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Who Pays Tax on Joint Bank Accounts?

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Although foreign bank accounts are frequently discussed, basic questions about who really owns an account for federal income tax purposes or is taxable on its income may be overlooked. For example, is it effective for two people to jointly own an account but for only one to receive and be taxed on its income? Wood and Ogden discuss the legal and factual framework that informs common factual settings and how it may affect income tax and reporting regimens.

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If A and B have a joint interest-earning bank account producing $100 of income, who pays tax on it? That sounds like a silly question. Surely both joint account holders pay tax! If two people open a joint account and each has equal access to the money, it only seems fair for each person to have $50 of income.

As with most things in tax law, it is often not that simple. The issue may sound as if it is primarily controlled by information reporting. After all, if A's Social Security number is linked to the account, won't A receive a Form 1099-INT from the bank for all the earned interest? That probably means A will feel forced to pay all the tax.

It is true that receiving a Form 1099 for 100 percent of the interest may seem to compel that conclusion. Yet, even in that case, some taxpayers will finesse the situation by reflecting the Form 1099 on their return but showing a deduction for the interest paid to their co-account-holder. In some circumstances, it appears that the IRS even instructs taxpayers to do so.

Those issues can and do arise with domestic as well as foreign accounts. Yet, in the latter case, the stakes seem particularly high. After all, with foreign accounts there will be no Form 1099 to alert the holders about the income and its reporting. Moreover, nettlesome questions about Form TD F 90-22.1 (foreign bank account report) and tax return reporting are likely to arise.

For example, suppose you are a U.S. citizen and maintain a joint account overseas with your uncle, a non-U.S. person. You know you have an ownership interest of some sort in the account, which means you should file an FBAR. But do you also have income from the account that must be reported to the IRS by virtue of it being a joint account?

The various IRS voluntary disclosure programs have thrust those questions (and many others involving foreign financial accounts or assets) into the limelight. Some cases may have obvious answers, but many do not. Some persons have attenuated joint ownership issues involving powers of attorney or signature authority without beneficial ownership. Some foreign financial accounts and assets are the product of informal family dealings, so each person may not be certain what he has.

Although some of these situations also raise gift and estate tax questions, our focus is solely on the income tax liability emanating from foreign accounts and assets. Similarly, the focus of this article is not on FBAR reporting, which is generally distinct from the federal income tax law regarding earnings on those accounts. Plainly, FBAR requirements may apply even though a taxpayer earns no income from a foreign account for federal income tax purposes.

Federal Income Taxation of Foreign Accounts

The United States taxes its citizens and alien individuals residing in the United States on their worldwide income.[1] The owner of income generated in a foreign account is treated as receiving that income for purposes of federal income tax liability. In the absence of a governing statute, the determination of who is the owner of income generated by an account for purposes of federal income tax liability appears to be based presumptively on legal ownership under prevailing local law.

We refer to that concept as ''local law ownership.'' In addition to local law ownership, the federal income tax questions surrounding foreign accounts are intensely factual. They may ultimately turn on the control over and benefits derived from the account assets, or ''beneficial ownership.''

To identify the beneficial owner of a foreign account, the IRS and the courts must evaluate the facts presented. Of course, the IRS and the courts will generally evaluate those facts as they are elucidated by the surrounding circumstances and the conduct of the parties.

Accordingly, in the absence of an applicable statute, ownership of foreign accounts for federal income tax purposes is typically based on local law or beneficial ownership. The determination of local law ownership and beneficial ownership are typically separate inquiries, and they do not always lead to the same conclusion.

Thus, the IRS may conclude that the beneficial owner of an account is different from the owner of the account under local law. In that circumstance, the IRS may seek to impose income tax liability on the beneficial owner of an account regardless of that person's rights to the account assets under the prevailing local law.

General Deference to Local Law Ownership

Federal income tax liability is generally allocated in proportion to the income to which each co-owner is entitled under local law.[2] That is an important rule and can trigger unexpected legal presumptions for account holders. For example, in Rev. Rul. 76-97,[3] the IRS said that a resident alien must include in income half the interest from a savings account held jointly with a nonresident alien (NRA) in a state where joint tenants share profits equally.

As a general proposition, once ownership of income is established under local law, federal law governs its taxation in accordance with those ownership interests.[4] That ownership determination may be made under the law of the jurisdiction in which the income was earned.[5] Thus, federal income tax liability will be *presumptively* allocated to the extent of an account holder's ownership of the account assets under the law of the prevailing foreign jurisdiction.

Exceptions Predicated on Beneficial Ownership

Despite the initial focus on local law, one should often go further. Deference to local law (as it pertains to federal income tax liability) is subject to broad judicial exceptions predicated on the concept of beneficial ownership. Thus, the IRS and courts often look beyond local law ownership to impose income tax liability on the party with beneficial ownership of the income-producing asset.[6] The more prominent of these exceptions are highlighted below.

Agents Are Generally Not Taxed

As has become clear in many foreign account disclosures, many people find that they are an account holder solely for the benefit of another. Often, the other person is a friend or family member. Significantly, if an individual or corporation ''holds legal title to property as an agent, then for tax purposes the principal and not the [agent] is the owner.''[7]

The importance of that concept cannot be overstated. Income generated on an account operated by an agent on behalf of a principal should generally be taxed to the principal, even though the name of the agent may also appear on the account as a joint signatory. In that situation, the agent's name often appears on the account solely for the convenience of the principal. Of course, proof problems may be nettlesome.

Yet the legal concept is clear. Indeed, the Supreme Court affirms that a nominal owner will not be treated as the owner of property for federal income tax purposes in a properly structured principal/agent relationship.[8] In *Bollinger*, the Supreme Court enunciated a three-part agency safe harbor:

[1]*See Francisco v. Commissioner*, 119 T.C. 317, 319 (2002), *Doc 2002-27768*, *2002 TNT 245-15*; reg. section 1.1-1(b).

[2]*See Lipsitz v. Commissioner*, 220 F.2d 871, 873 (4th Cir. 1955).

[3]1976-1 C.B. 15.

[4]*See Crawford v. United States*, 4 Cl. Ct. 699, 702 (1984) (applying French law to determine ownership of income for federal income tax purposes and reiterating that federal income tax liability generally follows ownership under local law).

[5]*See id.*; *see also Santiago v. Commissioner*, 61 T.C. 53, 58 (1974) (applying Spanish law to determine ownership of income earned in Spain).

[6]*See Chu v. Commissioner*, T.C. Memo. 1996-549, *Doc 96-32537*, *96 TNT 246-17* (taxpayer subject to income tax as beneficial owner of bank account, despite lack of local law ownership).

[7]*Montgomery v. Commissioner*, T.C. Memo. 1989-295 (citing *Commissioner v. Bollinger*, 485 U.S. 340 (1988)).

[8]*See Bollinger*, 485 U.S. at 349 (''it is uncontested that the law attributes tax consequences of property held by a genuine agent to the principal'').

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a. a written agency agreement must be entered into with the agent contemporaneously with the acquisition of the asset;

b. the agent must function exclusively as an agent with respect to the asset at all times; and

c. the agent must be held out as merely an agent in all dealings with third parties relating to the asset.[9]

In expanding the *Bollinger* safe harbor, the Tax Court later concluded that the *Bollinger* factors are nonexclusive.[10] Moreover, the Tax Court has even held that an oral agency agreement can suffice.[11] Of course, it is preferable to commit those understandings to writing, particularly given how high the stakes can turn out to be.

The agency concept is a fundamental one even apart from potential proof problems. Assuming a true agency relationship, an account holder arguably should not be subject to any federal income tax on earned income over which he had no control or beneficial right.

Beneficial Owners May Be Subject to Tax

In addition to the *Bollinger* safe harbor, courts generally look beyond local law ownership to impose income tax liability on the party with beneficial ownership of the income-producing asset.[12] In imposing income tax liability, courts have in some circumstances expressly rejected local law ownership in favor of beneficial ownership.[13] The beneficial ownership analysis has been applied to domestic as well as foreign bank accounts.[14]

Thus, an account holder may assert that beneficial ownership of account assets controls the federal income tax liability imposed on those accounts. In some circumstances, that argument may shift the income tax liability on earned interest from the owner of the account under local law to the account's beneficial owner.

The Tax Court has broadly defined beneficial ownership as the ''freedom to dispose of the accounts' funds at will.''[15] In applying that standard, courts may weigh a variety of indicia of taxable ownership. Those factors include: (1) which party enjoys the economic benefit of the property; (2) which party has possession and control; and (3) the intent of the parties.[16]

For example, in *CHEM Inc.*,[17] the taxpayer opened four bank accounts in the names of his four children. The taxpayer deposited money into the accounts but later withdrew funds to facilitate his own business ventures. He continued to claim that his children owned the four accounts, so he did not report any of the income the accounts generated.

The IRS proposed an income tax deficiency against the taxpayer based on the account income. In disputing the deficiency, the taxpayer argued that he had deposited the funds into the accounts solely for the benefit of his children. The accounts were in their names, the taxpayer said, and he had opened them in accordance with cultural tradition.

As to his withdrawals, the taxpayer claimed they were mere loans that would be repaid at a later date. Consequently, the taxpayer asserted that his children were liable for any tax arising from the income generated by the accounts. The Tax Court, however, was not convinced.

Relying on the entire record, the court determined that the taxpayer was the beneficial owner of the accounts. That made him liable for the income tax deficiency. The court reasoned:

> Our finding here is based on the identity of the true owner of the income-producing property. In such an inquiry, we look not to mere legal title, but to beneficial ownership. It is command over the property or the enjoyment of its economic benefits that marks the real owner. When transactions are between family members, special scrutiny of the arrangement is necessary, lest what is in reality but one economic unit be multiplied into two or more.
>
> While we do not doubt the sincerity of [the taxpayer's] long-term intentions, we nevertheless have found that [the taxpayer] owned the accounts in question during the years in issue. The circumstance that [the taxpayer] may have viewed the funds as the eventual property of his children does not change the nature of the dominion and control he exercised over those funds during the years in issue. [The taxpayer's] access to, and use of, the money in the children's bank accounts to facilitate his own business ventures establish him as the constructive owner of those funds. As such, we

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[9] *Id.* at 349.

[10] *See Advance Homes Inc. v. Commissioner*, T.C. Memo. 1990-302.

[11] *Id.* (''We conclude that *Bollinger* does not require the existence of a written agency agreement'').

[12] *See CHEM Inc. v. Commissioner*, T.C. Memo. 1993-520, *Doc 93-11736*, *93 TNT 234-25* (imposing income tax on beneficial owner of accounts); *see also Ng v. Commissioner*, T.C. Memo. 1997-248, *Doc 97-16164*, *97 TNT 106-18* (applying beneficial ownership analysis to jointly held Chinese accounts).

[13] *See Chu*, T.C. Memo. 1996-549 (''It is the ability to command the property, or enjoy its economic benefits, that marks a true owner'').

[14] *See, e.g.*, *Ng*, T.C. Memo. 1997-248.

[15] *Chu*, T.C. Memo. 1996-549.

[16] *Id.*; *see also CHEM Inc.*, T.C. Memo. 1993-520.

[17] T.C. Memo. 1993-520.

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> hold that he is subject to tax on any income earned on the children's accounts.[18]

The *CHEM Inc.* decision is notable in that the taxpayer clearly controlled and benefited from the accounts opened in his children's names. That was demonstrated by his withdrawals and the use of those withdrawals for his business ventures. Given the taxpayer's treatment of the accounts as his own, the Tax Court easily concluded that he was the beneficial owner for income tax purposes despite his intention to replace the withdrawn funds.

Treatment of Certain Community Property

In addition to the traditional analysis of local law and beneficial ownership, there is a special statutory rule for married couples that earn community income, whether under the laws of a state or foreign country, when one or both spouses are NRAs.[19]

When applicable, section 879(a) generally provides that:

> a. earned income is allocated to the spouse who rendered the personal services;
>
> b. trade or business income, and a partner's distributive share of partnership income, is allocated to the person participating in the business;
>
> c. community income derived from the separate property of one spouse is allocated to that spouse only; and
>
> d. all other community income shall be treated as provided under the local community property laws.[20]

Examples

The following examples are intended to illustrate the operation of local law and beneficial ownership concepts in the context of foreign joint accounts.

Example 1: Tom, a U.S. taxpayer, holds a foreign joint bank account with his brother Bill, who is not a U.S. taxpayer. Tom deposited all of the account assets and intended those deposits to be gifts to Bill. After Tom deposits funds into the joint account, Bill controls all the assets and withdraws the funds for his own benefit. Tom does not exercise control over the funds, nor does he withdraw or benefit from the account assets.

Q1: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A1: Yes. Because the United States generally taxes its citizens and alien individuals residing in the United States on worldwide income, Tom's ownership interest in the account may be subject to federal income tax.[21] Tom's federal income tax liability may be allocated in proportion to his ownership of the account assets under the law of the prevailing foreign jurisdiction.[22]

Fortunately for Tom, however, the IRS and courts may look beyond local law ownership to impose income tax on the party with beneficial ownership of the income-producing asset.[23] Tom may be able to avoid income tax liability if the IRS or courts are satisfied that he lacks beneficial ownership of the funds. That may be true regardless of whether Bill is subject to U.S. tax.

As noted above, the IRS and courts may weigh a variety of indicia of beneficial ownership: (1) which party enjoys the economic benefit of the property; (2) which party has possession and control; and (3) the intent of the parties.[24] At least some of the beneficial ownership factors seem to weigh in Tom's favor. He deposited the funds for the benefit of his brother Bill and never operated the account or withdrew money.

Tom may also fall within the *Bollinger* safe harbor, which might preclude the imposition of income tax liability on him in connection with the interest earned in the foreign account.[25] In addition to the facts presented, proof of an agreement that Bill had complete authority over the account assets could help Tom meet the *Bollinger* requirements. If Tom someday withdrew funds from the foreign account, it would be important for him to prove that he withdrew and used those funds as Bill's agent and under Bill's instructions.

Tom could help prove his income tax position by assembling relevant documents. Those documents might include bank statements, receipts, agreements with Bill, and declarations. It might be helpful if Tom complied with his gift tax obligations (if any) and for Bill to have paid the foreign and domestic income tax on the interest generated in the account.

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[18] *Id.* (internal citations omitted).

[19] Section 879(a). Under some circumstances, a U.S. citizen or resident spouse and an NRA spouse can elect joint filing status with the IRS. *See* section 6013(g). This marital election effectively subjects both spouses to federal income tax liability on worldwide income. *Id.* If the election is made, section 879(a) does not apply. *See* section 879(b).

[20] Section 879(a)(1)-(4).

[21] *See Francisco*, 119 T.C. at 319.

[22] *See Crawford*, 4 Cl. Ct. at 702.

[23] *See Chu*, T.C. Memo. 1996-549 ("The true owner of income-producing property, such as the [bank account], is the one with beneficial ownership, rather than mere legal title").

[24] *See generally CHEM Inc.*, T.C. Memo. 1993-520; *see also Ng*, T.C. Memo. 1997-248.

[25] *See Bollinger*, 485 U.S. at 349-350; *see also Advance Homes Inc.*, T.C. Memo. 1990-302.

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Example 2: Same as Example 1, except that Tom and Bill have agreed to share control over the foreign account and equally benefit from the account assets. Under the law of the prevailing foreign jurisdiction, Tom owns all the account assets.

Q2: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A2: Yes. Tom's federal income tax liability may be allocated in proportion to his ownership of the account assets under the law of the prevailing foreign jurisdiction.[26] Because he owns all of the account assets under local law, Tom is presumptively liable for all income generated by those assets.

However, federal income tax liability may be adjusted to conform to Tom's beneficial ownership of the funds. That may be true regardless of whether Bill is subject to U.S. tax. The IRS and courts generally determine beneficial ownership through a highly factual analysis, including an evaluation of intent, control over the account, and benefits derived from the funds.

Tom and Bill have agreed to equally share control and benefits from the account assets. If the terms of that agreement are followed in practice, beneficial ownership of half of the account assets and half of the resulting tax liability has arguably been shifted to Bill.[27] That reasoning suggests that Tom may be liable for only half of the federal income tax liability imposed on the foreign account.

If the terms of the agreement are not followed, the IRS might seek to impose income tax liability on Tom based on the brothers' actual conduct rather than their initial intent to equally share control and benefits from the funds.[28] In other words, the IRS might try to allocate the income tax liability between Tom and Bill in proportion to the actual control exercised by the brothers and the actual benefits derived from the account funds.

Example 3: Tom is a U.S. citizen and his wife Wilma is an NRA. Wilma has no obligation to file U.S. tax returns or pay U.S. taxes, and Tom files his U.S. tax returns separately. They live in a foreign country with community property laws and hold a joint bank account in that country. Tom and Wilma have agreed to share control over the account and equally benefit from the account assets.

Q3: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A3: Yes. Although Wilma is not a U.S. taxpayer, Tom is still required to report his worldwide income as a U.S. citizen.[29] As discussed earlier, there is a statutory rule for married couples that earn community income, whether under the laws of a state or foreign country, when one or both spouses are NRAs.[30]

Section 879 may apply to Tom because he is married to an NRA in a community property jurisdiction where the foreign joint account is located. Under that section, Tom's federal income tax liability may depend on many factors. Those factors include whether the account assets are considered separate or community property under the community property laws of the foreign jurisdiction.

For example, any interest income earned on Tom's separate property may be subject to federal income taxation. Section 879(a) and the local community property laws may govern the federal income taxation of the remaining income earned in the foreign joint account.

Example 4: Same as Example 3, except that Tom and Wilma have divorced. They have decided to continue the foreign account as joint holders.

Q4: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A4: Yes. Tom and Wilma have divorced but have retained the foreign joint account. Since section 879(a) does not appear to apply to unmarried individuals, the IRS and courts might allocate federal income tax liability to Tom under the traditional analysis of local law and beneficial ownership. Thus, Tom's federal income tax liability would presumptively be allocated in proportion to his ownership of the account assets under the local law of the prevailing foreign jurisdiction.[31]

However, turning to beneficial ownership analysis, Tom and Wilma have agreed to share control over and the benefits derived from the account assets. If their agreement is followed, Wilma is arguably the beneficial owner of half of the account assets and resulting tax liability, regardless of her or Tom's local law ownership. This situation is analogous to Example 2, in which Tom held a joint account with his brother Bill.

Assuming that Wilma is the beneficial owner of half of the account assets, Tom might only be taxed on half of the income earned in the foreign account.

[26] *See Crawford*, 4 Cl. Ct. at 702.

[27] *See Lipsitz*, 220 F.2d at 873-874 (rejecting claim that local law should dictate taxable ownership and allocating income tax liability based on "clear agreement" and conduct of parties).

[28] *See CHEM Inc.*, T.C. Memo. 1993-520 (in determining owner of account for federal income tax purposes, taxpayer's conduct dispositive).

[29] *See Francisco*, 119 T.C. at 319.

[30] *See* section 879(a).

[31] *See Crawford*, 4 Cl. Ct. at 702.

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Tom could help support that position by assembling relevant documentation. That might include bank statements, agreements with Wilma, declarations, income tax filings, gift tax returns (if any), and FBAR forms (if any), and any other documents demonstrating shared control over and benefits derived from the account assets.

Example 5: Tom is a U.S. taxpayer and is the sole signatory on a foreign bank account. His parents, who are not U.S. taxpayers, deposited all of the funds into the account for the support of Tom's daughter Daisy. Tom withdraws and uses the funds only under his parents' instructions.

Q5: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A5: Yes. Tom's federal income tax liability may presumptively be allocated in proportion to his local law ownership.[32] Because Tom is the only account holder, it is quite possible that the IRS would seek to impose tax liability on him for all income generated by the account assets. However, Tom may be able to avoid income tax liability under the beneficial ownership analysis.

Tom may meet the *Bollinger* agency safe harbor. It seems helpful that the funds were deposited by Tom's parents, that Tom never operated the account without explicit instructions to do so, and that it was understood that the funds were solely for Daisy's benefit. Those facts may even suggest that Tom's parents, rather than Tom, remained the beneficial owners of the account assets.[33]

Assuming that Tom lacks all indicia of beneficial ownership, he arguably should not be subject to federal income tax liability in connection with the foreign account. That may be true regardless of whether his parents are subject to U.S. tax. Proving that position, however, will be especially challenging given Tom's local law ownership of the account assets. In that regard, documentation of Tom's interest in the account will be key.

It would be helpful if there were proof of an agreement that Tom lacked any authority over his parents' deposits and duly complied with their instructions. That proof might include direct evidence such as written agreements, declarations, estate planning documents, and purchase receipts. Indirect evidence might include income tax returns filed by Tom's parents in connection with the account assets and FBAR forms reflecting their financial interest in the account.

Example 6: Same as Example 5, except that Tom did not use the funds in the foreign account for the benefit of his daughter Daisy. Instead, he invested the account assets into a business venture. Although that was against his parents' wishes, Tom plans on repaying the money.

Q6: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A6: Yes. Tom appears to have local law ownership of the foreign account. Therefore, Tom might be liable for all income generated by the account assets.[34] It will be difficult for Tom to avoid income tax liability through the beneficial ownership analysis.

The *Bollinger* agency safe harbor requires that the agent function *exclusively* as an agent regarding the asset at all times.[35] Here, Tom has used account assets for his own benefit in the form of a business venture. That action was not authorized by his parents. That Tom acted against his parents' explicit instructions weakens the likelihood of meeting the agency safe harbor.

Moreover, beneficial ownership often turns on control over and benefits derived from an asset.[36] Tom has arguably demonstrated control over and benefits derived from the account assets by withdrawing the funds and using them for his own purpose. At least one court has concluded that the intent to repay withdrawn funds is of little or no consequence in determining beneficial ownership.[37]

Tom appears to have acted outside the scope of his agency by disregarding his parents' instructions. He withdrew account funds at his own discretion and used them for his business venture. That freedom over the funds may be indicative of beneficial ownership.[38] Under that reasoning, Tom is potentially liable for all federal income tax liability in connection with the account.

Example 7: Same as Example 5, except that Tom's parents died last year. Before their death, Tom's parents expressed their hope that Tom continue to use the account assets for his daughter Daisy's

[32]*Id.*

[33]*See Hughes v. Commissioner*, T.C. Memo. 1994-139, *Doc 94-3490*, *94 TNT 62-10* (rejecting claim that brother owned account for income tax purposes when taxpayer exercised sole dominion and control).

[34]*See Crawford*, 4 Cl. Ct. at 702.

[35]*Bollinger*, 485 U.S. at 349-350.

[36]*See CHEM Inc.*, T.C. Memo. 1993-520.

[37]*See id.* (taxpayer who opened accounts in children's names and withdrew funds for business venture was owner of accounts for federal income tax purposes, despite intent to repay the withdrawn funds).

[38]*See Chu*, T.C. Memo. 1996-549 (defining beneficial ownership as the "freedom to dispose of the accounts' funds at will").

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benefit. Although not legally obligated to do so, Tom withdraws the funds solely for the benefit of Daisy at his discretion.

Q7: Can federal income tax be imposed on Tom in connection with the interest earned in that foreign account?

A7: Yes. Assuming Tom's parents did not legally bequeath the funds to Daisy, Tom is probably the owner of the funds under prevailing local law. His local law ownership may result in federal income tax liability on all income earned in the account.[39]

Turning to beneficial ownership and agency, it is possible that Tom was acting under the *Bollinger* safe harbor as a nontaxable agent while his parents were living. See Example 5. However, an agency relationship generally terminates on the death of the principal, in this case Tom's parents.[40] Therefore, for federal income tax purposes, Tom's agency role may have terminated on his parents' death.

Also, some courts have concluded that dominion and control over funds implicitly includes the power to select a beneficiary and that this power is dispositive in determining beneficial ownership.[41] Therefore, the IRS and courts could view Tom's unilateral authority over the account as indicative of beneficial ownership.

Tom's agency relationship probably terminated on his parents' death, and he does not appear to be acting as an agent for anyone else. His beneficial ownership of the account is arguably demonstrated by his unilateral authority, discretionary withdrawals, and choice of beneficiary. Taken together, it may be difficult for Tom to overcome the presumptive income tax liability on all income earned in the account.

Example 8: Tom is a U.S. taxpayer and is the sole signatory on a foreign account. Tom normally controls the account assets and he alone benefits from them. Recently, however, Tom's brother Bill, who is not a U.S. taxpayer, deposited money into Tom's foreign account. Bill made it clear that Tom was to return the deposited funds or use them only at Bill's request and under Bill's instructions. Tom agreed and did not withdraw or otherwise benefit from the funds deposited by Bill. Tom later transferred the deposited funds out of his foreign account to a third party at Bill's request.

Q8: Can federal income tax be imposed on Tom in connection with the interest earned on the funds deposited by Bill?

A8: Yes. Because Tom was the only account holder, he may be liable for all income generated by the account assets, including the money deposited by Bill.[42] However, Tom arguably should not be taxed on the temporary funds deposited by his brother because he may have lacked beneficial ownership of those funds. That may be true regardless of whether Bill is subject to U.S. tax.

Tom and Bill agreed that Bill would retain complete authority and control over the funds despite Tom's apparent local law ownership. That agreement appears to have been followed. Tom did not benefit from the funds and transferred the money at the time and in the manner requested by Bill.

Based on those same facts, Tom may also meet the *Bollinger* safe harbor in connection with the funds deposited by Bill. Indeed, Tom arguably should not be subject to federal income tax in connection with the transitory deposits he did not control and to which he had no beneficial right. However, given that the funds were commingled and solely in Tom's name, it may be difficult for him to prove and prevail on that position.

To do so, Tom might consider assembling relevant documentation. That might include a written agreement with Bill, declarations, and bank statements. It would be helpful if Bill continued to pay income tax on the deposited funds and filed an FBAR reflecting his financial interest in the foreign account.

Conclusion

Joint and other combined ownership of assets can be confusing. The law itself is manipulable, with both local law and beneficial ownership concepts at play. Even with domestic accounts, there can be confusion. And for foreign accounts, there may be multiple legal regimes that could be relevant.

Even nailing down the facts can be laborious. These accounts are often established for and among people that know each other well, are related, or otherwise have a high degree of trust for one another. It is therefore only natural that precise details of who really owns what may be unclear. In some families, it might seem untoward to even discuss such things.

With the current focus on foreign accounts and assets, we can expect more of these issues to arise. They can be confusing enough when the stakes seem small and are at least nongovernmental in

[39]*See Crawford*, 4 Cl. Ct. at 702.

[40]*See Estate of Cummins v. Commissioner*, T.C. Memo. 1993-518, *Doc 93-11555*, *93 TNT 231-15*; *Malone & Hyde Inc. v. Commissioner*, T.C. Memo. 1992-661.

[41]*See Bailey v. Commissioner*, 52 T.C. 115, 118-119 (1969) (taxpayer who controlled funds was deemed beneficial owner despite use of funds for benefit of another); *see also CHEM Inc.*, T.C. Memo. 1993-520 (taxpayer was beneficial owner of funds diverted to business venture).

[42]*See Crawford*, 4 Cl. Ct. at 702.

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nature. When the stakes loom large, as they can if significant taxes, penalties, and even potential criminal liability are at stake, they take on enormous significance.

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