STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2016-14

[MAINE ESTATE],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

The [Maine Estate] (the "Estate") appeals from an assessment of Maine estate tax issued by Maine Revenue Services ("MRS"). The Estate contends that MRS erred in issuing the assessment because no Maine estate tax is due. After considering the applicable law and the evidence presented, we uphold the assessment in full.

I. Background

[Decedent] (the "Decedent") died in Maine on [date] 2011. The Decedent's spouse, ("Predeceased Spouse"), predeceased the Decedent on [date] 1998, when they were both residents of [non-Maine state]. During the Predeceased Spouse's life, the Predeceased Spouse created a trust into which the Predeceased Spouse placed property, including certain items of income-producing intangible personal property (the "Intangible Assets"). As provided by the terms of the trust, the Intangible Assets were transferred into a second trust upon the Predeceased Spouse's death, with a [non-Maine Bank] appointed as trustee. Under the terms of the second trust, the trustee was directed to distribute the income from the Intangible Assets to the Decedent for life, and then to transfer the Intangible Assets to the Predeceased Spouse's descendants upon the Decedent's death. The Decedent was neither a trustee of the trust, nor did the Decedent have

any power of appointment over it. As thus arranged, the Intangible Assets constituted "qualified terminable interest property" ("QTIP Property") under the Internal Revenue Code ("I.R.C.").

Subsequent to the Predeceased Spouse's death, the Predeceased Spouse's estate filed a federal estate tax return, electing to treat the QTIP Property as having been passed to the Decedent at the time of the Predeceased Spouse's death without taxation as part of the Predeceased Spouse's estate. I.R.C. § 2056(b)(7)(A). Although the Decedent only received a life-estate interest in the QTIP Property which extinguished upon the Decedent's death, the effect of the federal QTIP election required that the QTIP Property be considered and taxed as "property includable in the gross estate of the decedent" for federal estate tax purposes. *Id*. § 2044(c).

At some point after the Predeceased Spouse's death, the Decedent established domicile in Maine. Upon the Decedent's death, the Estate timely prepared and filed a Maine estate tax return which omitted the value of the QTIP Property in computing the Maine tax. Upon examining the Estate's return, MRS determined that the Estate had incorrectly excluded the QTIP Property from its computation of the Maine tax. Consequently, MRS issued the subject assessment of Maine estate tax, interest, and a substantial understatement penalty.

The issues on appeal are (1) whether MRS incorrectly included the value of the QTIP Property in computing the Estate's Maine tax liability; (2) whether the Due Process and Commerce Clauses of the United States Constitution prohibit Maine from including the value of the QTIP Property in computing the Estate's Maine tax liability; and (3) whether there is substantial authority justifying waiver or abatement of the substantial understatement penalty. The Estate has the burden to show that it is more likely than not that MRS incorrectly issued the assessment against it. 36 M.R.S. § 151-D(10)(F).

II. Discussion

At all times relevant to this appeal,[1] Maine imposed a tax "upon the transfer of the estate of every person . . . who, at the time of death, was a resident of this State." 36 M.R.S. § 4063. Under section 4062(7) of Title 36, the term "transfer" includes

> the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain sale, gift or appointment in the manner described in this chapter.

The amount of the tax is computed by multiplying the "federal credit"[2] by a fraction,

> the numerator of which is the value of that portion of the decedent's federal gross estate that consists of real and tangible personal property located in the State plus the value of all intangible personal property[,] and the denominator of which is the value of the decedent's federal gross estate.

Id. § 4063.

1. Inclusion of the QTIP Property in the estate tax calculation.

The Estate concedes that neither the plain language of section 4063 nor any provision of federal estate tax law permits it to exclude the value of the QTIP Property from the federal gross estate when it computed the Estate's Maine tax liability. Nevertheless, the Estate contends that it correctly excluded the value of the QTIP Property when it figured its Maine estate tax.

The Estate first argues that the "transfer" that is taxed under the Maine statute includes only property that is actually transferred from the Decedent to the Decedent's heirs and excludes the QTIP Property in which the Decedent had only a life estate. In support of this contention, the Estate relies on the opinion of the Washington State Supreme Court in *Estate of Bracken v. Dept.*

[1] The Maine estate tax for estates of persons dying prior to December 31, 2012, as here, is determined under the provisions of 36 M.R.S. §§ 4061-4079, while the Maine estate tax for estates of persons dying after that date is determined under 36 M.R.S. §§ 4101-4118.

[2] The "federal credit" is a number computed under 36 M.R.S. § 4062(1-A). Its method of computation is not at issue between the parties and will not be further described in this decision.

of Revenue, 175 Wn.2d 549, 290 P.3d 99 (2012). In that case, the Washington court construed the term "transfer" in the Washington estate tax statute narrowly to mean only "real" transfers of property, excluding transfers of QTIP Property from the second spouse under I.R.C. § 2044(c). The Estate argues that the Board should adopt the restrictive interpretation of the term "transfer" in the State of Washington's estate tax statute in computing the Estate's Maine estate tax. We reject that argument. Such an interpretation is inconsistent with the plain language of the Maine estate tax statute, which begins the calculation of the Maine estate tax using the value of the federal gross estate. Furthermore, unlike the Maine statute, the Washington estate tax is imposed on "every transfer of *property* located in Washington." RCW 83.100.040(1) (emphasis added). The effect of the Washington statutory language imposing estate tax on "every transfer of property" is to make each transfer of a specific item of property a separate taxable transfer. Unlike Washington's estate tax statute, Maine imposes estate tax "upon the transfer *of the estate*," and is computed with specific reference to provisions of the I.R.C., including I.R.C. §§ 2056(b)(7) and 2044, permitting inclusion of QTIP property in the federal gross estate. The Maine statute is clearly distinguishable from that of the State of Washington. The court's opinion in *Bracken* is inapposite to the present case and does not support an adjustment to the assessment.

2. Due Process and Commerce Clause

The Estate next argues that because the Decedent does not actually own the QTIP Property, the State of Maine lacks jurisdiction to assess tax on the Property, which is held in trust in [non-Maine state]. The Estate also contends that the mere presence in this state of a trust beneficiary does not provide a sufficient connection with Maine to support the imposition of tax on a non-resident trust. The Estate's arguments are misdirected.

It has long been established that Maine's estate tax law does not impose a tax on property. Rather, Maine estate tax is an excise imposed on the transfer *of a decedent's estate*. *State v. Hamlin*, 86 Me. 495, 30 A. 76 (1894). Because the Decedent was a Maine resident at the time of the Decedent's death, Maine had jurisdiction over the Estate for estate tax purposes. The fact that the value of the QTIP Property was used to compute the Maine tax amount does not violate either the Due Process Clause or the Commerce Clause. *See Maxwell v. Bugbee*, 250 U.S. 525, 539 (1919) ("When the State levies taxes within its authority, property not in itself taxable by the State may be used as a measure of the tax imposed."); *cf. Smith v. State Tax Assessor*, 2004 ME 120 ¶ 13 ("The State commits no constitutional violation by relying, for commencement of its taxation calculation, on the federal adjusted gross income reported on the federal tax returns . . . ."). No adjustment to the assessment on this basis is therefore warranted.

The Estate next contends that the case of *Maxwell v. Bugbee*, cited above, is no longer good law, and that the subsequent decisions in *Frick v. Pennsylvania*, 268 U.S. 473 (1925), *Treichler v. Wisconsin*, 338 U.S. 251 (1949), and *Estate of Fasken*, 563 P.2d 832 (1977), prohibit using the value of the QTIP Property to calculate the Maine estate tax. Contrary to the Estate's contention, *Maxwell* remains good law. Furthermore, the cases cited by the Estate concern only taxation of transfers of *tangible* property not located in the state of domicile of the Decedent, while the QTIP Property at issue consists of *intangible* property which is taxable by the state of domicile of the Decedent. The court in *Frick* explains that *Maxwell* was properly decided, and that the value of property not taxable by the State of New Jersey was properly used to calculate the amount of tax imposed upon property subject to that state's jurisdiction. Rather than supporting the Estate's position in this case, *Frick, Treichler*, and *Fasken* simply do not apply.

3. Penalty waiver or abatement.

Finally, the Estate argues that the Board should waive or abate the assessed substantial understatement penalty on the ground that there is substantial authority supporting its filing position.

A substantial understatement penalty is imposed where a taxpayer files a return that understates his or her Maine tax liability by more than 10%. 36 M.R.S. § 187-B(4-A). The amount of the understatement of tax is calculated by excluding any portion of the understatement attributable to a filing position for which the taxpayer has "substantial authority." Furthermore, MRS must waive or abate the penalty if "[t]he taxpayer has supplied substantial authority justifying" its position. *Id.* § 187-B(7)(F). The term "substantial authority" is not defined in Maine tax law. However, federal tax law defines the term as

> an objective standard involving an analysis of the law and application of the law to relevant facts. . . . There is substantial authority for the tax treatment of an item *only* if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting the contrary treatment.

John Swenson Granite, Inc. v. Assessor, 685 A. 2d 425, 429 n.3 (Me. 1996) (quoting Treas. Reg. §§ 1.6662-4(d)(2), (3) (1996)) (emphasis added). The only authorities provided by the Estate in support of its position is the Washington State Supreme Court case of *Bracken*— a case from a jurisdiction whose estate tax law is materially different from Maine's—and the *Frick, Treichler,* and *Fasken* cases which are irrelevant to the circumstances here presented. Considering, on balance, the clear language of Maine's estate tax statute and the incorporated provisions of the I.R.C., we find that the authority supplied by the Estate in support of its position is not "substantial." Consequently, the Estate has not shown that it is entitled to waiver or abatement of the assessed penalty. No adjustment to the assessment is warranted on this basis.

III. Decision

The QTIP Property "treated as passing" to the Decedent by the Predeceased Spouse under I.R.C. § 2056(b)(7) and "treated as property passing from the [D]ecedent" under I.R.C. § 2044 is properly includable in computing the Estate's Maine estate tax under 36 M.R.S. § 4063. Additionally, the Estate has not shown substantial authority for excluding the value of the QTIP Property in computing the Maine tax. Accordingly, we uphold the assessment of estate tax, interest, and substantial understatement penalty in full.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at http://www.maine.gov/boardoftaxappeals/lawsrules/, for more information on when the Board may grant reconsideration. If no motion for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the Estate may contact Maine Revenue Services at 207-624-9725 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact the Estate with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: May 22, 2017