



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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November 13, 1997

Honorable Robert A. Judge, Sr., Secretary
Department of Revenue
11th Floor, Strawberry Square
Harrisburg, PA 17108

Re: IRRC Regulation #15-390 (#1887)
Department of Revenue
Inheritance Tax; Disclaimers of Nonprobate Taxable Assets

Dear Secretary Judge:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #15-390. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Chuck Tyrrell at 772-3455. He has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce". The signature is written in a cursive style with a large, prominent "R" and "N".

Robert E. Nyce
Executive Director

REN:wbg

cc: Anita M. Doucette
Douglas A. Berguson
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF REVENUE REGULATION NO. 15-390

INHERITANCE TAX; DISCLAIMERS OF NONPROBATE TAXABLE ASSETS

NOVEMBER 13, 1997

We have reviewed this proposed regulation from the Department of Revenue (Revenue) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to the clarity of and need for portions of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Section 93.81(a) - Need for general provisions

Subsection (a) states that the Department is revising its policy regarding disclaimers of nonprobate property to reflect the Commonwealth Court decision of *In Re Estate of Bernecker, (Bernecker)* 654 A.2d 246 (Pa. Cmwlth. 1995). The information regarding the reason for the proposed policy change and the summary of the *Bernecker* decision should be included, more appropriately, in the Preamble to the regulation. Therefore, we recommend the Department delete this section and reference the citation to the *Bernecker* decision in the Notes of Decision section in the *Pennsylvania Code*.

2. Section 93.81(b) - Applicability of regulation - Clarity

Subsection 93.81(b)(2) provides: "The same rule applies to nonresident decedents with nonprobate taxable assets subject to Pennsylvania Inheritance Tax." This provision is ambiguous because it does not indicate what specific rule applies. Furthermore, its location in the middle of the regulation is confusing. It is our understanding that the Department's intent is that the rule means the entire proposed regulation.

Accordingly, we recommend the Department move this provision to the beginning of the rulemaking. In addition, we recommend the provision state that "This regulation is applicable to all resident and nonresident decedents with nonprobate taxable assets subject to Pennsylvania Inheritance Tax."

3. Section 93.81(b) - Unnecessary language

Paragraph (3) provides that the disclaimer shall be in writing and satisfy the requirements of 20 Pa.C.S. Chapter 62 (relating to disclaimers) “in effect at the time the disclaimer is made.” The phrase “in effect at the time the disclaimer is made” is unnecessary. Disclaimers *must* satisfy the statutory requirements in effect at the time the disclaimer is executed. Therefore, we recommend that the phrase “in effect at the time the disclaimer is made” be deleted from the final-form regulation.

4. Section 93.81(b) - Clarity

Subsections (1)(i), (5), and (6) do not use consistent terminology when referring to an individual who may be making a disclaimer. Specifically, Subsection (1)(i) refers to “the disclaiming party or the personal representative of the deceased individual or the guardian or attorney-in-fact of the incapacitated person or minor to whom the interest, absent the disclaimer, would have devolved.” In contrast, Subsection (5) refers to “the individual, his personal representative if the individual seeking to disclaim has died, or the guardian or attorney-in-fact of an incapacitated individual or minor.” For clarity purposes, we recommend the Department use consistent terminology when referring to individuals who may disclaim.

5. Section 93.81(b) - Lack of need for court citations

Paragraphs (4) and (6) of Subsection (b) contain citations to various county court of common pleas orphan court division decisions. We have two concerns with including these citations in the regulation.

First, by including the citations to county orphan court decisions, the Department is applying county or local court holdings on a statewide basis. In effect, the inclusion of the local orphan’s court decisions in the regulation makes the local decisions precedent for all counties even though the cases were not reviewed by an appellate court.

Second, according to the Department, the cited cases reaffirm the provisions contained in the Tax Reform Code (TRC) regarding inheritance tax. The Department believes that the citations clarify the Probate, Estates, and Fiduciary Code (PEF Code) provisions regarding disclaimers and the TRC provisions regarding disclaimers or renunciation for inheritance tax purposes.

However, the regulation is promulgated pursuant to the Department’s authority under the TRC. The regulation sets forth the treatment of disclaimers for inheritance tax purposes, not for probate purposes.

For these reasons, we recommend that the Department delete the citations from the regulation. If the Department believes that the cases will provide assistance to individuals and

practitioners, the Department should explain the cases in the Preamble and reference them in the Notes of Decisions section contained in the *Pennsylvania Code*.

6. Section 93.81(b) - Disclaimer made without court authorization - Clarity

Paragraph (7) is ambiguous because it appears to require Subsections (i) - (iii) to occur in order to allow a personal representative to make a disclaimer on behalf of a decedent without court authorization. However, Section 6202 of the PEF Code allows a disclaimer to be made without court authorization only when the will of the decedent so authorizes. To resolve this issue, we recommend that Paragraph (7) be amended and restructured as follows:

(7) If the will of the decedent authorizes the personal representative to make a disclaimer on behalf of a decedent without court authorization, the personal representative shall:

- (i) Sign and date the disclaimer within 9 months of the date of death of the decedent as provided in Section 2116(c) of the TRC (72 P.S. § 9116(c)), and
- (ii) Attach a copy of the probated last will and testament to the Inheritance Tax return filed with the Department.

7. Repeal of Chapter 94 Statement of Policy

Currently, the Department has a statement of policy (61 Pa. Code Chapter 94) that mirrors the proposed rulemaking. However, there is no language in the Preamble indicating that the statement of policy will be repealed upon final publication of the regulation. Accordingly, we recommend that the Preamble of the final-form regulation include language which repeals the Chapter 94 statement of policy.

INDEPENDENT REGULATORY REVIEW COMMISSION

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Comments: We are submitting the Independent Regulatory Review Commission's comments on the Revenue Department's regulation #15-390. Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Anita M. Doucette Date: 11/13/97