GCM 36944 (IRS GCM), 1976 WL 39181

Internal Revenue Service (I.R.S.)
General Counsel Memorandum

December 10, 1976
Section 2208 -- Certain Residents of Possessions Considered Citizens of the U.S.
2208.00-00 Residents of Possessions Considered Citizens of the U.S.
Section 2209 -- Certain Residents of Possessions Considered Nonresidents Not Citizens of United States
2209.00-00 Certain Residents of Possessions Considered Nonresidents Not Citizens of U.S.

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Br5:MDFinley
JOHN L. WITHERS

Assistant Commissioner (Technical)

Attention: Director, Individual Tax Division

This is in response to a memorandum from the Director, Individual Tax Division (T:I), dated October 7, 1976, that forwarded for our concurrence or comments a proposed technical advice memorandum to the Director, Office of International Operations.

ISSUE

Whether a decedent, who acquired United States citizenship on the basis of both his residence in ***, where he resided until death, and his marriage to a United States citizen, is considered a 'citizen' of the United States under Int. Rev. Code of 1954, § 2208 [hereinafter cited as Code] for Federal estate tax purposes.

CONCLUSION

The proposed technical advice memorandum holds that the decedent is considered a citizen of the United States for purposes of Federal estate tax because citizenship was acquired on the basis of both residence in a United States possession and marriage to a United States citizen, rather than

solely by reason of residence in such a possession, as the memorandum interprets is required in order to apply the Code § 2208 'exception' to being considered a United States citizen for Federal estate tax purposes.

We disagree because we believe that the exception under Code § 2208 is intended to apply to a decedent who was *** a naturalized citizen of the United States and who fulfilled the residency requirement for such citizenship solely in (and died as a resident of) a United States possession. We think that where residency is a basis upon which a decedent was naturalized, the decedent's marriage to a United States citizen is an irrelevant factor in the context of Code § 2208 since we view the exception language in that section to be focusing on the physical (geographical) connection or relationship a decedent has with a particular situs that gives rise to, or is used to acquire, United States citizenship-that is, by reason of being (1) a citizen of, (2) born in, or (3) a resident of, a United States possession. If residency solely in a United States possession is the 'connection' used to acquire United States citizenship, as in the subject case, we do not think that Congress ever intended for marriage to a United States citizen (which may shorten the required residency period in the possession) to remove the decedent from the 'solely by reason of . . . residency within [a] possession' Code § 2208 exception to being a United States citizen for Federal estate tax purposes. Our view, therefore, is that the subject decedent was not a citizen of the United States for Federal estate tax purposes, but rather was a nonresident not a citizen of the United States as provided in Code § 2209. We recommend that your proposed technical advice memorandum be revised accordingly.

FACTS

***2** *** was born in *** in *** and was a He married *** national, on *** In *** moved from *** to ***

*** wife became a naturalized United States citizen in *** on *** became a naturalized citizen on *** in *** on the basis of section 319(a) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1430(a), which provides in general for the naturalization of aliens who are resident in the United States for at least three years and who are married to United States citizens.[1]

*** died *** He had maintained his residence in *** from *** until the time of his death.

ANALYSIS

Code § 2208 provides:
A decedent who was a citizen of the United States and a resident of a possession thereof at the time of his death shall, for purposes of the tax imposed by this chapter [Chapter 11-Estate Tax], be considered a 'citizen' of the United States within the meaning of that term wherever used in

this title unless he acquired his United States citizenship solely by reason of (1) his being a citizen of such possession of the United States, or (2) his birth or residence within such possession of the United States. [Emphasis added.]

Treas. Reg. § 20.2208-1, in part, states:

As used in this part [Estate Tax Regulations], the term 'citizen of the United States' is considered to include a decedent dying after September 2, 1958, who, at the time of his death, was domiciled in a possession of the United States and was a United States citizen, and who did not acquire his United States citizenship solely by reason of his being a citizen of such possession or by reason of his birth or residence within such possession. . . .

Code § 2209 provides:

A decedent who was a citizen of the United States and a resident of a possession thereof at the time of his death shall, for purposes of the tax imposed by this chapter, be considered a 'nonresident not a citizen of the United States' within the meaning of that term wherever used in this title, but only if such person acquired his United States citizenship solely by reason of (1) his being a citizen of such possession of the United States, or (2) his birth or residence within such possession of the United States.

Relying on a literal interpretation of Code § 2208, the proposed technical advice memorandum concludes that the decedent was a citizen of the United States for purposes of the Federal estate tax. The interpretation is that decedent did not qualify for an exception under Code § 2208 because his United States citizenship was acquired on the dual basis of his residence in *** and his marriage to a United States citizen, rather than solely by reason of his residence in ***

Representatives for the decedent's estate question whether this literal interpretation is consistent with the congressional intent as set forth in the legislative history (Conf. Rep. No. 2632, 85th Cong., 2d Sess. (1958), discussed below) accompanying the enactment of Code § 2208. Their argument is that Congress did not intend to impose the Federal estate tax on the estates of decedents whose United States citizenship depended in any way upon their residence in a possession of the United States.[2] Thus, they argue that the decedent is within the exception under Code § 2208 and is not a citizen of the United States for Federal estate tax purposes because his United States citizenship was based on residence in *** a United States possession. The estate's representatives contend that the estate is liable for Federal estate tax only to the extent provided with respect to a nonresident not a citizen of the United States pursuant to Code § 2209. We agree that the decedent, based on the legislative history of Code §§ 2208 and 2209, should be considered a nonresident not a citizen of the United States for Federal estate tax purposes.

***3** We think the literal or strict position your proposed technical advice memorandum takes in interpreting Code § 2208, although literally correct, is in substance quite similar to a proposed literal or strict position your office desired to take regarding that section several years ago. In G.C.M. 35360, ***, I-4221 (June 4, 1973), we considered a proposed revenue ruling which eventually was published as Rev. Rul. 74-25, 1974-1 C.B. 284. We disagreed with your literal or strict interpretation of Code § 2208 in that situation just as we do here. Rev. Rul. 74-25 is consistent with G.C.M. 35360. Although we agree that the specific facts in Rev . Rul. 74-25 and G.C.M. 35360 are distinguishable from those in the subject case, we do think the legislative history rationale in Rev. Rul. 74-25 and G.C.M. 35360 for not taking a strict or literal approach under Code § 2208 is not only relevant to the subject case but determinative.

In Rev. Rul. 74-25, a decedent acquired his United States citizenship solely by virtue of his birth in Puerto Rico. The decedent died a resident of the United States Virgin Islands. That ruling expressly concedes that were a literal interpretation of Code §§ 2208 and 2209 adopted, the decedent would have had to have acquired United States citizenship in the same United States possession as that in which he resided at death in order to be considered a 'nonresident not a citizen of the United States' for such purposes. Rev. Rul. 74-25 expressly rejects such a literal interpretation on the basis of the legislative history accompanying the enactment of Code §§ 2208 and 2209. That ruling summarizes the basic congressional purpose with respect to these two sections as being '. . . to close the loophole that enabled United States citizens to move from the United States and establish citizenship in United States possessions and thereby remove their estates from the application of the estate tax.' Rev. Rul. 74-25 holds that, since the abuse sought to be eliminated by Congress in enacting Code §§ 2208 and 2209 was clearly distinguishable from the facts therein, the decedent therein would be considered a nonresident not a United States citizen for Federal estate tax purposes under Code § 2209 .

G.C.M. 35360, which accords with Rev. Rul. 74-25, provides the basis for the rationale in that ruling. G.C.M. 35360, in turn, premises its conclusions on a detailed analysis of the congressional purpose underlying the enactment of these two sections.

Initially, before we examine the legislative history of Code §§ 2208 and 2209, we would point out that we think that any Code provisions that are reasonably susceptible of two such widely varying interpretations as that contained in your proposed technical advice memorandum and in the subject memorandum, certainly require reference to their underlying legislative history. This is in accord with our express view in G.C.M. 35360. We do not disagree with the proposed technical advice memorandum's citation of United States v. United States Steel Corp., 482 F.2d 439, 444 (7th Cir. 1973), for the proposition that the 'plainer' the language of a statute, the more convincing contrary legislative history must be in order to 'avoid' the application of the plain meaning of the statutory words. We think, however, that the legislative history of Code §§ 2208 and 2209 is most

convincing in overcoming what your proposed technical advice memorandum concludes to be the 'plain' meaning of those sections with respect to the circumstances of the subject case.

***4** Code § 2208 was added to the Code by the Technical Amendments Act of 1958, P.L. 85-866, § 102(a), 72 Stat. 1606, 1674 (1958). This provision of the Act was approved by the conference committee with the deletion of another provision that was later added to the Code as Code § 2209 by P.L. 86-779, § 4(b)(1), 74 Stat. 998, 999 (1960).

In introducing as a floor amendment in the Senate the provisions that were to become Code §§ 2208 and 2209, Senator Williams had included in the Congressional Record for August 12, 1958 a Background Memorandum on Estate Tax Problems in Possessions and a memorandum from the Treasury Department. The Background Memorandum reads as follows:

BACKGROUND MEMORANDUM ON ESTATE TAX PROBLEMS IN POSSESSIONS

Section 2001 of the 1954 Internal Revenue Code imposes an estate tax on the estate of a citizen or resident of the United States. The tax is applicable to all property wherever situated except real property situated outside the United States. Section 2101 imposes an estate tax on the estate of nonresidents who are not citizens of the United States. For purposes of the latter tax, the estate consists only of property situated in the United States. In the Estate of Albert D. Smallwood, (11 T.C. 740 (1943)), the Tax Court held that the estate of a citizen of the United States who resided and acquired citizenship in Puerto Rico was not subject to tax as an estate of a citizen of the United States. This decision was followed by the Tax Court in the Estate of Arthur S. Fairchild (24 T.C. 408 (1955)), in which it was held that the estate of a citizen of the United States resident in the Virgin Islands was not subject to the estate tax. It has also been held in Estate of Rivera (19 T.C. 271, aff'd. 214 F.2d 60 (2d Cir. 1954)) that the estate of a citizen of Puerto Rico who was not otherwise a citizen of the United States was not subject to estate tax under section 2101 as a nonresident decedent not a citizen of the United States.
In general, the results reached in the foregoing decisions are based on the theory that the United States does not extend its Federal tax system to possessions unless Congress does so expressly. The courts have uniformly held that Congress has not extended the scope of the estate tax to include citizens of United States possessions, whether or not they are also United States citizens. The Internal Revenue Service has followed these decisions and, moreover, believes that the legal conclusions upon which they are based are equally applicable to the gift tax.

In addition to expanding the scope of the estate and gift taxes to citizens of the United States resident in United States possessions, the bill would also make the estate and gift taxes applicable to citizens of possessions who are not otherwise citizens of the United States. The estates of such individuals would be subject to tax in the same manner as nonresidents who are not citizens of the United States. This reverses the result reached in the Rivera case, above. . . .

TECHNICAL EXPLANATION

***5** Section 1 of the bill amends subchapter C of chapter 11 of the code by adding new section 2208 thereto. Section 2208 provides that the term 'citizen' of the United States wherever used in connection with the estate tax includes every decedent who was a United States citizen resident in a possession of the United States unless he acquired such citizenship solely by reason of (1) his being a citizen of a possession of the United States, or (2) birth or residence within a possession of the United States. Section 2208 also provides that a decedent who was a citizen of the United States and a resident of a possession is considered to be a nonresident not a citizen of the United States if he acquired his United States citizenship solely for the reasons stated in the preceding sentence. Thus, a person who became a United States citizen solely by reason of his being a citizen of Puerto Rico, or solely by reason of his birth or residence within the Virgin Islands, would fall within the classification of a 'nonresident not a citizen of the United States', and only that portion of his property which was situated within the United States would be includible in his gross estate for estate tax purposes. On the other hand a United States citizen who moved from the United States to Puerto Rico or the Virgin Islands would never fall into the classification of a 'nonresident not a citizen of the United States' merely because of his subsequent acquisition of Puerto Rican citizenship or subsequent residence in the Virgin Islands. Under the provision of section 2001 of the code, by reason of the addition of section 2208 to the Code, the estate of such latter individual would be taxed in the same manner in which it would have been taxed if he had never left the United States. . . . (104 Cong. Rec. 17106 (1958))

The Treasury memorandum included by Senator Williams in the Congressional Record is virtually identical to the first three paragraphs in the above-quoted Background Memorandum. The fourth (last) paragraph of the Treasury memorandum simply indicates that the Treasury Department favors enactment of these estate tax provisions 'to correct unintended benefits.'

In conference, the provisions revising the result in Rivera that were later (in 1960) to become Code § 2209 were eliminated from the Technical Amendments Act of 1958. With regard to the provisions of the Act that became Code § 2208, the conference report states:

Amendment No. 227: This Senate amendment added to the Internal Revenue Code of 1954 provisions relating to the imposition of estate and gift taxes on citizens of the United States residing in the possessions.

Under the provisions of this amendment United States citizens who are residents of the possessions and who acquired their United States citizenship completely independently of their connections with the possessions will have their estate taxed in the same manner as estates of citizens of the United States are taxed. The estates of all other residents of the possessions, regardless of citizenship, will be taxed in the same manner as the estates of residents not citizens. The same

line of demarkation is drawn in these provisions in taxing the making of gifts by residents of possessions. For example, a United States citizen who moves from the United States to one of the possessions will continue to be treated for estate and gift tax purposes in the same manner in which he would have been treated if he had remained in the United States. . . . The Senate amendment applies to estates of decedents dying after the effective date of this bill, and to gifts made after the effective date of this bill.

***6** The House recedes with a modification that these provisions shall apply only to residents of possessions who acquired their United States citizenship completely independently of their connections with the possessions. With respect to all other residents of possessions, regardless of citizenship, existing law will continue to be applicable. It is recognized that with respect to these other residents of possessions a problem may still remain. However, it was believed that additional time is required for study in this area. For that reason no action is taken at this time with respect to these other residents of possessions. [Conf. Rep. No. 2632, 85th Cong., 2d Sess. (1958), 1958-3 C.B. 1188, 1228] [Emphasis added.]

We think it was the clear intent of Congress, as expressed in the above-quoted conference report, to extend the Federal estate tax to those United States citizens dying resident in a United States possession who acquired their United States citizenship 'completely independently' of their connections with any United States possessions. As to all other citizen residents of possessions, regardless of citizenship, that reports states that existing law (that the estates of such decedents were not subject to Federal estate tax, as decided in Smallwood, Rivera, and Fairchild) was to continue to apply while Congress further studied the matter. Thus, prior to the enactment of Code § 2209 in 1960, acquisition of United States citizenship through birth, residence or citizenship in a United States possession was not the type of United States citizenship Congress intended to cause any Federal estate tax consequences.

Congress' further study of the matter, as noted above, resulted in the enactment in 1960 of Code § 2209, the legislative history of which we think succinctly delineates the problems Congress sought to resolve with the enactment of Code §§ 2208 and 2209 and, in doing so, further supports the interpretation of Code §§ 2208 and 2209 that we recommend herein. Specifically, S. Rep. No. 1767, 86th Cong., 2d Sess. (1960), 1960-2 C.B. 829, 832-33, provides:

Present law provides that upon the death of a citizen or resident of the United States, an estate tax is to be imposed with respect to all property left by the decedent wherever situated except real property situated outside of the United States. In the case of the death of nonresidents who are not citizens of the United States, present law imposes an estate tax only with respect to property situated in the United States. However, in the case of deaths of residents of U.S. possessions whose citizenship was derived from citizenship in a possession, the courts have held that such residents

fell in neither of the two above categories with the result that in these cases the imposition of the estate tax was avoided entirely.

In Estate of Albert D. Smallwood (11 T.C. 740; 1948) the Tax Court held that the estate of a citizen of the United States who resided in, and acquired citizenship in, Puerto Rico was not subject to estate tax as a citizen of the United States. Subsequently, in 1955 the Tax Court in Estate of Arthur S. Fairchild (24 T.C. 408) held that the estate of a citizen of the United States resident in the Virgin Islands was not subject to the estate tax. In addition, in Estate of Rivera (19 T.C. 271, aff'd. 214 F.2d 60; 2d Cir. 1954) the courts have held that the estate of a citizen of Puerto Rico who was not otherwise a citizen of the United States was not subject to the estate tax as a nonresident decedent not a citizen of the United States.

***7** The results reached in these decisions are based on the theory that the United States does not extend its Federal tax system to possessions unless Congress expressly so provides and the courts have, therefore, held that Congress by not extending the scope of the estate tax had not extended the scope of the estate tax to include citizens of U.S. possessions whether or not they otherwise were U.S. citizens. The Internal Revenue Service not only followed these decisions but also believed that the legal conclusions upon which they were based were equally applicable to the gift tax.

As a result of these decisions, Congress in the Technical Amendments Act of 1958 made the estate and gift taxes specifically applicable in the case of citizens of the United States who are residents of a possession but only if the citizen did not become a citizen of United States solely by being a citizen of a possession or solely by reason of his birth within a possession of the United States or solely by reason of his residence within the possession. (Hereafter those who attained U.S. citizenship solely as a result of one of these factors will for convenience be referred to as being a citizen of a U.S. possession.) With respect to these citizens of United States who are residents of a possession but whose citizenship was not derived from citizenship in a U.S. possession, the estate and gift tax provisions were made applicable in the same manner as is generally true in the case of citizens of the United States. As a result, such citizens who are residents of a possession are subject to U.S. estate tax with respect to all property, real or personal, tangible or intangible wherever situated, except real property situated outside of the United States . Similarly, in the case of the gift tax, such U.S. citizens who are residents of a possession at the time they make a gift are subject to gift tax with respect to all gifts of property which is real or personal, tangible or intangible and without regard to whether the property is situated within or without the United States .

Although making the estate and gift taxes applicable to U.S. citizens who were residents of a possession, if their citizenship arose other than from citizenship of a possession, Congress did not in 1958 deal with the problem of those residents of a possession whose citizenship was derived from the possession. The problem was recognized but it was believed that further time was required for the study of the appropriate tax treatment for these citizens of a U .S. possession.

The House and your committee in this bill recommend that these citizens of a U.S. possession be subject to the estate and gift tax imposed by the United States, in general, to the same extent as in the case of nonresidents not citizens of the United States.

The effect of this, in the case of the estate tax, is to impose the U.S. estate tax with respect to the portion of the gross estate of these citizens of U.S. possessions who are residents of the possessions at the time of their death, only with respect to that part of their gross estate which at the time of their death is situated in the United States. . . .

***8** As we noted in G.C.M. 35360, the above-quoted legislative history of Code §§ 2208 and 2209, when read together, shows that Congress was consciously extending the application of the Federal estate tax to an area where the courts had denied its applicability based on Congress, theretofore, not having expressly made such an extension. The Federal estate tax extension made by Code § 2208 was not to every decedent dying resident in United States possessions, but instead applied only to those decedents Congress chose to include in the definition of 'United States citizen' for such purpose. We think the above-quoted legislative history clearly shows, as is expressly stated in Rev. Rul. 74-25, supra, that Code § 2208 was intended to close the loophole that enabled United States citizens, who had acquired their citizenship by birth or residence in the United States (apart from their connections with a United States possession), to move from the United States and establish citizenship in a United States possession and thus to avoid Federal estate taxation. Congress closed this loophole by focusing on whether the United States citizenship of the decedent-resident of a United States possession was acquired by reason of his physical (geographical) connection or relationship (birth, residence, or presence) with a United States possession. In doing so Congress clearly intended to impose the Federal estate tax where the courts had theretofore specifically concluded that it was inapplicable. The above-quoted accompanying legislative history expressly states that the decedents dying resident in a United States possession to whom Congress was extending the Federal estate tax were those decedents who acquired their United States citizenship completely independently of their connections with any United States possessions. Thus we are not faced with the need to be restrictive in our interpretation of an exclusion per se from tax when we consider Code § 2208, but rather we are faced simply with the need to interpret the scope of the United States citizen definition in that section.

Certainly, it cannot be said that the subject decedent acquired his United States citizenship completely independently of his physical (geographical residence) connections with *** a United States possession. Moreover, the decedent fulfilled his residency requirement for naturalization solely in ***. The conclusion you have reached in your proposed technical advice memorandum focuses on the technically correct (literal) fact that the subject decedent's United States citizenship was based on section 319(a) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1430(a),

which provides for the naturalization of aliens who are resident in the United States (including its possessions such as ***) for at least three years and who are married to United States citizens.

Although admittedly you could make (and have made) the literal argument that the subject decedent did not acquire his United States citizenship solely on the basis of his residence in ***, but also on the basis of his marriage to a United States citizen, we think your interpretation goes beyond the scope of to whom Congress sought to extend the Federal estate tax under Code § 2208, just the same as a literal interpretation of that section would have done under the facts in Rev. Rul. 74-25. We think that while marriage to a United States citizen can shorten the residency requirements attendant with United States naturalization, it is the residency requirement or connection (where present) and not the marriage factor upon which Congress focused to arrive at its definition of United States citizen for purposes of Code § 2208. Also, we would point out that it is the residency requirement or connection that is the basic key to naturalization, since an alien's marriage (regardless of how long) to a United States citizen without the alien's being resident in the United States will not satisfy the naturalization requirements (except for the special circumstances noted in 8 U.S.C. §§ 1427(c) and 1430(b)-(d)). We find nothing in the legislative history of Code §§ 2208 or 2209 that would indicate or even suggest that marriage to a United States citizen is or was intended to be a relevant consideration for purposes of Code § 2208 where the decedent satisfied the naturalization residency requirement solely in a United States possession in order to acquire his United States citizenship. In fact the legislative history quoted above states that, with respect to all those who acquired their United States citizenship other than completely independently of their connections with United States possessions, existing law (until the enactment of Code § 2209, no Federal estate tax at all) was to continue to apply. We think this legislative history should control the Service's position in this case rather than a literal interpretation of the Code.

***9** Thus, we think the estate of decedent herein is subject to Federal estate tax only to extent provided in Code § 2209, since we think under the provisions of that section (which are identical to those creating the exception to the definition of United States citizen in Code § 2208) that the decedent was a 'nonresident not a citizen of the United States.'

Our conclusion herein should not be construed as agreeing with the assertion by representatives for the decedent's estate that, based on Conf. Rep. No. 2632, Code § 2208 excepts from the term 'citizen of the United States' a decedent whose United States citizenship depended in any way upon residence in a United States possession. The language in the conference report-that Code § 2208 'shall apply only to residents of possessions who acquired their United States citizenship completely independently of their connections with the possessions'-offers direct support for the estate's representatives' interpretation. (Emphasis added.) We think, however, that if this legislative history is interpreted literally, it is inconsistent with the exception language of Code § 2208 which applies only where a decedent 'acquired his United States citizenship solely by reason of . . . his . . . residence within [a] possession of the United States.' (Emphasis added.) We think that, in view

of this literalistic inconsistency between the legislative history and the actual Code provision, it would be a reasonable exercise of administrative discretion to limit the effect of the above-quoted legislative history of Code §§ 2208 and 2209 on such Code sections by interpreting the 'solely by reason of' Code language as requiring that all residence, which is used to qualify a decedent for United States citizenship, be in one or more United States possessions in order for the decedent to be considered outside the scope of Code § 2208 and a nonresident not a citizen of the United States within the scope of Code § 2209. As you can see, our conclusion above with respect to the subject decedent's estate is consistent with our suggested 'administrative' interpretation of Code §§ 2208 and 2209.

MEADE WHITAKER
Chief Counsel

By:

ALAN R. FRASER
Technical Assistant to the Director
Interpretative Division

Attachment:

Adm. file

This document is not to be relied upon or otherwise cited as precedent by taxpayers.

Footnotes

1 Section 1430(a) provides an exception from the usual five year residency requirement for citizenship under 8 U.S.C. § 1427(a). In addition to the residency requirement (either five or three years), there are general requirements for naturalization, including an understanding of the English language, a knowledge and understanding of the history, principles, and form of government of the United States, and good moral character. 8 U.S.C. §§ 1421-1427.

2 Memorandum of Law, dated *** at 3, prepared by representatives for the decedent's estate.

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