Gifts on Creation of Joint Accounts: The Devil Is in the Details©

By Bruce M. DiCicco

This article addresses the federal tax implications when New Yorkers create joint bank accounts and joint brokerage accounts.[1] Our focus will be on the federal gift tax issue with respect to the creation of such accounts and recent advice that federal gift tax returns should be filed in all cases when such accounts are first created by a depositor who furnishes all the funds while the other joint tenant furnishes none.[2] Particular attention will be given to the Internal Revenue Service's (IRS) requirement that a withdrawal from a joint account is required before a completed gift occurs. For purposes of this article, I will refer to the contributing joint tenant as "A" and the non-contributing joint tenant as "B," both of whom are U.S. citizens.

First, the basics. Internal Revenue Code (I.R.C.) § 2501(a) imposes a tax on the transfer of property by gift by an individual, resident or nonresident. Treasury Regulation § 25.2511–1(a) provides: "the gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible."

There is, however, an exemption from the gift tax for transfers between spouses. Creating an account with B, who is the spouse of A, does not result in any federal gift tax because gifts between spouses are not subject to the tax.[3] The same is true when A opens an account with his own money, or has an existing account, and simply adds his or her spouse as a joint owner on the account.[4]

If an account is created as a joint account, a presumption arises that joint ownership was intended. Much has been written and decided, however, about whether a particular account that is ostensibly created as a joint bank account is really intended as such. Typical claims that arise are whether a convenience account was intended, meaning an account established in joint ownership by A but where B was added only to provide a "convenience" to A. Typically B is added just so that B could write checks and pay bills for A. This is a common occurrence in this author's experience, frequently between elderly or infirm parents and their trusted children, for example. No actual joint account was intended in such situations.[5]

New York case law is replete with discussion of the presumption found in New York Banking Law § 675(b), namely, that accounts established in the name of A and B in form to be paid or delivered to either, or the survivor of them, are presumed to create a joint tenancy. The statute provides, and many courts have held, that when a joint account is created, there is *an immediate and unconditional* one-half interest in the deposited funds created for each account holder.[6] So, when A deposits $100 into an account with B, designating the account as joint, B accordingly has a present right to withdraw a one-half interest, or $50. B's one-half interest is referred to as the "moiety." It is key, however, to distinguish the right to withdraw from the right of survivorship because the latter is the right to take what is left in the account after the death of one of the joint tenants. This right is known as the "right of the joint tenancy."

In a true joint tenancy jurisdiction, the fact that A or B withdraws more than one-half of the account during their lifetimes does not prevent (or destroy) the right of joint tenancy (meaning the right to receive the remainder of the joint account) after the death of A or B. In other words, if B withdraws $65 and A dies, B still receives $45 by virtue of his right of survivorship and the excess withdrawal by B does not destroy the right of the joint tenant to receive the balance of the account. New York State, however, does not follow this rule and it is therefore said that New York is ***not*** a true joint tenancy state. In New York, a withdrawal by B in excess of his moiety terminates the joint tenancy and gives A the right to have $15 returned to his estate dependent on whether A consented to, or intended for, B to withdraw more than his moiety.[7] The rule in New York, therefore, can be expressed as follows: joint accounts are a joint tenancy but only as to the moiety. As to a withdrawal beyond A or B's moiety, a right to an accounting exists to determine whether, in our example, A intended to allow the excess withdrawal. Since the litigants in many of the cases involving this subject typically only seek recovery of the withdrawal in excess of the moiety, they also seem to indicate a completed "gift" as to the moiety.[8] Other cases more clearly so indicate.[9]

Treatises define a "gift" as:

> an irrevocable transfer by a donor, competent to make a gift, and clearly and unmistakably intending to divest him-

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self of title, dominion, and control over the subject matter of the gift, to a donee capable of accepting a gift, or to someone acting as trustee or agent for the donee in accepting it.[10]

The definition, at first blush, seems to fit the conclusion that there is a gift on creation of a joint bank account in New York State as to the moiety.

Treas. Reg. § 25.2511-1(h)(4) provides, however (and here is the rub):

> If A creates a joint bank account for himself and B (or similar type of ownership by which A can **regain the entire fund without B's consent**), there is a gift to B when B **draws upon the account** for his own benefit, to the extent or as to the amount drawn **without any obligation** to account for part of the proceeds to A.[11]

The regulations require three things. In a joint account arrangement, either depositor may withdraw the entire fund without the consent of the other joint tenant by simply writing a check for the balance in the account. So, the requirement of regaining the entire fund is easily satisfied by the nature of the rights attached to such accounts. The third requirement seems to be met on creation of the joint account in New York, at least as to moiety for the non-contributing joint owner because there is no obligation to account from B to A and the joint tenancy is not destroyed as to the moiety. The second requirement is the one about which the IRS has taken a position.

IRS Revenue Ruling 69-148 states:

> For purposes of the Federal gift tax, the creation by *A* of a joint bank account for himself and *B*, or a similar type of ownership by which *A* can regain the entire fund without *B's* consent, does not constitute a completed transfer from *A* to *B* **until the latter draws upon the account for his own benefit** without any obligation to account for a part of the proceeds to *A*.[12]

A Chief General Counsel Memorandum,[13] which has not been changed, faced the issue of whether there was a gift on creation of a joint account and sought to clarify earlier advice[14] and fix what the Chief Counsel referred to as "the chaotic case law . . . ." The Chief Counsel announced:[15]

> While we continue to believe that there is an adequate legal basis for the view that federal gift tax liability arises on the creation of a bank account where a true joint tenancy is intended pursuant to state law, a uniform federal rule that **no gift occurs until withdrawal** is desirable from an administrative standpoint in light of the variations in local law and the factual difficulty in determining in any individual case whether a true joint tenancy has resulted, as the chaotic case law . . . on this subject amply demonstrates. Moreover, such a uniform rule is consistent with the view adopted in the decided cases which have involved this issue.[16]

Page 5 of the 2018 instructions to I.R.S. Form 709 explains:

> If you create a joint bank account for yourself and a donee (or a similar kind of ownership by which you can get back the entire fund without the donee's consent), you have made a gift to the donee **when the donee draws** on the account for his or her own benefit. The amount of the gift is the amount that the donee took out without any obligation to repay you.[17]

On the other hand, in *Estate of Buchholtz v. Commissioner,* the court held that gifts were made on creation of the joint accounts. In *Buchholtz*, there was a *withdrawal* of funds from joint bank accounts within three years prior to death. In finding that the gifted property was not includible in the estate of Mr. Buchholtz, the court had to have found that gifts on creation of the accounts occurred since otherwise the I.R.C. § 2035(b) presumption would have applied had the court not done so.[18] An Action on Decision announcement (AOD) supports this reading of *Buchholtz* as well, even though the court did not explicitly make clear that it was so holding.[19] The United States District Court for the Eastern District of Wisconsin has held that there was a gift on the creation of a joint brokerage account where the intent to establish the right of each joint tenant to one-half of the account was confirmed in writing a number of times with the custodian, Merrill Lynch, even though no withdrawals were made at the time the gift was found to have been made.[20] The court reviewed all the facts that tended to establish an intention to create a joint account in finding there was a completed gift on creation. Some also seize upon the legal statutory presumption found in New York Banking Law § 675 to bring order to the decisions and argue to the effect that accounts established as joint accounts are presumed to be joint accounts and therefore gifts are made on creation of the joint account as a result of the statutory presumption.

But New York Banking Law § 675 creates only a presumption and presumptions can be overcome.[21]

New York's Appellate Division has also held in any number of decisions that if no joint account was intended but rather the intent was to create a mere convenience account, it would result in no gift on creation.[22] This issue of intent was also raised in *Buchholtz*, where the IRS argued, among other things, that no intention to create a joint account existed because B testified that he would have returned the funds if requested to do so by A.

There is also federal case law holding that a withdrawal is necessary before a gift of a joint account can be completed where either A or B can withdraw the entire deposit.[23] The rationale in these cases is that where A retains the right to withdraw all the funds in a joint account by virtue of being a joint owner, no gift can be intended to B.

So there are a number of complications in concluding that there is a gift on creation in New York for federal gift tax purposes. First, the time at which the determination is made as to the intent of A and B about the nature of the account, namely, whether it is intended as joint or not, is a moving target.[24] The U.S. Tax Court has held that the time at which the intention of the parties to an alleged joint account is to be determined is not fixed. The court stated:

> We think that the most that can be distilled from more recent decisions (all of which held in favor of the taxpayer) is that, while the critical point in time will often be when a joint bank account is opened or deposits made therein, a general guideline to this effect should not be elevated into an absolute rule of law.[25]

Can one be sure when a court will apply the determination of intent? Will a court find it made at the date the accounts are first established or later when a depositor dies? Can subsequent events affect the intentions? There is no hard and fast rule**.**

Second, of course, is the IRS regulation presented above that must be enforced with its plain meaning. I.R.C. § 7805 gives the U.S. Secretary of the Treasury the power to create the necessary rules and regulations for enforcing the I.R.C.

Third is the oft-cited factor in determining whether a gift is intended, which is that A did not file gift tax returns on the creation of the joint account, indicating that no gift was intended.[26]

Would a better analysis be to rely on the Treasury Regulation until a withdrawal is made from the joint account by B? Does this approach have the benefit of not becoming embroiled in the factual determinations of intent of A or B as pointed out by the General Counsel? Would it be risky advice to A or B to file a gift tax return prior to withdrawals being made when the very time to determine whether a gift is intended is not fixed? Would one not want to accelerate the gift tax potential or use of the unified exemption amount? If one answers all these questions in the negative, only then should a gift tax return be filed on the creation of a joint account, A and B should each report one-half of the interest earned on each of their personal income tax returns, and the custodial bank should issue a Form 1099 one-half to each joint owner.

Fourth, to be considered last (but not least) is how your conclusions on the gift tax issue affect qualified disclaimers? If there is no completed gift on creation and no withdrawals, B should be able to disclaim the entire value of the account after the death of A.[27]

Endnotes

1. This discussion is not applicable to so-called "convenience accounts" established under New York Banking Law § 678.
2. Francine R.S. Lee & Elisa Shevlin Rizzo, *The Confusion Surrounding Joint Bank Accounts in New York*, N.Y. St. B. J., 51 Tr. & Est. L. Sec. Newsl. 3, at p. 20 (Fall 2018).
3. I.R.C. § 2523.
4. Jointly held assets also pass by operation of law to the surviving joint owner and are not controlled or affected by the terms of one's will. This may, in the minds of the lay person, drive the desire to create such accounts since doing so avoids the process by which a court determines that the document designated as will is in fact "decreed" to be one's will. That court process is known as "probate."
5. *See* Lee & Rizzo, *supra* note 2 for discussion of the presumption of New York Banking Law § 675 and the impact of donative intent.
6. *See* 41 Alb. L. Rev. 141 (1977).
7. *In re Kleinberg v. Heller*, 376 Misc. 2d 636 (Sur. Ct., Bronx Co. 1974), *rev'd sub nom*, 45 A.D.2d 514 (1st Dep't 1974), *rev'd*, 38 N.Y.2d 836, 844 (1976).
8. *See, e.g.*, *Estate of Jesse I. Friedman*, N.Y.L.J. Aug. 17, 1988 (Sur. Ct., N.Y. Co.) (Preminger, S.).
9. *See, e.g.*, *Bricker v. Krimer*, 13 N.Y.2d 22 (1963) (holding that there is no duty to account as to the moiety) (citing *In re Estate of Pinnock*, 83 Misc. 2d 233 (Sur. Ct., Bronx Co, 1975).
10. *See, e.g.*, Rabkin & Johnson, 4 Fed. Income, Gift and Est. Tax'n § 51.04.
11. Treas. Reg. § 25.2511-1(h)(4) (emphasis added).
12. Rev. Rul. 69-148, 1969-1 C.B. 226 (emphasis added) (citing Treas. Reg. § 25.2511-1(h)(4)).
13. IRS Gen. Couns. Mem. 37,310 (Nov. 2, 1977). The Chief Counsel is an Assistant General Counsel of the Treasury Department, appointed by the President with the advice and consent of the Senate. *See* 31 U.S.C. § 301(f)(2). For most purposes, the Chief Counsel is subject to the supervision of the General Counsel of the Treasury Department, not the Commissioner of Internal Revenue. General Counsel's Memoranda are "legal memoranda from the Office of Chief Counsel to the Internal Revenue Service prepared in response to a formal request for legal advice from the Assistant Commissioner (Technical)." *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 669 (D. D.C. 1981) (internal citation omitted). They are "primarily prepared by attorneys in the Interpretative Division of the Office of Chief Counsel and usually addressed to the Office of the Assistant Commissioner (Technical) in connection with the review of proposed private letter rulings, proposed technical advice memoranda, and proposed revenue rulings of the IRS." *Id.*

14. IRS Gen. Couns. Mem. 37,310 (Nov. 2, 1977) (revoking both IRS Gen. Couns. Mem. 35,088 (Oct. 20, 1972) and IRS Gen. Couns. Memo. 36,647 (March 23, 1976) to the contrary).

15. This is especially true where New York case law constantly uses the word "gift" to describe **rights** to joint funds which are the subject of the controversy but not necessarily the federal gift tax implications.

16. IRS Gen. Couns. Mem. 37,310 (Nov. 2, 1977) (emphasis added); *see also* IRS Gen Couns. Mem. 37,590 (June 29, 1978). "If differences arise between the positions of the Office of Assistant Commissioner (Technical) and the Office of Chief Counsel, the differences are generally reconciled on an informal basis before the adoption of the revenue ruling, private letter ruling, or technical advice memorandum in question." *Taxation with Representation Fund*, 646 F.2d at 669. "IRS personnel are instructed by section 4245.3(3) of the Internal Revenue Manual that GCMs should not be used as precedents in the disposition of other cases but may be used as a guide with other research material in formulating a district office position on an issue." *Id.* (citing I.R.M. § 4245.3). "However, GCMs are frequently cited by staff attorneys in the Office of Chief Counsel in subsequent GCMs to insure consistency, avoid duplication of research, provide a reference source, and update earlier memorandums when a position on an issue is sustained, modified, or changed within the Office of Chief Counsel." *Id.* (internal citation omitted). "GCMs are also considered by attorneys in the Interpretative Division and the Litigation Division to be of some precedent as a research item." *Id.* Under the Treasury Regulations, General Counsel Memoranda, unfortunately, "do not establish precedent, and taxpayers cannot cite them as authority against the United States." *Von Cos. v. United States*, 51 Fed. Cl. 1, 11 (Fed. Cl. 2001). "The authorities underlying such expressions of opinions where applicable to the facts of a particular case, however, may give rise to substantial authority for the taxpayer's position." James P. Holden, *New Professional Standards in the Tax Marketplace: Opinions 314, 346 and Circular 230*, 4 VA. TAX REV. 209 (1985) (citing 26 C.F.R. § 1.6661-3(b)(2)).

17. IRS Form 709, Instructions, p. 5 (2018) (emphasis added).

18. At the time of *Buccholtz*, I.R.C. § 2035 was not changed by the Tax Reform Act of 1976 as to I.R.C. § 2035(b), which required gifts made "in contemplation of death" and if made within three years of the date of death, such was presumed unless overcome.

19. *Estate of Buchholtz v. Comm'r*, T.C. Memo 1977-396 (Nov. 15, 1977), *action on dec.*, 1979-75 (Feb. 1, 1979); *Estate of Buchholtz v. Comm'r*, 70 T.C. 814 (1978), *action on dec.*, 1979-75 (Feb. 1, 1979).

20. *First Wis. Tr. Co. v. U.S.*, 553 F. Supp. 26 (E.D. Wis. 1982).

21. *In re Bobeck*, 531 N.Y.S.2d 340 (2d Dep't 1988); *Wacikowski v. Wacikowski*, 93 A.D.2d 885, *lv. to app den*, 60 N.Y.2d 553 (1983); *Sherman v. Georgopoulos*, 84 A.D.2d 811 (2d Dep't 1981); *Phillips v. Phillips*, 70 A.D.2d 30, 38 (2d Dep't 1979).

22. *In re Friedman* 104 A.D.2d 366 (2d Dep't 1984); *McGill v. Booth*, 94 A.D.2d 928 (3d Dep't 1983); *In re Comarad*, 63 A.D.2d 837 (4th Dep't 1978); *In re McMurdo*, 56 A.D.2d 602 (2d Dep't 1977).

23. *See Wilson v. Comm'r*, 56 T.C. 579 (1971) (applying Idaho law); *see also Haneke v. U.S.*, 548 F.2d 1138 (4th Cir. 1976) (applying Maryland law).

24. *Estate of Buchholtz v. Comm'r*, T.C. Memo 1977-396 (Nov. 15, 1977).

25. *Id.*

26. *Wilson*, 56 T.C. at 579.

27. Philip A. Di Giorgio & Louis W. Pierro, *Post Mortem Planning Allows Fine Tuning of a Client's Estate Plan*, 34 EST. PLAN. MAG. 4, Apr. 2007, at pp. 31, 33; *see* Treas. Reg. § 25.2518-2(c)(5) (Example 12).