Subs-Cohen
Brf due 1-5-09

UNITED STATES TAX COURT

ESTATE OF NOORDIN M. CHARANIA, DECEASED, FARHANA CHARANIA, MEHRAN CHARANIA, and ROSHANKHANU DHANANI, ADMINISTRATORS	
Petitioners,	DOCKET NO. 16367-07
v.	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	Judge Mary Ann Cohen

1-5

PETITIONERS' OPENING BRIEF

Per Judge

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STATEMENT OF THE CASE

This case arises from a notice of deficiency issued by Respondent on February 22, 2007, to Farhana Charania, Mehran Charania, and Roshankhanu Dhanani, the administrators under Belgian law of the Estate of Noordin M. Charania, asserting an estate tax deficiency of $2,070,000.01 and penalties of $511,758.94.

On October 20, 2008, the Court granted the parties' joint motion under Rule 122 of the Court's Rules of Practice and Procedure for leave to submit the case on the basis of the pleadings and the facts recited in a concurrently filed Stipulation and accompanying exhibits. The Court set January 5, 2009, as the date for filing simultaneous opening briefs and February 19, 2009, as the date for filing simultaneous reply briefs.

The principal issue in the case is the ownership, under the relevant choice of law and marital property principles of Belgium and the United Kingdom, of 250,000 shares in Citigroup, Inc., registered in the name of Noordin M. Charania ("Decedent") at the time of his death. Belgium was Decedent's country of domicile at death, and the United Kingdom was the country of common nationality of Decedent and his surviving spouse. The

4. They had two children, their daughter Farhana Charania, born in Uganda, and their son Mehran Charania, born in Belgium. ¶ 18.

5. While he lived in Uganda, Decedent was the sole proprietor of Transit Congo, a company acting 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. ¶ 19.

6. In July, 1972, the Ugandan regime of Idi Amin gave all people of Asian, *i.e.*, Indian, descent in Uganda a deadline of three months to leave the country. ¶ 20.

7. Decedent and his family left Uganda permanently in October, 1972, and moved to Belgium. ¶ 20.

8. They left Uganda with only a few items of personal property; the Ugandan government seized all of their assets within Uganda and they owned no other assets outside of Uganda. ¶ 21.

9. When Decedent and Mrs. Dhanani left Uganda, they did not intend to return; rather, they intended to stay in Belgium, where Decedent continued to be self-employed as an agent for the Belgian shipping company CMB, where he lived for almost thirty years until his death, and where Mrs. Dhanani continues to live. ¶¶ 22, 24.

10. Decedent died on January 31, 2002 in Edegem, Belgium, survived by Mrs. Dhanani and by their children, Farhana and

Mehran, and having executed a will on June 17, 1985. ¶¶ 26, 27, 30.

B. Acquisition of Citigroup Shares

11. Fifty thousand shares of Citigroup's predecessor's stock were purchased on August 7, 1997, twenty-five years after Decedent and Mrs. Dhanani had left Uganda for good, with funds held in an account registered in Decedent's name at Fortis Bank Asia HK or its predecessor bank (the "Fortis account"). Exh. 11-J.

12. The 50,000 shares were converted on October 21, 1998, into Citigroup, Inc., shares at a ratio of 2.5 shares in the new company for every share in the old company, with the result that 125,000 shares in Citigroup were held in the Fortis account. Exh. 13-J.

13. In June or July of 1999, 62,500 bonus shares of Citigroup were issued, bringing the total to 187,500. Ex. 14-J.

14. In August or September of 2000, an additional 62,500 bonus shares were issued, bringing the total to 250,000, the number held in the Fortis account at the time of Decedent's death. Exh. 12-J.

15. Decedent and Mrs. Dhanani were domiciled in Belgium on the date the original 50,000 Citigroup shares were acquired as well as on the dates of the conversion of shares and issuances of bonus shares just described. ¶ 22.

16. Decedent's will bequeathed one third of his property, without enumerating any of his holdings, to his spouse, one third to his daughter, Farhana, and one third to his son, Mehran. Exhs. 6-J, 8-J.

C. Filing of The Estate Tax Return and Payment of The Tax

17. On October 31, 2002, former counsel to the Estate filed an Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes (Form 4768), seeking an extension to file the return until April 30, 2003, and an extension to pay the estate tax until October 31, 2003. ¶ 39.

18. On November 12, 2002, the Estate paid a tax in the amount of $1,150,732.33. Exh. 1.

19. On December 18, 2003, Mrs. Dhanani executed the Charania Qualified Domestic Trust Agreement between herself, as settlor, and Farhana Charania, Mehran Charania, and Gregory D. Testerman as trustees. ¶ 40.

20. On April 29, 2004, the Estate mailed to the IRS an Estate (and Generation-Skipping Transfer) Tax Return (Form 706-NA), which elected the alternate valuation date of July 31, 2002. ¶¶ 1, 42.

21. The value of Citigroup common stock on that date was $33.25 per share. ¶ 43.

22. Treating the 250,000 shares as community property, the Estate reported 125,000 shares of Citigroup common stock as

Decedent's gross estate in the United States, with a value on the alternate valuation date of $4,156,250. ¶ 44; Exh. 1.

23. Taking an estate tax marital deduction of $1,385,417 for the one third of the 125,000 Citigroup shares owned by Decedent and passing under his will to his surviving spouse, the Estate reported a taxable estate of $2,770,833. Exh. 1.

24. On February 22, 2007, Respondent issued a deficiency notice to the Estate of $2,070,000.01, and asserted a penalty under Code § 6651(a)(1) of $511,758.94. ¶ 4; Exh. 4-J.

25. Over the next several months, Respondent sent several communications to Petitioners asserting penalties and interest owed. *See* Exh. 19-P.

26. By letter of July 6, 2007, Petitioners requested that the penalties be waived on the ground that the failure to file and pay any taxes owed in a timely manner was due to reasonable cause and not willful neglect. Exh. 20-P.

27. In response to Petitioner's request, Respondent abated a late filing penalty of $289,085.37 and a failure to pay penalty of $7,115.33. The late filing penalty was abated "as of" June 21, 2004, to avoid additional accrual of penalty. Petitioners made a payment of $12,006.33 on March 14, 2007. Exh. 5-J.

POINTS ON WHICH PETITIONERS RELY

As to the deficiency:

The law of Decedent's domicile, Belgium, governs the question whether the Citigroup shares were community property or the sole property of Decedent. *See Eggleston v. Dudley*, 257 F.2d 398, 400 (3rd Cir. 1958). *See also Helvering v. Stuart*, 317 U.S. 154, 161-162 (1942); Code §§ 2103 and 2104.

The parties agree that, under Belgian conflict of laws principles, the ownership of matrimonial property is governed by the law of the common nationality of the spouses, in this case the law of the United Kingdom. Exhs. 23-J, 24-J, 25-J, 36-J, 37-J.

Under English conflict of law principles, an English court would apply Belgian marital property law to determine the ownership of the Citigroup shares. Exh. 38-J, 28-J, 27-J, 37-J, 34-J, 29-J.

The parties agree that, under Belgium's marital community property law, the Citigroup shares were community property owned one-half by Decedent and one-half by Mrs. Dhanani. Exhs. 21-J, 38-J, 24-J, 36-J.

As to the penalty:

Any failure to file the estate tax return and/or to make payment on a timely basis with respect to any estate tax ultimately found to be due from the Estate is due to reasonable

cause rather than willful neglect, and therefore no penalty is warranted. Exh. 20-P; entire record.

ARGUMENT

We show below that the Citigroup shares registered in Decedent's name at his death were community property owned one-half by Decedent and one-half by his spouse. Under U.S. law, the law of Belgium, Decedent's country of domicile at the time of his death, determines whether the shares were community property. Belgian substantive marital property law applies community property principles. Belgian conflicts law, however, would refer the question of ownership to the law of the United Kingdom, the common nationality of Decedent and his wife. English substantive marital property law does *not* follow community property principles. Thus Petitioners are entitled to prevail if Belgium substantive marital property law applies, but not if English substantive laws applies.

As we will demonstrate, United Kingdom conflict laws, applying the doctrine of mutability, would refer the issue of ownership back to Belgian substantive marital property law, under which the Citigroup shares would be deemed community property. Hence only the shares considered to have been owned by Decedent at the time of his death are subject to United States estate tax.

I.
The Citigroup Shares Were Community Property

A. Belgian Law Governs.

Under Code §§ 2103 and 2104, the Citigroup shares are deemed property situated within the United States subject to U.S. estate tax.[3] For United States estate tax purposes, ownership of intangible personal property is governed by the law of the decedent's domicile at death. *See Eggleston*, 257 F.3d at 400; *see also Stuart*, 317 U.S. at 161-162. The parties have stipulated that Decedent was domiciled in Belgium at the time of his death. ¶ 22. The ownership of the Citigroup shares registered in Decedent's name is therefore governed by Belgian law.

Under this Court's Rule 146, "Determination of Foreign Law," the Court "may consider any relevant material or source, including testimony, whether or not submitted by a party or otherwise admissible. The Court's determination shall be treated as a ruling on a question of law." *See Angerhofer v. Comm'r*, 87 T.C. 814 (1986) (citing and applying the Rule). The parties have accordingly produced materials on how the ownership of the Citigroup shares would be treated under Belgian law. Petitioners rely principally on an opinion from Professor Hans van Houtte, a Belgian law professor and an expert on

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3 Code § 2103 provides that the value of the gross estate of a non-resident non-citizen consists of that part of his gross estate "which at the time of his death is situated in the United States." Code § 2104(a) defines shares of stock issued by a U.S. corporation as property situated in the U.S.

international private law, and an opinion from Matthew Cook, a London barrister who is an expert in British conflicts law. Respondent relies on several opinions from the Library of Congress and on secondary sources such as treatises and articles. As we shall see, many of Respondent's sources actually support the views of Professor van Houtte and Barrister Cook.

B. The Parties Agree That Belgian Law Would Look To United Kingdom Law.

All of the materials submitted by the parties agree that a Belgian court would apply United Kingdom law to determine the ownership of the Citigroup shares. In his letter of May 3, 2007, Professor Hans van Houtte, an expert in international private law, opines that a Belgian court, applying the Belgian conflict rules in effect at the time of the marriage of Decedent and Mrs. Dhanani, would look to the law of the common nationality of the spouses to establish the ownership of the Citigroup shares. Since both Decedent and his spouse were citizens of the United Kingdom, a Belgian court would apply British law. Belgian law, however, would look first to British choice of law principles to determine which jurisdiction's *substantive* law would govern the issue of ownership. Exh. 24-J.

Materials submitted by Respondent agree. In an opinion of September, 2006, Nicole Atwill of the Library of Congress also states that, under Belgian choice of law principles, the ownership of the Citigroup shares would be governed by British

law. Exh. 25-J. A second report prepared by Ms. Atwill, dated September, 2008, goes one step further, suggesting, in explicit agreement with the opinion of Professor van Houtte, that a Belgian court would look first to British choice of law rules to determine which jurisdiction's law should be applied to decide the ownership of the shares. Exh. 36-J.[4] Hence the question is, what would an English court do?

C. United Kingdom Conflicts Laws Would Look Back To Belgium's Substantive Law Of Marital Property.

In an opinion of September 20, 2008, Barrister Cook, an expert in the conflicts law of the United Kingdom, states that British choice of law principles would refer back to Belgian substantive property law to determine the ownership of the Citigroup shares. Exh. 38-J.[5] The general principle under British conflicts law is that the rights of spouses in each other's movable property is governed by the law of the marital domicile. It is undisputed that the original marital domicile of Decedent and Mrs. Dhanani was Uganda. ¶ 14. Mr. Cook opines, however, that a British court would apply the doctrine of mutability, under which the domicile of a married couple may be changed under certain circumstances (such as forced exile), rather than the doctrine of immutability, under which a couple's

4 See also the letter of Belgian lawyer Nele Daam, Exh. 23-J; and the opinion of Library of Congress employee Clare Feikert, Exh. 37-J.

5 Copies of the materials referred to in Barrister Cook's opinion, as well as his curriculum vitae, appear at Exhs. 30-J, 39-J, 40-J, 41-J, 42-J, 43-J and 44-J.

domicile cannot be changed except by a document signed by them. Applying the doctrine of mutability, a British court would hold that the spouses' forced exit from Uganda and their establishment of a permanent domicile in Belgium changed their marital domicile from Uganda to Belgium, with the result that Belgian substantive law would govern their rights in marital property. Exh. 38-J.

Materials submitted by Respondent strongly support Barrister Cook's conclusion. Thus, for example, according to the British treatise DICEY AND MORRIS ON THE CONFLICT OF LAWS (11TH ED.) 1987,

> the doctrine of immutability does not work well if the spouses are forced to change their domicile by political or economic pressure. It does not seem reasonable that political refugees should continue to be governed for the rest of their lives by the law of their matrimonial domicile - the one country in the world which they will probably never revisit.

Exh. 28-J, p. 1070. In this case, applying the doctrine of immutability would mean that property acquired more than twenty-five years after Decedent and Mrs. Dhanani were stripped of everything they owned and forced to flee Uganda would be subject, more than thirty years after they had established their domicile in Belgium, to the law of the country that had ejected them.[6] As Barrister Cook and DICEY AND MORRIS agree, that illogical

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6 See also the article by William H. Newton III, submitted by Respondent, which states that England "in appropriate circumstances may well look to the law of the new domicile." Exh. 27-J, p. 3 (citing DICEY).

and unfair result would be avoided by the application of the mutability doctrine.

The opinion of Library of Congress specialist Clare Feikert, submitted by Respondent, also supports Petitioners. Exh. 37-J. Feikert discusses the doctrines of mutability and immutability, states that English conflicts of laws principles in this area are unsettled, and concludes that, in applying the law to the facts of this case, "the courts must first look to the domicile of the parties." *Id.* p. 6. She then continues:

> [T]he residence of the parties in Belgium was a result of their entry there as a result of being forced to flee the regime of Idi Amin in October 1972. Whether the parties intended to make Belgium their domicile for purposes of English law hinges upon their intention. If they intended to return to Uganda once the political climate changed then they are deemed to have retained Uganda as their domicile, unless the change in political climate in that country was highly improbable. If the parties' intention was not to return to Uganda once the political climate changed, it may be inferred that they had the intention to acquire Belgium as their domicile of choice.
>
> If the court determines that the parties intended to make Belgium their permanent and exclusive residence it could then be considered that Belgium is their country of domicile and the court would then have to determine whether the doctrine of mutability or immutability applies to the parties matrimonial property under the English conflict of laws.

Id. pp. 6-7. As noted earlier (p. 3), the parties have stipulated that Decedent and Mrs. Dhanani intended to stay in

Belgium when they left Uganda. ¶¶ 22, 24. Feikert declines to opine on whether an English court would apply the doctrine of mutability on these facts but, as we have seen, Barrister Cook is clear on the matter and DICEY AND MORRIS supports his conclusion that the court would apply the mutability doctrine.[7]

Barrister Cook's conclusion is also strongly supported by *In re Annesley* [1926] Ch. 692 (attached hereto), a case involving succession rather than community property issues but nonetheless highly instructive. The testator was a British national (like Decedent here) but was domiciled in France (as Decedent was domiciled in Belgium). Her will disposed of all of her property and was valid under English substantive law. Under French substantive law it was invalid because she left two

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7 The aged English case of *De Nicols v. Curlier* [1900] A.C. 21, Exh. 30, is sometimes said to have adopted the doctrine of immutability. There the couple had married in France (a community property regime) but voluntarily moved to England. The court held that the wife (by then a widow) retained her interest in the property acquired by the husband in England. Even sources submitted by Respondent acknowledge that the case does not govern here. See Clare Feikert's opinion, stating that "[t]he principles in *De Nicols v. Curlier* have not been completely settled and there are some scholars that argue if the case is not within the limits of *De Nicols v. Curlier* then the doctrine of mutability should apply." Exh. 37-J p. 6; DICEY, MORRIS & COLLINS ("The exact limits" of the case "have never been settled" and "[s]ome writers contend that, where the case is outside those limits, the mutability doctrine should prevail * * *."). Exh. 41-J, p. 1299 (footnote omitted). Moreover, Barrister Cook notes that *De Nicols* is distinguishable on two grounds beyond its age and unsettled limits: (1) the court held that the couple had an implied contract under French law, the original marital domicile, but no such implied contract exists under English law, which governed in Decedent's and Mrs. Dhanani's original marital domicile of Uganda, and (2) the court assumed that the move to England was the husband's decision alone, whereas here the move to Belgium was the action of both spouses. Exh. 38-J, pp. 5-6.

daughters who were entitled by French law to a third each of the estate. French law (like Belgian law here) applied the law of the testator's nationality, *i.e.*, British law (*id.* pp. 706-07). The British court held, however - just as Barrister Cook opines a British court would hold in this case - that British conflicts law "referr[ed] the question back to * * * the law of domicile." *Id.* p. 707. Hence French substantive law applied, just as Belgian substantive law should apply in this case.

The application of Belgian law has still more to recommend it, namely, congruence with modern U.S. law. As an article by William H. Newton III (submitted by Respondent) states, "[t]he modern trend in the United States is away from * * * mechanical approaches and * * * toward an interest analysis" so as "to effectuate the policies of the jurisdiction having a dominant interest in the matter." Exh. 34-J, p. 1-2.[8] An interest analysis is also applied by the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 258 (1971), cited by a PLI article by Robert C. Lawrence III, submitted by Respondent. Exh. 29, p. 1 & n. 140. Section 258 provides:

> (1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movables * * *.

8 See also an article by Robert C. Lawrence III submitted by Respondent, noting the application by U.S. courts of "the modern interest analysis in dealing with choice of law problems." Exh. 26-J, p. 60.

> (2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the State of the applicable law.

An interest analysis in this case would clearly apply the substantive law of Belgium, which is the jurisdiction having the dominant interest in the property ownership of Belgian domiciliaries.

In sum, the parties agree that this Court's task is to determine what an English court would do in this case. Only one authority among all the sources submitted by the parties actually opines on that issue: Barrister Cook, who states that an English court in this case would apply the doctrine of mutability and refer the matter back to Belgian substantive marital law. No source submitted by Respondent states a contrary conclusion on the facts of this case, and several of those sources actually support Petitioners in recognizing that the doctrine of immutability should not be followed in cases of forced exile. And finally, to the extent that U.S. policy considerations have any role to play, adopting Barrister Cook's view would further those considerations because Belgium is clearly the jurisdiction with the greatest interest in questions of marital property concerning its domiciliaries.

D. Belgium Is A Community Property Jurisdiction.

Under Belgian property law, moveable property acquired by spouses during their marriage other than by gift or inheritance is considered community property owned equally by the spouses. Exhs. 21-J, 38-J, 24-J, 36-J. Since the Citigroup shares were acquired with funds traceable to Decedent's employment in Belgium, they would be treated as community property under Belgian marital property law. ¶ 21; Exh. 38-J.

Accordingly, for all these reasons, one half of the 250,000 Citigroup shares held in Decedent's name at the time of his death belonged to his wife. It follows that Respondent erred in treating all of the shares as belonging to Decedent's gross estate subject to U.S. estate tax, and its notice of deficiency should be set aside.

II.
No Penalty Should Be Imposed

If we are correct that the 250,000 Citigroup shares were held as community property, then there is no occasion even to consider whether the Estate should be assessed a penalty for late payment of tax.

Even if we are incorrect, however, no penalty should be assessed, because any failure to timely file an estate tax return and/or pay estate tax was due to reasonable cause rather than willful neglect. *See* Code § 6651(a)(1), imposing a penalty for the failure to file a timely return unless "such failure is due to reasonable cause and not due to willful neglect."

The estate tax return for Decedent's estate was due on October 31, 2002, nine months after his death. Code § 6075(a). Because of the lack of contacts of both Decedent and Petitioners with the United States, it was reasonable for Petitioners initially to be unaware of any U.S. estate tax liability that might be imposed on the Estate. When they did become aware that U.S. estate tax might be payable with respect to the Citigroup shares, they engaged a U.S. law firm for advice on that issue.[9]

On October 31, 2002, Petitioners filed Form 4768, requesting a six-month extension to file the return and a one-year extension to pay any tax due. The extension of time to file was granted. The extension of time to pay was not approved nor was it denied. Exh. 16-J. On November 12, 2002, only twelve days after payment was due and well within the extended period of time for payment sought in the extension request, Petitioners made a payment of $1,150,732.33, which consisted of $1,148,216.50 of tax and $2,515.83 of interest. Petitioners then established a qualified domestic trust and filed a U.S. estate tax return on April 29, 2004. ¶ 1; Exhs. 1-J, 5-J, 16-J, 20-P.

The preparation of the return and the determination of the amount of tax due were complicated by the multiple jurisdictions involved. Nevertheless, Petitioners' good faith effort at

9 In early 2007, Petitioners terminated that firm and retained the undersigned counsel.

compliance is evidenced by their request for an extension and their payment of $1,150,732.33 only twelve days after the due date (without extension). The delay in filing the actual return was occasioned by the legal complexities regarding the ownership of the shares by Decedent's spouse as well as the practical steps required to form a qualified domestic trust. Hence Petitioners' actions had a reasonable cause and were not the product of willful neglect.

Indeed, in 2007, Respondent waived penalties in the total amount of $296,200.70, presumably on the grounds that any failure to file the estate tax return and/or to pay the estate tax on a timely basis was due to reasonable cause and not to willful neglect. Exh. 5-J. Nothing has changed since Respondent agreed to that waiver. Nor has Respondent asserted any facts supporting its contention that Petitioners' failure was not due to reasonable cause and/or was due to willful neglect.

CONCLUSION

The Court should enter an Order that-

1. the ownership of the Citigroup shares is governed by Belgian marital property law, meaning that the shares were community property owned one-half by Decedent and one-half by his spouse;

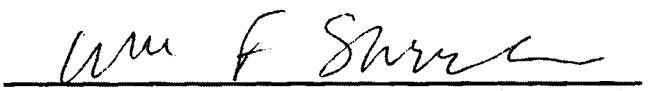
2. no deficiency in estate tax or penalties are due from the Estate;

3. Petitioners are entitled to all correlative adjustments allowable by operation of law, including any applicable refunds for taxes overpaid;

4. in any event, any failure to timely file an estate tax return and/or pay any tax due was due to reasonable cause; and

5. Petitioners are entitled to such other and further relief as may be appropriate.

Respectfully submitted,



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January 5, 2008

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF FOR PETITIONERS** by causing a copy thereof to be sent by hand on January 5, 2009 to counsel for Respondent:

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