UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-1027

UNITED STATES OF AMERICA,

Plaintiff-Appellant-
Cross-Appellee,

VERSUS

JAMES NEAL BLAKEMAN,
As Executor of the Estate of
C. E. BLAKEMAN, Deceased,
ROBERT EARL BLAKEMAN
and KAREN A. WHALEY,

Defendants-Appellees-
Cross-Appellants
and Cross-Appellees,

RIDGLEA BANK, ET AL.,

Defendants-Appellees,

VERSUS

MAUDINE BLAKEMAN,

Defendant-Appellee-
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

July 28, 1993

ON PETITION FOR REHEARING

(Opinion July 21, 5th Cir., 1992, ___ F.2d ___)

Before JOLLY, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is

hereby GRANTED. We hereby WITHDRAW Parts II.C. and III. of our original opinion, ___ F.2d ___ (5th Cir. 1992), and substitute the following:

II

C

The district court, finding that Mrs. Blakeman's homestead interest was the economic equivalent of a life estate, used the Treasury tables set forth in Treasury Regulation § 20.2031-10(f)[15] to determine its value.[16] The district court measured the value of the estate as of the date of the tax assessment and determined that the value of Mrs. Blakeman's homestead estate (life estate) was 74.423 percent of the total value of the 100 acres. The district court then held that the government's lien attached only to the estate's remainder interest in the 100 acres and held that the remainder interest was worth 25.577 percent of the value of the homestead as of the date of the assessment.[17] The

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[15] *See* 26 C.F.R. § 20.2031-10(f).

[16] The court found that the parties agreed that "the value of Mrs. Blakeman's homestead estate is the economic equivalent of a life estate and that use of the tables set forth in Treas. Reg. §20.2031-10(f) in determining the value of said estate is appropriate." *United States v. Blakeman,* 750 F. Supp. 216, 222 (N.D. Tex. 1990) ("Memorandum Opinion").

[17] The court so reasoned because "the general federal tax lien described in 26 U.S.C. § 6321 and on which federal levy may be had under 26 U.S.C. § 7403(a) attaches only to the interest of the delinquent taxpayer in particular property and not to the entire property." *See Blakeman,* 750 F. Supp. at 222 ("Memorandum Opinion") (citing *United States v. Rodgers*, 461 U.S. 677, 690 (1983)). This amount represents 14.071 percent.

district court, however, found that "inequity would result if Mrs. Blakeman were to . . . have the use of the homestead for the ten years that have passed since date of assessment, as she has had, and at the same time to receive sales proceeds representing the value of the homestead life estate for that same ten-year period," and concluded that Mrs. Blakeman's interest in the 100 acres should be determined by the value of Mrs. Blakeman's homestead interest as of the present date. Using the Treasury tables, then, the district court found Mrs. Blakeman's interest in the property to be 60.352 percent of the value of the land as of judgment. The district court then determined that the difference between the 74.423 percent representing the value of Mrs. Blakeman's homestead estate at date of assessment (June 17, 1980) and the 60.352 percent (Mrs. Blakeman's interest at judgment) should be given to the estate.[18]

The government argues that Mrs. Blakeman's interest in the Randol Mill Property should be valued as of the foreclosure date and contends that the district court erred in holding that the government's tax lien was limited to the estate's interest in the property on the lien's attachment date. Mrs. Blakeman, on the other hand, argues that the district court should have determined the interests of the

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[18] *See Blakeman,* 750 F. Supp. at 222 ("Memorandum Opinion").

respective parties as of the date the lien arose. In the alternative, Mrs. Blakeman argues that, if her homestead interest is to be valued as of the foreclosure date, it should be valued under the tables promulgated pursuant to 26 U.S.C. § 7520, and the district court erred in using the tables under Treas. Reg. § 20.2031-10.[19]

Mrs. Blakeman contends that she is entitled to at least 74.423 percent of the gross proceeds realized from the sale of the homestead property without any reduction to account for the period she occupied the property. Mrs. Blakeman relies on *Harris v. United States*, 764 F.2d 1126 (5th Cir. 1985), contending that the government should be estopped from asserting a position contrary to that taken in *Harris*. We find Mrs. Blakeman's contention without merit.

It is well-settled that a federal tax lien reaches property and interests in property owned by the taxpayer on the date of the assessment, as well as property and interests in property acquired by the taxpayer from that date until the tax debt is satisfied. *See Texas Commerce Bank--Fort Worth v. United States*, 896 F.2d 152, 161 (5th Cir. 1990) ("The lien arises on the date the IRS *assesses* unpaid taxes, applies to

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[19] Federal district courts in tax foreclosure cases are authorized to order a sale of the homestead property and distribute the sale proceeds in accordance with the interests of the parties. *See* 26 U.S.C. § 7403(c). Section 7403(c) does not, however, provide a precise method of (1) valuing the interests of the parties to the foreclosure and (2) distributing the sales proceeds realized on the foreclosure sale. *Id*.

currently owned as well as after-acquired property, and continues until the taxpayer satisfies the debt or the statute of limitations runs."), *citing* 26 U.S.C. § 6322; *Glass City Bank v. United States*, 326 U.S. 265, 267, 66 S. Ct. 108, 110, 90 L. Ed. 56 (1945); *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244 (10th Cir. 1989); *Prewitt v. United States*, 792 F.2d 1353, 1355 (5th Cir. 1986); *see also Rice Investment Co. v. United States*, 625 F.2d 565, 568 (5th Cir. 1980) ("After-acquired property . . . is reached by the lien.") (citations omitted). Therefore, the federal tax lien reaches the interests of C.E.'s estate as of the date of the foreclosure sale.

Mrs. Blakeman's next argument is that, if her homestead interest is to be valued as of the foreclosure date, her interest should be valued according to the tables promulgated pursuant to 26 U.S.C. § 7520.[20] The government agrees that the tables promulgated pursuant to 26 U.S.C. § 7520 are the proper tables to determine Mrs. Blakeman's interest in the property, but argues that, because Mrs. Blakeman failed to raise properly the issue of the applicability of § 7520 in the district court, she has waived her right to assert that the district court should have used the tables promulgated pursuant to 26 U.S.C. § 7520. We disagree.

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[20] Mrs. Blakeman contends that the district court erred when it stated that she agreed that the tables under Treas. Reg. § 20.2031-10 should be used to determine the extent of her homestead interest.

Mrs. Blakeman raised her argument concerning § 7520 in her proposed findings of fact and conclusions of law, but she did not raise it again at trial.[21] We believe, in light of our decision in *Laney v. Comm'r of Internal Revenue,* 674 F.2d 342 (5th Cir. 1982), and decisions of other courts of appeals, that that was sufficient to preserve Mrs. Blakeman's argument for appeal. In *Laney* the taxpayers urged an issue on appeal which they had not pleaded before the tax court, and which the tax court had not addressed. *See id.* at 351. The Commissioner contended that the taxpayers had waived the argument. *See id.* We held that the argument was not waived, because the taxpayers had included the issue in their trial

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[21] Mrs. Blakeman's proposed findings and conclusions stated:

> 3. In 1988, congress enacted Section 7520, which is the determining provision for valuing life estates and remainder interests at this time. Section 7520 requires the life estate and remainder to be determined
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> a. Under the tables prescribed by the Secretary, and
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> b. By using an interest rate equal to 120% of the Federal midterm rate in effect under Section 1274(d)(1) for the month in which the valuation date falls.
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> If the date of measurement is the date of foreclosure, then the Federal midterm rate for September 1990 is 8.53%. The second element of the formula is 120% of the Federal midterm rate, which is 10.28%. Table R(1) (located at [paragraph] 311AB of CCH Standard Federal Tax Reporter) for a person age 62 (Maudine Blakeman's current age) at 10.2% reflects a remainder factor of .25532% [sic], and therefore, results in a life estate factor of 74.468% of the gross sale price of the property sold at foreclosure.

Record on Appeal, vol. 4, at 866-67.

memo before the tax court. *See id.* The D.C. Circuit reached a similar result in *Kapar v. Kuwait Airways Corp.,* 845 F.2d 1100 (D.C. Cir. 1988), where it held that an unpleaded issue was preserved for appeal by inclusion in memoranda of law submitted to the district court. *See id.* at 1103 n.7. In *Hellenic Lines, Ltd. v. United States,* 512 F.2d 1196 (2d Cir. 1975), the Second Circuit held that an issue was preserved for appeal because it was raised in proposed conclusions of law and in a post-trial memorandum. *See id.* at 1205 n.15 Because in those cases memoranda of law and proposed conclusions of law were adequate to preserve issues for appeal, we conclude that Mrs. Blakeman's proposed findings and conclusions were adequate to preserve her argument under § 7520.

The holding in *United States v. Indiana Bonding & Sur. Co.,* 625 F.2d 26 (5th Cir. 1980), appears at first blush to support a contrary conclusion. In *Indiana Bonding* we held that the defendant, Indiana Bonding and Surety Company ("Indiana"), had waived its statute-of-limitations defense, because "[e]ven though this issue was listed as one of [Indiana's] contentions in the pretrial order . . . Indiana's failure to present evidence in support of the defense before the district court preclude[d] our review of it." *See Indiana Bonding,* 625 F.2d at 29. However, *Indiana Bonding* is distinguishable. Because the issue waived there))whether a cause of action was barred by the statute of limitations))required the presentation of evidence, we

recognized Indiana's failure to present evidence as a waiver of the issue.[22] *See id.* ("Indiana's failure to present evidence in support of the defense before the district court precludes our review of it here."). In this case, by contrast, there was no need for Mrs. Blakeman to offer evidence regarding the applicability of § 7520, because the applicability of that section followed automatically from the date of valuation of Mrs. Blakeman's homestead interest.[23] Because it was unnecessary for Mrs. Blakeman to present evidence, we do not recognize her failure to do so as a waiver of her argument. Therefore, the logic of *Indiana Bonding* lacks force here, and we believe that *Laney, Kapar, and Hellenic Lines* offer better guidance for the resolution of this dispute.

Because Mrs. Blakeman did not waive her argument under § 7520, and because the government concedes that § 7520 is applicable, we reverse and remand so that Mrs. Blakeman's homestead interest may be valued according to the tables promulgated pursuant to 26 U.S.C. § 7520.

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[22] We do not mean to suggest that, in every case where the admission of evidence is appropriate to the resolution of a disputed issue, failure to elicit testimony leads to waiver of the issue. That question is not before us, and we express no opinion on the subject.

[23] Section 7520 applies if the valuation date occurs on or after May 1, 1989. The district court determined that the valuation date was the date of foreclosure, and ordered a foreclosure sale within 120 days of October 30, 1990. Therefore, the valuation date occurred after May 1, 1989, and it automatically followed that § 7520 applied.

III

For the foregoing reasons, we AFFIRM in part and REVERSE and REMAND in part for the district court to determine the government's interest in the Randol Mill Property as of the date of the foreclosure sale, in accordance with the tables set forth in the Treasury Regulations, and for the district court to determine the value of Mrs. Blakeman's homestead interest according to the tables promulgated pursuant to 26 U.S.C. § 7520.