law Division of the Law Library of Congress who specializes in Sub Saharan Africa. In his position as a Foreign Law Specialist, Goitom performs legal research regarding the laws of English speaking Sub-Saharan African countries for Congress, executive agencies, courts, and others. (Ex. 36-J, Goitom Curriculum Vitae)

98. Goitom received an LL.B. degree with distinction from the University of Asmara, Asmara, Eritrea, in August, 2002. He also received an LL.M. degree in International Legal Studies from New York University School of Law in May, 2007. (Ex. 36-J, Goitom Curriculum Vitae)

99. Goitom's research indicated that Ugandan law allowed limited changes in the marital regime from customary marriage to civil marriage. Goitom was not able to locate any Ugandan law indicating whether or not Ugandan law would govern the ownership of movable property of spouses once domiciled in Uganda who had left Uganda. (Ex. 36-J, Goitom report)

100. Matthew Cook (Cook), an English barrister, prepared a report entitled "In the matter of: E/O Charania - Opinion" dated September 30, 2008, on behalf of petitioners. (Ex. 38-J)

101. Cook is a graduate in law with distinction from Oriel College, Oxford. He practices in commercial law, including conflict of laws. (Ex. 44-J)

102. Cook acknowledged in his report that Decedent and Mrs. Dhanani were British citizens at the time of their marriage, and that they did not execute marriage articles. (Ex. 38-J, p. 1)

103. Cook opined that if Decedent and Mrs. Dhanani had never left Uganda, a British court would conclude that the law of matrimonial domicil [English spelling in original] at the time of their marriage was Ugandan law. (Ex. 38-J, p. 3)

104. Cook noted that, in his opinion, the two leading cases in this area, Lashley v. Hog and De Nicols v. Curlier, are very old and should be "treated with caution." (Ex. 38-J, p. 4)

105. Cook opined that although De Nicols v. Curlier is the leading case cited by commentators in favor of the doctrine of immutability, he believes it is not applicable to the instant case. (Ex. 38-J, pp. 5-6)

106. Cook stated that because, in his view, the law was uncertain, "I can only address this issue on the basis of logic and the light of how I consider a modern English judge would approach this issue." (Ex. 38-J, p. 6)

107. Cook stated, without citing any authority, that it was an "absurdity," "given increased longevity and mobility," to determine the rights of a married couple under the laws of a country to which they have no remaining connection. (Ex. 38-J, p. 6)

108. Cook stated, without citing any authority, that, if a couple changed their domicile after marriage, rather than the couple having an implied contract derived from the laws of the country in which they were married, "there would be an implied contract between them that their matrimonial property rights would be governed by their new domicil [English spelling in original]." (Ex. 38-J, pp. 6-7)

109. Cook stated that there was "no clear English law on whether *renvoi* applies to matrimonial property cases, since the

issue has not arisen in England and Wales." (Ex. 38-J, p. 7)

110. Cook cited a Nova Scotia case, Vladi v. Vladi (1987), 39 DLR (4th) 563 (N.S.), involving matrimonial property in which, he stated, "the doctrine of *renvoi* was applied initially...and then disapplied..." (Ex. 38-J, p. 7)

111. Cook stated, without citing any authority, that, "in the absence of a simple answer to this question, [he] considered it unlikely that an English Court would extend the *renvoi* doctrine into a new area...," and would therefore apply Belgian domestic law. (Ex. 44-J, p. 8)

112. Form 706-NA, Schedule B, provides that in order for a deduction for expenses and claims of the estate to be allowed, the amount of a decedent's gross estate outside the United States must be documented. Additionally, the amount of the estate's expenses and claims must be documented, and an itemized schedule of claimed expenses must be attached to the return. (Ex. 1-J)

113. Petitioners did not report the amount of Decedent's gross estate outside the United States on Form 706-NA, instead leaving that portion of the return blank. (Ex. 1-J)

114. Petitioners did not attach an itemized list of claimed expenses to Form 706-NA, nor did they claim any deductions for

expenses of administration on Form 706-NA, instead leaving that portion of Form 706-NA blank. (Ex. 1-J)

115. Respondent determined in the notice of deficiency that petitioners had submitted insufficient evidence to establish the value of Decedent's gross estate outside the United States, or the amount of funeral expenses, administration expenses, decedent's debts, or claims, if any, of the estate. Therefore, respondent determined that the amount of the deduction allowable to the estate for expenses and claims is zero. (Ex. 4-J)

116. Petitioners did not claim any expenses for estate administration in their Tax Court petition. (Pet.)

117. The record contains no evidence of decedent's gross estate outside the United States. (Entire Record)

118. The record contains no evidence of expenses of estate administration. (Entire Record)

119. Although counsel for petitioners presented letters to respondent regarding the late filing penalty, there is no affirmative showing in the record by petitioners stating the facts which they allege constitute reasonable cause for the late filing of the estate tax return. (Exs. 19-P, 20-P; Entire Record)

ULTIMATE FINDINGS OF FACT

1. The legal matrimonial regime of Decedent and Mrs. Dhanani is that of their common national law, namely British law. (Entire Record)

2. Decedent and Mrs. Dhanani acquired the marital regime of separate property as a result of their status as British citizens married in a former British protectorate. (Entire Record)

3. Although Belgium is a civil law country, Belgium recognizes separate property regimes. (Entire Record)

4. Under Belgian law, a married couple wishing to change their original marital property regime must appear together in court and request such a change, presenting to the court a notarized list of their property and respective property rights. (Entire Record)

5. Decedent and Mrs. Dhanani did not change their original marital regime of separate property at any time after their marriage. (Entire Record)

6. The Citigroup shares at issue were acquired by decedent, titled in his name, and held in an account in his name. (Entire Record)

7. The Citigroup shares at issue were the separate property of decedent. (Entire Record)

8. Petitioners had a return preparer and were represented by counsel at all relevant times. (Entire Record)

9. Petitioners had all the information necessary to file a timely estate tax return prior to the extended due date for filing the return. (Entire Record)

10. Petitioners did not have reasonable cause for the late filing of the estate tax return. (Entire Record)

POINTS RELIED UPON

Decedent and Mrs. Dhanani were both British citizens, born in Uganda. Decedent and Mrs. Dhanani were married in 1967 in Uganda, which was a British protectorate until 1962. Decedent and Mrs. Dhanani did not sign a marriage contract at any time before or after their marriage.

In October, 1972, Decedent and his family left Uganda, having been ordered out of the country by the regime of Idi Amin, and moved to Belgium. Although they lived in Belgium for almost thirty years, Decedent and Mrs. Dhanani did not appear before a notary at any time in Belgium to change their marital property regime.

While domiciled in Belgium, Decedent acquired 250,000 shares of Citigroup stock with substantial value. It appears that the shares were acquired with Decedent's funds, since Mrs. Dhanani did not work in Belgium. The shares were registered in the name of Decedent, and held in safekeeping in an account in Decedent's name only.

Decedent died on January 31, 2002, in Belgium. On October 31, 2002, the estate requested an extension of time to file the estate tax return until April 30, 2003. This request was approved by the Service. The estate made a payment of estate

tax on November 13, 2002. No further extensions of time to file the return were requested by the estate or approved by the Service.

The estate tax return was mailed to the Service on April 29, 2004, nearly one year after the extended filing date had passed. The estate returned as Decedent's gross estate in the United States 125,000 shares of Citigroup common stock, taking the position that the other 125,000 shares were the community property of Mrs. Dhanani.

Petitioners rely on an opinion from Cook, an English barrister, who concluded that an English court would apply Belgian domestic law to determine the ownership of the shares. Cook states that, in his view, the law is unclear, and his opinion is therefore based on "logic." Cook's report appears to advance a position based on equity rather than law. However, it is not inequitable that the shares are Decedent's separate property, since Decedent and Mrs. Dhanani had the opportunity to elect a community property regime at any time during their thirty year residence in Belgium.

Petitioners also rely on letters by Belgian lawyers Daem and Van Houtte. These attorneys opine that the shares were community property because they were acquired while Decedent and

Mrs. Dhanani resided in Belgium, a community property jurisdiction. However, both Daem and Van Houtte's opinions are based on the erroneous assumption that since the spouses took no action to cause the shares to be separate property, they must be community property. In fact, in respondent's view, it was the failure of the spouses to take action to change their original matrimonial regime which causes the shares to be separate property.

Respondent obtained several reports from the United States Law Library of Congress. Atwill's 2006 report opines that the legal matrimonial regime in this case would be that of the spouses' common national law, namely British law. Under British law, the shares are the separate property of decedent unless the spouses change their regime. Atwill's 2008 report includes a description of the affirmative acts which á couple must take to change their marital property regime under Belgian law. Decedent and Mrs. Dhanani did not take those steps.

The estate is liable for the late filing penalty. The record contains documentary evidence of the late mailing of the return, and the date of mailing has also been stipulated. There is no reasonable cause for this late filing, because the estate had all the necessary information to file a return by the

extended due date. The estate had already been advised by Daem as early as November 6, 2002, as to their reporting position. Further, the number of shares and the per share value of the shares on both the date of death and the alternate valuation date were known. Decedent had no other property in the United States. Thus, an estate tax return should have been filed by the due date, and supplemented later if necessary.

ARGUMENT

I. SINCE THE 250,000 CITIGROUP SHARES WERE THE SEPARATE PROPERTY OF DECEDENT, ALL 250,000 SHARES ARE INCLUDIBLE IN HIS GROSS ESTATE IN THE UNITED STATES.

A. PERTINENT AUTHORITIES.

I.R.C. § 2031(a) provides the general rule that the value of the gross estate of the decedent shall be determined by including the value at the time of his death, of all property, real or personal, tangible or intangible, wherever situated. See also, I.R.C. § 2033, to the same effect.

I.R.C. § 2101(a) imposes a tax on the transfer of the taxable estate, determined as provided in I.R.C. § 2106, of every decedent nonresident not a citizen of the United States.

I.R.C. § 2106(a) provides that for purposes of the tax imposed by I.R.C. § 2101, the value of the taxable estate of every decedent nonresident not a citizen of the United States includes the value of the gross estate which is situated at the time of decedent's death in the United States, less certain deductions enumerated therein.

I.R.C. § 2106(a)(1) provides that the deduction for expenses of the estate, if any, is allowed in the same proportion that the part of the gross estate situated in the

United States bears to the value of the decedent's entire gross estate, wherever situated.

The subject case presents an issue regarding the application of foreign law. As permitted by T.C. Rule 146, the parties have stipulated to copies of relevant materials and sources, including reports in support of the parties' respective positions. Pursuant to T.C. Rule 146, the Court's determination of foreign law "shall be treated as a ruling on a question of law." Podd v. Commissioner, T.C. Memo. 1998-418; Reese v. Commissioner, 64 T.C. 395, 397 (1975), A.O.D., 1975 WL 38099 (IRS AOD) (1975).

In general, taxpayers bear the burden of proof. T.C. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933). I.R.C. § 7491(a)(1) provides that the burden of proof may shift to respondent in a court proceeding, if the taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the taxpayer's liability. Although questions of foreign law are treated as questions of fact "to be proved by the party having the burden of proof," Simenon v. Commissioner, 44 T.C. 820, 835 (1965), the Court has also held that, in a fully stipulated case, "there are no facts in dispute [and the case is decided] on the weight of the evidence, without regard

to any burden-shifting rule." Levine v. Commissioner, T.C. Memo. 2005-86, n.1.

To respondent's knowledge, the case law regarding marital property regimes in England and Belgium is limited, but clear. Respondent relies on the existing case law, the views of the law by authors of leading treatises on matrimonial property regimes, and the views provided for purposes of this case by foreign law specialists from the United States Law Library of Congress.

B. THE CITIGROUP SHARES AT ISSUE WERE THE SEPARATE PROPERTY OF DECEDENT.

1. AS BRITISH CITIZENS, DECEDENT AND MRS. DHANANI HAD THE MARITAL REGIME OF SEPARATE PROPERTY.

Decedent and Mrs. Dhanani were married in Uganda, a former British protectorate. Decedent and Mrs. Dhanani were British citizens at all times. Decedent and Mrs. Dhanani did not sign marriage articles at any time before or after their marriage. Since Decedent and Mrs. Dhanani had the common nationality of a common law country, and did not select a community property marital regime after they moved to Belgium, their marital regime by default is that of separate property. INTERNATIONAL TAX AND ESTATE PLANNING by Robert C. Lawrence III (Lawrence), published in the February, 1984 issue of TRUSTS AND ESTATES magazine, page 51 ("If

marriage...irrespective of subsequent domicile..." INTERNATIONAL INCOME TAX AND ESTATE PLANNING, Chapter 2. Conflict of Laws in International Income Tax and Estate Planning, Property ownership interests—Relationship to conflict of laws, § 2:14, William H. Newton, III, updated July, 2008.

As described by Lawrence, under the implied contract theory, "the laws of the original matrimonial domicile continue to apply to all acquisitions of property during marriage, even after a change of domicile." INTERNATIONAL TAX AND ESTATE PLANNING: A PRACTICAL GUIDE FOR MULTINATIONAL INVESTORS, Chapter 4: Jointly Held and Community Property, §4:4.2, Practising Law Institute, Robert C. Lawrence III, October 10, 2006; INTERNATIONAL TAX AND ESTATE PLANNING, 1984, by Robert C. Lawrence III, id. at page 58.

The leading case recognizing the doctrine of implied contract in England is De Nicols v. Curlier, [1900] A.C. 21, 1899 WL 11679 (HL). In that case, a couple had married in France in 1854, which country recognized rules of community property. The couple did not sign a marriage contract. The couple moved to England, where the husband became a naturalized British subject. The House of Lords held that the wife had a community property interest in her husband's property upon his death, recognizing the community property interests of the wife

derived from their marriage under French law. The House of Lords noted that the French Code Civil provided for a community of goods, unless the marriage ended by death or divorce, or there was a judicial separation of the couple or a judicial separation of the couple's property. [1900] A.C. at 26. The House of Lords found no difference between parties who had entered into a written contract which included those provisions and parties who had accepted such provisions by entering into a marriage under French law. [1900] A.C. at 26, 44-46. To the same effect is a later proceeding in the same case, In re de Nicols, 1900 2 Ch. 410, 1900 WL 30071 (Ch D).

Lashley v. Hog, (1804) 2 Coop temp Cott 449, 4 Pat 581, HL), is sometimes cited as a case supporting the doctrine of mutability. However, in deciding De Nicols v. Curlier, the House of Lords specifically considered Lashley v. Hog and found it distinguishable and not controlling. In Lashley v. Hog, Roger Hog, a Scottish man, and Rachel Missing, an English woman, had married in 1737 in England. The couple entered into a marriage contract regarding land, but apparently not as to personal property. Hog purchased an estate in Scotland during the marriage. When Missing died in 1760, Hog was domiciled in Scotland. At that time, Scotland recognized community property,

or a "communion of goods in the married state." 2 Coop temp Cott at 480. After Hog's death, the couple's daughter, Rachel Lashley, filed a claim in the Scottish courts asserting an interest in her deceased mother's share of the couple's personal property. The House of Lords, Lord Eldon, held in favor of Lashley, 2 Coop temp Cott at 478, since the couple had no settlement as to their personal property and had moved to a jurisdiction which provided a settlement (community property) by operation of law.

Although De Nicols v. Curlier is not a modern decision, it has never been overruled. Further, the House of Lords in De Nicols rejected the result in Lashley v. Hog on a number of grounds. De Nicols clearly recognizes an implied contract of spouses upon marriage, and there has been no intervening decision to the contrary.

In his report for petitioners, Cook references Vladi v. Vladi, (1987) 39 DLR (4th) 563 (N.S.), a Nova Scotia case which he sees as instructive on matrimonial property regimes. In Vladi v. Vladi, two Iranian nationals were married in West Germany in 1973. When they were divorced in 1985, the couple's "last common habitual residence" was West Germany. The wife later moved to Nova Scotia, and applied under the Nova Scotia

Matrimonial Property Act, 1980 (N.S.), c. 9, § 22, for a division of their matrimonial property. The Nova Scotia Supreme Court, Trial Division, noted that under the Act, the division of moveable property, wherever situated, was governed "by the law of the place where both spouses had their last common habitual residence or, where there is no such residence, by the law of the Province." The court then ordered a division of the property based on West German law.

In respondent's view, Vladi v. Vladi has no relevance here because there is existing British case law. Even if it were somehow relevant, however, the present case is distinguishable from it, because it does not involve divorce or division of assets under a specific statute.

2. DECEDENT AND MRS. DHANANI TOOK NO ACTION IN BELGIUM TO CHANGE THEIR MARITAL REGIME TO ONE OF COMMUNITY PROPERTY.

According to Lawrence, most jurisdictions allow married couples to change their original matrimonial regime by agreement. INTERNATIONAL TAX AND ESTATE PLANNING, published in the February, 1984 issue of TRUSTS AND ESTATES magazine, page 51. Belgian law provides procedures by which a married couple may modify or completely change their marital regime. These procedures require the presentation of an inventory of all of

the couple's assets to a Notary, and appearance by the couple in court to request the modification. Code Civil, Les Codes Larcier, Vol. I, Droit Civil et Judiciaire (Larcier 2008), art. 1394, 1395.

Decedent and Mrs. Dhanani took no action to change their marital regime after they relocated from Uganda to Belgium. Daem and Van Houtte incorrectly assume that Decedent and Mrs. Dhanani took no action to cause the shares not to be community property. In fact it was the couple's failure to take the required action under the Belgian Code Civil which causes the shares to remain the separate property of decedent.

As the record shows, Decedent acquired substantial wealth in Belgium, including the Citigroup shares worth millions of dollars. Petitioners had access to numerous advisers for estate tax purposes; presumably Decedent had access to advisers before his death as well. Decedent and Mrs. Dhanani resided in Belgium together for almost thirty years, and had the opportunity to change their marital regime if they had so chosen, but they did not do so.

II. PETITIONERS ARE LIABLE FOR THE LATE FILING PENALTY UNDER I.R.C. § 6651(a)(1).

A. PERTINENT AUTHORITIES

I.R.C. § 6075 provides that the estate tax return is due nine months after the death of decedent.

I.R.C. § 6018(a)(2) provides that in the case of the estate of every nonresident not a citizen of the United States, the executor shall make an estate tax return if that part of the gross estate situated in the United States exceeds $60,000.00.

I.R.C. § 6081(a) permits the Secretary to grant a reasonable extension of the time to file an estate tax return. However, except in the case of an executor who is abroad, no filing extension is permitted for more than six months. Treas. Reg. § 20.6081-1(c).

Treas. Reg. § 20.6081-1(e) provides that an extension of time for filing a return does not operate to extend the time for payment of the estate tax. If a payment extension is not obtained, "interest will be due on the tax not paid by the due date and the estate will be subject to all applicable late payment penalties."

I.R.C. § 6651(a)(1) provides that an addition to the tax is imposed in the case of failure to file any return on the date prescribed therefor (determined with regard to any extension of time for filing) unless it is shown that such failure is due to reasonable cause and not due to willful neglect.

I.R.C. § 6651(b)(1) provides that for purposes of I.R.C. § 6651(a)(1), the amount required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax.

B. RESPONDENT HAS MET HIS BURDEN OF PRODUCTION AS TO THE LATE FILING OF THE RETURN.

I.R.C. § 7491(c) provides that respondent shall have the burden of production in any court proceeding with respect to the liability of a taxpayer for any addition to tax. Respondent has met his burden of production through documentary evidence, including the return itself, the mailing envelope, and the transcript of account. Further, the parties have stipulated that that the return was filed almost one year to the day after the filing extension date had passed.

C. PETITIONERS DID NOT HAVE REASONABLE CAUSE FOR THE LATE FILING OF THE RETURN.

Treas. Reg. § 301.6651-(c)(1) provides that the failure to timely file a return is due to "reasonable cause" if the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the date prescribed by law. The regulation requires that the taxpayer "must make an affirmative showing of all facts alleged as a reasonable cause for his failure to file such return...in the form

of a written statement containing a declaration that it is made under penalties of perjury." Petitioners bear the burden of proof as to reasonable cause. Higbee v. Commissioner, 116 T.C. 438, 446-447 (2001).

Petitioners, as the administrators of the estate, had a nondelegable duty to timely file the estate tax return. Estate of Gardner v. Commissioner, T.C. Memo. 1986-380. Petitioners received one six month filing extension, but never requested or received any further extension. Petitioners requested, but never received, an extension for payment of the estate tax.

The United States Supreme Court addressed the issue of the executor's duty to timely file the estate tax return in the leading case of United States v. Boyle, 469 U.S. 241 (1985). The Supreme Court held in Boyle that "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not 'reasonable cause' for a late filing under § 6651(a)(1)." 469 U.S. at 252.

In Boyle, the executor, Robert W. Boyle (Boyle), hired an attorney, Ronald Keyser (Keyser), to serve as the attorney for Boyle's mother's estate. Boyle provided Keyser with pertinent information and documents necessary to file the estate tax return for his mother's estate. Keyser assured Boyle that the

return would be filed on time, but in fact filed it three months late due to a clerical error. 469 U.S. at 242-243.

The Court observed that penalties for late filing had been enacted by Congress in order to ensure that tax returns were timely filed and taxes promptly paid; under the statute, the taxpayer "bears the heavy burden of proving both (1) that the failure did not result from 'willful neglect,' and (2) that the failure was due to reasonable cause.'" 469 U.S. at 245. (emphasis added)

The Court further noted that Congress had placed the burden of prompt filing "on the executor, not on some agent or employee of the executor. The duty is fixed and clear; Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of situations." 469 U.S. at 249-250.

The Court distinguished between reliance on an attorney for advice "on a matter of tax law," and compliance with a filing deadline. The Court observed that "[i]t requires no special training or effort to ascertain a filing deadline and make sure that it is met." 469 U.S. at 251-252.

The Court also noted factors which respondent has considered reasonable cause, including "unavoidable postal

delays, the taxpayer's timely filing of a return with the wrong IRS office, the taxpayer's reliance on the erroneous advice of an IRS officer or employee, the death or serious illness of the taxpayer or a member of his immediate family, the taxpayer's unavoidable absence, destruction by casualty of the taxpayer's records or place of business, failure of the IRS to furnish necessary forms in a timely fashion, and the inability of an IRS representative to meet with the taxpayer when the taxpayer makes a timely visit to an IRS office in an attempt to secure information or aid in the preparation of a return." 469 U.S. 241, n.1.

None of the factors listed in Boyle is present here. Petitioners have not presented any details as to why the return was late. Petitioners assert that they relied on counsel to determine whether a United States estate tax return was filed, and that the filing delay was due to the complexity of the law. Yet, petitioners requested a filing extension on the original due date of the return, so they presumably knew by October 31, 2002, that a return was required. Petitioners knew the number of shares and their per share value as of both the date of death and the alternate valuation date. They had even received their original letter from Daem by November 6, 2002, in which Daem

asserted that the shares were community property. When the return was mailed to the Service on April 29, 2004, petitioners reported the estate tax as $1,148,217.00, the same amount they had listed on their extension request dated October 31, 2002. Thus, nothing about petitioners' filing position appears to have changed from the date of the filing of their extension request to the date that the return was filed, some eighteen months later.

In Estate of Ridenour v. United States, 468 F. Supp.2d 941, 952 (S.D. Ohio 2006), the District Court imposed a late filing penalty, even though the executor claimed that she had relied on experienced counsel and that the estate "was complex from an administrative matter with numerous stocks and accounts to value and [to] liquidate." 468 F. Supp.2d. at 951-952. The Court stated, "Courts have held that the complexity of an estate or difficulty in valuing its assets do not constitute reasonable cause...Moreover, it bears emphasis that Plaintiff was, at her request, afforded an additional six months to file the estate tax return, giving her a total of fifteen months to file...Accordingly, the Court rejects Plaintiff's premise that the complexity of the estate constitutes reasonable cause." 468 F. Supp.2d at 952.

Like the executor in Estate of Ridenour, petitioners have had counsel at all relevant times. However, unlike that estate, the estate of Decedent contained only one asset, a publicly traded stock requiring no appraisal.

In Estate of Campbell v. Commissioner, T.C. Memo. 1991-615, the Court imposed the late filing penalty even though the estate had difficulties in valuing stock of a closely held corporation, and delays in obtaining an appraisal. The Court held that the estate could have filed a return that was substantially correct by the extended due date of the return. Yet the estate in Estate of Campbell involved the valuation of stock in a cattle and grain farming corporation which had land in Montana and New Mexico, and was considerably more complex than the present estate. Further, the executrix and the attorney in Estate of Campbell asserted that they had made efforts to obtain a timely appraisal. It is unknown what efforts petitioners made to see that the return herein was timely filed.

It is also not reasonable cause for late filing if the taxpayer believes there will be no tax due on the return. See, e.g., Fong v. Commissioner, T.C. Memo. 1991-180. In Sandoval v. Commissioner, T.C. Memo. 2000-189, the Court held that even where the taxpayers timely filed an extension, posted a cash

bond, and correctly reported that there was no tax due for the years at issue, late filing penalties were appropriate. The Court rejected the taxpayers' arguments that their problems retaining office staff and a return preparer constituted reasonable cause. "Petitioners had extensions of time to file their returns for the years in issue, but they filed them long after the extended time had passed. Making cash deposits does not substitute for timely filing a return. Petitioners did not show that they had reasonable cause to file their returns late or that they exercised good faith in filing their returns."

Here, petitioners made a payment of what they calculated the estate tax to be within about two weeks after the date of their request for a filing extension. Respondent later determined a substantial deficiency in estate tax, and the tax paid earlier was not adequate to pay the estate tax. Petitioners had several advisers and a return preparer at all relevant times. Based on all the facts and circumstances, the late filing penalty should be sustained.

CONCLUSION

It follows that the determination of the Commissioner of Internal Revenue should be sustained.

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