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Estate Planning Hot Topics and Current Developments

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Obama Administration Budget Proposal
Fiscal Year 2016 — New Items

- Realization at death (p. 2)
- GRATs — 25% gift (p. 4)
- Return to 2009 parameters (and the 2016 plan would accelerate that to 2016!) (p. 4)

New Legislation — Consistency of Basis and Reporting

- Section 2004 of Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, enacted July 31, 2015 (p. 10)
- Background: Section 1014(a) refers to "fair market value" at the date of death. The value determined for estate tax purposes is generally deemed to be the "fair market value" under §1014(a), but that is not conclusive. Treas. Reg. §1.1014-3(a). A recipient of property from a decedent may argue that the fair market value at date of death is really higher than the estate tax value, if the person is not estopped from taking that position. Rev. Rul. 54-97. Apparently, the IRS thought it was getting whipsawed on low estate tax values but higher basis values. (p. 10)
- Two Aspects on New Legislation: (1) Basis consistency; and (2) Information reporting

New Legislation — Consistency of Basis and Reporting

Basis Consistency — New Section 1014(f)

- "Fair market value" under §1014(a) shall not exceed the finally determined estate tax value (p. 10)
- Applies only to property "whose inclusion in the decedent's estate increased the [estate tax] liability" (Reason: otherwise no whipsaw)
- So the basis consistency requirement does not apply to estates, for example, that owe no estate tax due to the marital or charitable or administrative expense deductions, or because the estate is under the exemption amount. **But that exception does not apply to the reporting requirements.** (p. 10)

New Legislation — Consistency of Basis and Reporting

Information Reporting — New Section 6035 Requiring Executor to Report Valuation Information (p. 10-11)

- **What estates?** If the estate is required to file an estate tax return under §6018(a) (p. 11)
- **To whom?** To (1) the IRS and (2) "each person acquiring any interest in property included in the decedent's gross estate." (p. 11)
  - The IRS? Are they contemplating matching programs? (p. 11, 21)
  - Trusts — Is information given to the trustee or to each beneficiary? (See §7701(a)(1) defining "person" to include a "trust.")
- **When?** 30 days after earlier of Form 706 due date or actual filing date. Supplemental statements are required 30 days after an adjustment. (p. 11)
  - Extension granted on information reports until February 29, 2016 (p. 12)
- **What is reported?** "A statement identifying the value of each interest in such property as reported on such return" and info. as the IRS prescribes.

New Legislation — Consistency of Basis and Reporting

- Practical Problem: Most of the estate has probably not been distributed by 30 days after the estate tax return due date. What information must be reported to beneficiaries? (p. 12–13)
- Penalties
  - Using inconsistent basis: §6662 accuracy related penalties on understatements apply (p. 10)
  - Failure to give information returns and statements: §6721-6722
    - General rule: $250.00 per failure (after 2015)
    - "Due to intentional disregard": $500 or, if greater, "10 percent of the aggregate amount of the items required to be reported correctly." (p. 11)
- Effective Date: Returns filed after date of enactment (p. 12)
- Fiduciary Concerns: Examples — (1) 706 values, (2) Audit adjustments
- Revenue Estimate: $1.54 billion over 10 years (p. 13)

Treasury — IRS Priority Guidance Plan

Repeated Items (p. 13–14)

- Only two items from last year's plan eliminated (§67 and portability final regulations) (p. 13–14)
- One of the repeated items is whether QTIP trusts can be used with portability (in light of Rev. Proc. 2001-38) (p. 14)
- Material participation by trusts — Not anytime soon; ACTEC comments (p. 123–124)

New Items (p.14)

- Guidance on qualified contingencies of charitable remainder annuity trusts under §664
- Guidance on basis of grantor trust assets at death under §1014 (p. 15-16)
- Guidance on the valuation of promissory notes for transfer tax purposes under §§2031, 2033, 2512, and 7872 (p. 16–20)
- Guidance on the gift tax effect of defined value formula clauses under §2512 and 2511 (p. 20)

Speculation Regarding Section 2704 New Proposed Regulations

- Beginning in 2003, IRS has had a project for additional §2704 regulations
- Legislative proposal (in 2009 but now withdrawn) to revise §2704 (p. 23–24):
  - Additional "disregarded restrictions" (including new assumptions)
  - Assignee interests
  - Third–party involvement in removing restrictions
  - Safe harbors
  - Interaction with marital and charitable deduction
- ABA Tax Section meeting in May: One of 5 items of highest priority per Cathy Hughes (Treasury official) (p. 20)
- Speculation that the new regulation might be issued before September 2015
- ABA Tax/RPTE meeting September 18, 2015: "Getting closer" but cannot predict when; AICPA Meeting November 4, 2015: "Expected very soon" (p. 21)
- Effective date of new regulation? (p. 25)
- Dichotomy — Few pay estate tax but all estates get basis adjustment

Speculation Regarding Section 2704 New Proposed Regulations

- Section 2704: (p. 21-22)
  - Family control
  - Applicable restrictions disregarded in valuing transfer of entity interest
  - Applicable restriction is a restriction that (i) limits ability "of the corporation or partnership to liquidate," and (ii) the restriction lapses (entirely or partially) after the transfer OR the transferor or family members can remove the restriction (entirely or partially)
  - But an "applicable restriction" does not include "any restriction imposed, or required to be imposed, by any Federal or State law" (p. 22)
- State law restriction — regulations approach: "An applicable restriction is a limitation on the ability to liquidate the entity (in whole or in part) that is **more restrictive than the limitations that would apply** under the State law generally applicable to the entity in the **absence of the restriction.** …" Treas. Reg. §25.2702-2(b) (p. 22)

Speculation Regarding Section 2704 New Proposed Regulations

- Scope of new regulation: Cathy Hughes in May said the legislative proposal provides insight about scope of the new regulation (p. 23)
- Richard Dees (Chicago) sent 29-page letter to Treasury Assistant Secretary of Tax Policy and IRS Commissioner detailing why implementing the legislative proposals by regulation "would be invalid as contrary to the origin, purpose and scope of the current statute." (p. 24)
  - Part of Mr. Dees reasoning is that §2704 merely authorizes *disregarding* certain restrictions, not substituting other valuation assumptions (such as family aggregation) (p. 24)
- IRS has never received court acceptance of its argument that §2704 applies to restrictions on the right to "liquidate" one's *interest in the entity*; the statute (and examples in the regulations) refers to liquidating the entity, but the regulation refers to liquidation ("in whole or in part"). The Tax Court rejected that IRS argument in *Kerr v. Commissioner*, 113 T.C. 449 (1999), *aff'd on other grounds*, 202 F.3d 490 (5th Cir. 2002).

Speculation Regarding Section 2704 New Proposed Regulations

- The IRS may be changing course!!
- Leslie Finlow, an IRS senior technician reviewer, said at the American Institute of CPAs Fall Tax Division Meeting on November 4, 2015, that:
  - The guidance is expected very soon; and
  - The guidance will not be based on previous Treasury Department proposals — "We're not looking at the Greenbooks or anything President Obama said four years ago … We're looking at the statute, and the statute as it looks now is what you will see at the conclusion." (p. 24)
- This summary of Ms. Finlow's comments is from Freda, *IRS: Forget 2013 Treasury Proposal on Valuation Discounts*, BNA DAILY TAX REPORT 214 DTR G-6 (November 5, 2015). This article observes that practitioners had been worried that the IRS was planning to issue new restrictions based on the 2013 Greenbook proposal, which added restrictions "that may extend beyond the scope of those currently addressed by tax code Section 2704(b)." (p. 24–25)
- But is it realistic that the IRS could make substantial changes to the proposed regulations AND quickly get through the bureaucratic multiple levels of approval in order to have the guidance "expected soon?"

Closing Letters

- June 16, 2015 update to the “Frequently Asked Questions on Estate Taxes” on the IRS website (p. 26)
- Estate tax closing letters will be issued only on request for returns filed on or after June 1, 2015
- Wait four months after filing Form 706 to request closing letter
- Reason: Cutting expenses
- Possible alternative: Information about requesting a transcript for estate tax return and relying on a code on the transcript may be added to the IRS website (mentioned by Cathy Hughes at September 16, 2015 ABA Tax/RPTE meeting) (p. 26)
- If paying estate tax, most planners will still ask for closing letters

Closing Letters

- The closing letter issue was addressed at the American Institute of CPAs Fall Tax Division Meeting on November 4, 2015, in discussions with the Trust, Estate and Gift Tax Technical Resource Panel (p. 26)
- Practitioners expressed concern that a code on the estate tax return transcript will not carry the same weight as a closing letter, and that locating a code on the transcript is too complex for the executors of small estates
- Practitioners said a more convenient approach would be to include a box on Form 706 that the executor could check off requesting a closing letter
- Information about an alternative approach of relying on a code on the estate tax transcript has not been added to the IRS website; perhaps the IRS will not proceed with that plan (p. 27)
- The “Frequently Asked Questions on Estate Taxes” webpage on the IRS website was revised on November 2, 2015, to add a telephone number for requesting closing letters: (866) 699-4083; that number is also in the 2015 Form 706 Instructions)

Inflation Adjustments for 2016; Revenue Procedure 2015-53

- Individual income tax brackets — for married couple, top bracket starts at $466,950 of taxable income (up from $464,850 in 2015) (p. 27)
- Estate and trust tax brackets — top bracket begins at $12,400 (up from $12,300 in 2015)
- Transfer tax exemption amount (gift, estate, GST) — increases by only $20,000 to $5,450,000
- Annual exclusion — remains at $14,000
- Gifts to non-citizen spouse — first $148,000 of present interest gifts to non-citizen spouse are excluded from taxable gifts (p. 27)

A Few Practice Trends

- Cannot ignore GST tax (p. 27)
- Planning more difficult for $10 million couple (portability vs. credit shelter trust decisions) (p. 28, 41–44)
- Grantor trust planning still important for transfer planning (p. 29, 79)
- Unwinding prior strategies (including not funding bypass trusts or “undoing” bypass trusts after first spouse has died) (p. 30, 50–54)
- Basis adjustment planning (for trust beneficiary with excess estate or GST exemption) (p. 30, 58–73)
- Increasing use of powers of appointment (general and limited) (p. 58–60, 73–78)
- Estate and trust distribution planning (p. 31, 115–118)

IRS Radar Screen

- Kitchen sink approach (p. 86)
- Installment sales to grantor trusts *(Woelbing* and *Beyer)* (p. 87)
- FLPs and LLCs (fewer reported cases but still many audits) (p. 88-90)
- Defined Value Clauses (added to IRS Priority Guidance Plan; where are all the 2012 *Wandry*-transfer audits?) (p. 90–93)
- Valuation of promissory notes (added to IRS Priority Guidance Plan) (p. 16–20, 94)
- GRAT annuity payments and transactions (p. 94)

Sale to Grantor Trust Attacked, *Woelbing Estates*

- *Estate of Donald Woelbing* and *Estate of Marion Woelbing* (pending Tax Court cases; petitions filed December 26, 2013) (p. 95–97)
- H sold stock to trust (probably a grantor trust) in the company that produces Carmex lip balm for $59 million AFR note in 2006
- Sales agreement had defined value provision — selling that number of shares equal to the face amount of the note
- Trust held three insurance policies subject to split dollar agreement
- Two sons (trust beneficiaries) gave guarantees to the trust for 10% of purchase price
- Gift tax returns made split gift election; H died in 2009, W died in 2013
- IRS contests stock valuations; says note is valued at zero under §2702 so large gifts. Also, note not in H's estate but stock included at DOD value under §2036 and §2038 (p. 96)
- Danger of split gift election if §2036 may apply (p. 99)

Sale to Grantor Trust Attacked, *Woelbing Estates*

- Section 2036 Issue: Why did the IRS raise §2036?
  - May have been a lack of "cushion" issue (p. 97)
  - *Fidelity-Philadelphia Trust Co. v. Smith*, 356 U.S. 274 (1958) ("the promise is a personal obligation of the transferee, the obligation is usually not chargeable to the transferred property, and the size of the payments is not determined by the size of the actual income from the transferred property at the time the payments are made") (p. 97)
  - What about the guaranties? It seems that guaranties *should Fidelity-Philadelphia* test, but they did not help in *Trombetta v. Commissioner*, T.C. Memo. 2013-234 (strange facts case, including that grantor retained enjoyment over all the trust assets, not just retained periodic annuity payments) (p. 97)
- Section 2702: Seems to be similar issue — was the right to note payments a retained equity interest in the stock that was transferred? (p. 96)

Sale to Grantor Trust Attacked, *Woelbing Estates*

- Rumors in March 2015 that the case was settling, leading up to a March 16, 2015 trial setting (p. 97)
- No settlement has been announced
- Case has now been set for another trial setting — February 29, 2016 (p. 97)
- Is this primarily a valuation case?

Sale to Grantor Trust Attacked, *Beyer Estate*

- John Porter reports that Estate of Beyer was tried (before Judge Chiechi) in December 2013. *Estate of Edward G. Beyer v. Commissioner*, Docket No. 010231-11 (p. 87, 97)
- IRS argued that all of the assets of a family limited partnership are included in the estate under §2036
- IRS also argued that partnership interests that were sold to a grantor trust should also be brought back into the estate under §2036

"*Wandry*" Defined Value Clauses

- Formula allocation clause: Allocate dollar amount to family trust and excess to charity, spouse, GRAT, or incomplete gift trust. Four cases approve this approach with excess passing to charity *(McCord, Christiansen, Petter, Hendrix)* (p. 90)
- Formula transfer clause (approved in *Wandry*): Transfer "that number of units equal to $5 million, as finally determined for federal gift tax purposes" (p. 20, 90)
- *Wandry* is just a TC Memo case; not appealed; IRS nonacquiesced
  - Many *Wandry* transfers were made in 2012 and have been reported on 2012 gift tax returns (many not filed until October 2013)
  - The IRS is still looking for the "right case" to pursue
  - IRS attacked *Wandry* provision in sales agreement in *Woelbing*
- Defined value clauses are now on the IRS Priority Guidance Plan (p. 13-14, 20)

Self-Canceling Installment Notes; *Estate of William Davidson*

- Risk premium for cancellation feature (p. 101)
- Estate of William Davidson basic facts (p. 101)
  - Age 86; Life expectancy of 5.8 years under §7520 table (p. 101)
  - IRS expert: 2.5 years
  - Four medical consultants (two by estate and two by IRS) all said greater than 50% probability of living one year (p. 101)
  - Large stock sales in January 2009 for 5-year annual interest/balloon principal SCINs: (p. 101)
    - Some with principal premium (88% premium)
    - Some with interest rate premium (13% above §7520 rate)
  - Mr. Davidson gave some SCINs to 5-year GRAT (remainder passed to same trust that owed the SCINs) (p. 101)
  - Diagnosed with serious illness shortly after the sales
  - Died about two months after the sales, in March 2009; no note payments

Self-Canceling Installment Notes; *Estate of William Davidson*

- IRS Position (see CCA 201330033) (p. 100–102)
  - Not a bona fide transaction so note should be valued at zero; no reasonable expectation of repayment (p. 101)
  - Alternatively, in determining value of SCIN note, §7520 does not apply
    - Mortality tables; Reg. §1.7520-3(b)(3) — tables apply if individual is not terminal, defined to mean greater than 50% probability of living at least one year (p. 102)
    - IRS says to consider decedent's "medical history on the date of the gift" (p. 100)
- Case settled; stipulated decision entered on July 6, 2015 (p. 102)

Estate of William Davidson; Malpractice Action

- Estate has sued the planner regarding its structuring of the transaction, *Aaron v. Deloitte Tax LLP*, N.Y. Sup. Ct., No. 653203/2015 (filed September 24, 2015) (p. 102)
- Detailed failures mentioned in petition (suggesting that these were arguments that the IRS emphasized in rejecting the plan's effectiveness) (p. 103)
- List included failures to:
  - Design and implement bona fide economic transactions conducted at arm's length, as opposed to purely tax-driven transactions
  - Properly structure the SCIN transactions with appropriate capitalization, interest rates, and repayment terms
  - Use actual anticipated life expectancy rather than using the §7520 mortality tables to calculate the appropriate risk premium, particularly in light of Mr. Davidson's poor health

Estate of William Davidson; Malpractice Action

- Continued list of failures listed in Estate's malpractice petition:
  - Provide for actual payment of at least a portion of the risk premium during the term of the SCINs
  - Provide appropriate amortization for repayment of the SCINs, rather than using a balloon payment at the end of five years, to reflect that there was a realistic expectation of repayment
  - Fund the purchasing trusts with sufficient assets to be able to repay the SCINs upon maturity
  - Create defensible and acceptable transactions rather than circular, illusory arrangements (the GRAT transactions resulted in a potentially circular flow of funds)
  - Separate the various transactions to give independent significance to each transaction in order to avoid challenge under the step transaction doctrine (p. 103)

Distribution Planning New Paradigms

- Distributions from an estate or trust may reduce the income subject to the top 39.6%/20% rates on ordinary and capital gains income, respectively, as well as reducing the income subject to the 3.8% tax on net investment income (p. 115)
- The top brackets are reached for estates and trusts at $12,300 in 2015 ($12,400 in 2016)
- The top brackets for individuals are $464,850 joint/$413,200 unmarried in 2015, adjusting in 2016 to $466,950 joint/$415,050 unmarried
- Capital gains ordinarily are excluded from DNI (so that capital gains are ordinarily taxed at the estate or trust level). Reg. §1.643(a)-3(a). However, the regulations provide that capital gains will be included in DNI in various circumstances. Reg. §1.643(a)-3(b). (p. 115–116)

Distribution Planning New Paradigms

- Example Clause giving trustee discretion to utilize flexibilities afforded by the regulation to cause capital gains to be in DNI:

  The Trustee may allocate realized short-term capital gains and/or realized long-term capital gains to either trust income or trust principal, and such gains shall be includable in distributable net income as defined in I.R.C. § 643 and the regulations thereunder (1) to the extent that such gains are allocated to income and distributed to the trust beneficiary; or (2) if such gains are allocated to principal, to the extent they are consistently treated as part of a distribution to the trust beneficiary, actually distributed to the trust beneficiary, or used by the Trustee in determining the amount distributable to the trust beneficiary.

- Gregory Gadarian, *Including Capital Gains in DNI*, ACTEC 2014 Fall Meeting of Fiduciary Income Tax Committee (p. 118)

Digital Assets — Fiduciary Access

- Uniform Fiduciary Access to Digital Assets Act (UFADAA) was approved July 2014. Its default position is that fiduciaries have access to digital assets subject to an opt out by the account holder. (p. 137–138)
- UFADAA was introduced in 26 states.
- Despite being "at the table" in discussing UFADAA, internet service providers (ISPs) fought hard against the proposals and none were enacted. (p. 139)
- ISPs (primarily through their trade association, NetChoice, proposed an alternate statute, Privacy Expectation Afterlife Choices Act (PEAC Act). It only addresses executors (not trustees). It takes a default privacy approach and executors would only have contents of digital accounts by (i) court order, and (ii) express consent by the account holder. It was not adopted in any state. (p. 140)
- A compromise was negotiated in the Spring of 2015 and Revised UFADAA was approved in July 2015. (p. 141)

Digital Assets — Fiduciary Access

- Revised UFADAA
  - Other Than Contents — Access Default: Fiduciaries have full access to digital assets other than contents unless the user opts out. TOS provision restricting fiduciary access is upheld absent conflicting provision in estate planning document or online tool/setting (p. 141)
  - Contents — Privacy Default: Fiduciaries may access contents of digital assets only if estate planning document or online tool authorizes access (p. 142)
  - Priority of instruments giving access directions (in order): (i) online tools, (ii) estate planning documents, and (iii) TOS agreements (p. 142)
  - **CAUTION:** Estate planning attorneys will have to caution clients that decisions that they made, perhaps unwittingly, years ago about their account settings will override provisions in their estate planning documents granting fiduciary access to digital assets (analogous to beneficiary designations overriding provisions in wills and trust documents) (p. 143)

"Net Net Gifts" — *Steinberg v. Commissioner*

- Donees agreed to pay two separate liabilities of the donor (hence, these types of gifts have been referred to as "net, net gifts"): (1) the federal gift tax imposed as a result of the gifts, and (2) any federal or state estate tax liability imposed under §2035(b) if the donor died within three years of making the gifts. (p. 171)
- Tax Court in 2003 rejected the §2035(b) offset as being too speculative. *McCord v. Commissioner*, 120 T.C. 358, rev'd, 461 F.3d 614 (5th Cir. 2006) (p. 172)
- Tax Court in 2013 rejected IRS motion for summary judgment disallowing §2035(b) offset. *Steinberg v. Commissioner*, 141 T.C. 258 (2013) ("Steinberg I") (p. 172)
- Following trial, Tax Court now allows the §2035(b) offset. *Steinberg v. Commissioner*, 145 T.C. No. 7 (Sept. 16, 2015) (Judge Kerrigan) ("Steinberg II") (p. 172–177)

"Net Net" Gifts — *Steinberg v. Commissioner*

- Steinberg II rejected the IRS argument that the §2035(b) liability assumption merely reflected tax apportionment that the donees would bear in any event: (i) there was no assurance at the time of the gift that the N.Y. apportionment statute would continue to apply; (ii) the donor might change her will to remove the donees as the residuary beneficiaries; and (iii) the contractual obligation provided an additional enforcement mechanism. (p. 176)
- **Planning:** The "net net gift" strategy will not be used frequently.
  - Having the donee assume the potential §2035(b) estate tax liability typically results in a relatively small gift offset unless the donor is quite elderly. (In *Steinberg*, for an 89-year-old donor, the §2035(b) offset reduced the $109 million gift by $5.8 million.) (p. 177)
  - For younger donors, the gift offset is low but the estate inclusion might still be the full §2035(b) liability if the donor dies within three years.
  - But, the strategy may be helpful to limit the donor's tax exposure when making gifts to step-family members.

Gift Effect of Settlement Agreement — *Redstone*

- *Estate of Redstone v. Commissioner*, 145 T.C. No. 11 (October 26, 2015)
- A settlement of litigation resulted in the resolution of a dispute regarding the ownership of 100 shares of closely-held stock registered in the name of one shareholder. The shareholder's father (who was president of the company) maintained that some of those shares were held in an oral trust for the shareholder's children. (p. 180)
- After years of negotiating and pursuing lawsuits, a settlement resulted in the company agreeing to pay $5 million to the shareholder for 66 2/3 shares, with the remaining 33 1/3 shares being held in a trust for that shareholder's children. In a deposition in a later lawsuit, the shareholder testified he never thought there was an oral trust, but he had to agree to get paid. (p. 180)
- The court concluded that the settlement constituted a bona fide arm's-length transaction that was free from donative intent and that was "made in the ordinary course of business." The transfer was made "for a full and adequate consideration in money or money's worth." (p. 182)

Gift Effect of Settlement Agreement — *Redstone*

Planning Considerations

- **Common "Scary Concern."** Almost every settlement of litigation in a family-related context at some point raises consternation among the planners as to whether any parties are making taxable gifts as a result of the settlement.
- Some experts have summarized that planners often worry about the gift issue in settlement discussions, but "this is one of the scariest things that almost never happens." The IRS's approach in *Redstone*, though, highlights why this is such a scary issue — the IRS not only asserted that the settlement resulted in significant gift tax, but also asserted fraud, negligence, and failure to file penalties from a settlement of hostile protracted family litigation. (p. 182)

Gift Effect of Settlement Agreement — *Redstone*

Planning Considerations — continued

- Factors considered. The Tax Court in Redstone summarized factors that the courts often consider in determining whether litigation settlements result in taxable gifts. Planners will try to satisfy as many of these factors as possible to avoid gift treatment:
  - whether a genuine controversy existed between the parties;
  - whether the parties were represented by and acted upon the advice of counsel;
  - whether the parties engaged in adversarial negotiations;
  - whether the settlement was motivated by the parties' desire to avoid the uncertainty and expense of litigation; and
  - whether the settlement was finalized under judicial supervision and incorporated in a judicial decree. (p. 183)


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