

TAXATION



presents

2024 Estate and Gift Tax Conference

Panel 17: From Death to Distribution

Friday, March 22, 2024

4:15pm - 5:00pm

Speakers: Robin Klomparens and Lisa M. Piehl

Conference Reference Materials

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

© 2020 California Lawyers Association
All Rights Reserved

The California Lawyers Association is an approved State Bar of California MCLE provider.

From Death to
Distribution

Federal Tax
Requirements
and Potential
Controversies

Estate and Gift Tax Conference March 2024

Robin Klomparens, Attorney
Fennemore WKBKY

Lisa M. Piehl, Program Manager
Internal Revenue Service, Estate and Gift Tax Policy

Pre-death actions

- Estate Planning
- Formalities
- Compliance with state and federal requirements
- Aggressive Planning
 - Pros and Cons
- Conservative Planning
 - Pros and Cons



Death

- What needs to be accomplished and what timeframes?
- Review estate plan
 - Estate Administration: File Will with probate court (based on decedent's domicile)
- Federal Tax Filings
 - Form 56 Notice Concerning Fiduciary Relationship: Executor files this to notify the IRS that they are acting as the fiduciary required to file tax returns.
 - Form 1041 Income tax return for the estate/trust: Required for every domestic estate with a gross income of \$600 or more during a tax year.
 - Final Form 1040: Will be due April 15 or with an extension for the year of death.
 - Form 2848 Power of Attorney (more flexible document than the Authorization on Page 2, Part 4 of the Form 706)
 - Form 8971: Information Regarding Beneficiaries Acquiring Property from a Decedent. Estates must file Form 8971, separately from the F 706, if the estate is required to file Form 706 or Form 706-NA
 - Any unfiled Form 709s
 - Form 706
 - Form 706 and any tax is due 9 months from date of death. An extension of 6 months is available. File Form 4768 to request an extension to file and/or pay.
 - Executor is responsible for filing: term "executor" on Line 6a of the Form 706 refers to the executor, personal representative, or administrator of the decedent's estate.
 - Filing threshold:
 - 2021: \$11,700,000
 - 2022: \$12,060,000
 - 2023: \$12,920,000

Form 706 - continued

- Required to file:
 - First to die
 - Portability: Executor may elect portability of any Deceased Spousal Unused Exclusion (DSUE) by timely filing a complete and properly prepared estate tax return for a decedent who died in 2011 or later
 - There is no box to check to elect, simply filing the Form 706 makes the election.
 - To opt out of making the portability election, the box in Section A of Part 6 on page 4 of the Form 706 must be checked.
 - 1st to die under filing threshold: Certain returns filed only to elect portability may report certain assets by using a good faith estimate of value.
 - Executor must check item 11 on page 1, part 1 of the Form 706 if an estimate is used.
 - Second to die, single, above filing threshold
- Return assembly:
 - Notebooks, spiral binding, velo binding, hole punch document fasteners and/or covers on the return are not necessary and delay processing.
 - Exhibits should be indexed and placed at the back of the tax return - not behind each individual schedule.
 - Copies of tax returns filed with Form 706 must be identified as exhibits to the Form 706
 - Include copies of all documents, referred to in the return or in the supporting documents.

Due Diligence

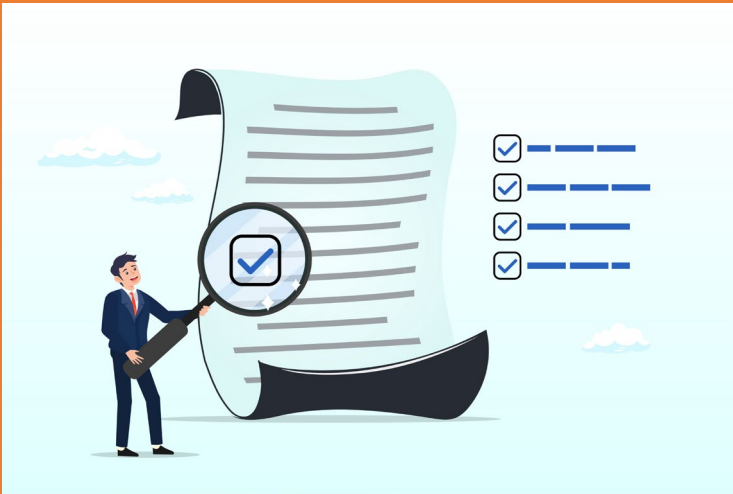


- Exercise due diligence
 - Request information on Form 709s filed
 - Form 4506-T Request for Transcript of Tax Return (to receive an account transcript for gift tax returns)
 - Form 4506 Request Copy of Tax Return (to receive a copy of a gift tax return)
 - Note: Based on the decedent's assets and/or domicile a State estate tax form may need to be filed. Not all state's have estate taxes, some mirror the Federal estate tax and some are slightly different.
 - If later relying on late portability election (five years from date of death) remember to obtain relief no return was required to be filed. If past five years 9100 relief is available if certain requirements are met.
 - Form 8971: Information Regarding Beneficiaries Acquiring Property from a Decedent. Estates must file Form 8971, separately from the Form 706, if the estate is required to file Form 706 or Form 706-NA

After Form 706 filed

- What actions are taken by IRS?
 - Return can be accepted as filed.
 - Return can be selected for classification.
 - Classifier can accept as filed.
 - Classifier can identify compliance issues.
 - Return with issues can be sent to exam or accepted as filed by reviewer.
- Return sent to exam.
 - Manager can survey after reviewing or assign to examiner.
 - Assignment is not always based on domicile of TP (where TP resided, not place of death). Cases are assigned based on location, statutes, workloads, etc. IRS examiners have a national inventory.
 - Examiner reviews identified issues.
 - If determination can be made without contact to taxpayer, the return will be surveyed.
 - If contact is required, examiner will send an initial contact letter with request for information and deadline for response.
 - Examiners are requesting documents in electronic format (via secure emails, third party websites such as Dropbox, etc.) but physical docs are still permitted, but discouraged.

Examination



- Issues during exam can include:
 - Valuation-Real property and Business valuations
 - TP required to provide a qualified appraisal.
 - IRS has internal appraisers who may be asked to review appraisals and provide oral or written analysis.
 - IRS has ability to retain an Outside Fee Appraisal
 - Art Panel: Pieces of art valued over \$50,000 are required to be reviewed by Art Appraisal Services
 - Either an art appraiser within the IRS or sent to the Art Panel
 - Specific documentation will be requested.
 - Legal
 - Examples:
 - Marketable Securities: recommend valuation based on valuation service
 - Life Insurance policies: ownership, F 712
 - Jointly owned property: show contribution.
 - Inclusion: assets where TP held dominion or control (IRC Sections 2036-2038)

Examination - continued

- Omission- omitted assets, unreported gifts.
 - Examiners may request TPs to file gift tax returns for past years when gifts were made.
 - These returns will be filed with the examiner working the estate.
- Deductions
 - Expenses: invoices, etc. may be requested
 - Attorneys Fees and Executor's Commissions
 - Examiner will request a F 4421 to be completed upon the exam with the exact fees/commissions paid.
 - Referrals to income tax are made based on individual fees/commissions.
 - Marital Deductions: review of the estate planning documents, US Citizen vs QDT.
 - Charitable Deductions: verification of the charity.
 - Be mindful of the recent 2053 regulations
- Penalties
 - Possible penalties include: FTF, FTP, Negligence, Undervaluation
- Elections
 - Section 2032A Special Use and Section 6166 Installment elections will be verified, allowed/disallowed and recalculated based on any adjustments. Liens will likely be placed on the property with taxpayer input prior to any audit
 - 6161 election-must be reviewed annually
 - GST

Examination complete - agreed

- No Change: The examiner determines the return is substantially compliant as filed and issues a report showing no changes.
- Agreed
 - Will receive a signed report from the examiner.
 - Closing Letters: Requested using Pay.gov, search for Estate Tax or Closing Letter. Select Estate Tax Closing Letter User Fee from the results. The fee is currently \$67.
 - Account transcripts may be used in lieu of a closing letter (Rev Proc 2017-12). Account transcripts are available to authorized tax professionals through Transcript Delivery Service

Examination complete - unagreed

- Unagreed
 - 30-day letter or 90-day letter
 - A manager's conference is always offered before a case closes unagreed.
 - AJAC Timeframes:
 - Estate Tax = 270 days remaining on Statute
 - Gift Tax = 365 days remaining on Statute
 - Note: IRS may ask for statute extensions on gift tax returns in order to allow the TP to go to Appeals (Independent process within the Service) if time is running out
 - 30 day: TP has 30 days to respond to an unagreed report in a written Protest. IRS will issue a written Rebuttal and close the case to Appeals.
 - 90 day (Statutory Notice of Deficiency): TP will receive a Stat Not of Def with the unagreed report. The case will go to IRS Counsel. In many cases, the case will be bumped back to Appeals. However, the TP will have to file with Tax Court (District Court if the tax has been paid) The case will go to IRS Counsel. In many cases, the case will be bumped back to Appeals. However, the TP will have to file with Tax Court (District Court if the tax has been paid)
 - Ninety days after the issuance of the 90-day letter, a Petition must be filed by the Taxpayer for all years of a stat notice or for the combined stat notice. The petition must address all issues in the stat notice.

Pre-Trial

- Pre-Trial
 - The case is routed to IRS Chief Counsel and is assigned to an attorney. There is an Estate and Gift Tax Cadre of CC Attorneys who generally are assigned cases based on the geography of the cases (requested place of trial). While sometimes cases are assigned to attorneys with a known area of specialty or interest. That is not always true.
 - The assigned attorney can be a General Attorney or Senior Attorney and is often the attorney who assisted with trial. For large, complex and highly visible issues an STA (Special Trial Attorney) may be assigned to run the case/team for litigation. The STAs are housed in the Strategic Litigation Branch of Chief Counsel's office.
 - Once the Petition is assigned, an Answer must be filed responding to each allegation in the Petition with agrees, denies or denies for lack of knowledge.
 - After the Answer is filed, the case is sent back to Appeals for their consideration of the case. For certain cases (i.e., where law needs to be developed and we are establishing a litigation position), the case may be withheld from Appeals or designated for Litigation.
- Note: Designation for Litigation is done during the Examination and is requested by Exam. Withholding a docketed case from Appeals is requested by Chief Counsel. Both processes are laborious and require many levels of approval.



Pre-Trial Continued

- If not resolved, the case is sent back to the assigned attorney to begin discovery. The attorney will review the file and documents. A Branerton Letter is sent to the Taxpayer (now Petitioner) requested needed additional information. This is considered informal discovery. Formal discovery consists of Requests for Production of Documents and Interrogatories. This is a mutually cooperative process. Filings in court keep the Judge apprised of the process with status reports. If there are disagreements regarding what documents need to be provided or interviews/depositions etc., motions will be filed with the Judge for decision. Depositions can also be taken.
- The attorney holds conferences with Petitioner's Counsel to determine issues they can agree upon. Third party witnesses are interviewed. Expert witnesses are obtained and provide expert reports regarding valuation, economic substance, etc. Respondent and Petitioner determine all facts that they can agree on and file a Stipulation of Facts with the court. Expert Reports and Rebuttals are filed with the Court a couple of months prior to trial. Before and during trial many motions can be made: Motions to Dismiss, Motions for Summary Judgement, Motions in Limine (to exclude witnesses etc.) A pre-trial memo is filed by both parties which lists all witnesses being called to testify and what they will testify about. The memo also lays out the facts and law as interpreted by each party and is filed with the Court. The Tax Court Judges want/encourage as many stipulated facts as possible.
- Just prior to trial, the expert witnesses are prepared for trial to defend and explain their expert reports as the expert relays his or her opinions through a report. The expert witness may not be granted permission to testify. Any appraisers used by the taxpayer to substantiate value on a 709 or 706 may be caked as witnesses by IRS. The taxpayer is stuck with these appraisers. The fact witnesses are assigned to trial team members and the questions are carefully written for both direct and cross examination.

Trial and Post-Trial

- Trial and Post Trial
 - During trial, each witness testifies for the judge after opening statements. After all testimony and closing statements, the trial concludes.
 - During the trial, evidence must have been moved into the record. This evidentiary record and the testimony of the witnesses and the law will be presented to the court in a Post Trial Brief. After briefs are filed, the court may still entertain certain motions and rebuttals. Lastly, after consideration of all evidence and testimony, an opinion is released by the court.
 - Waiting for opinion – how long can this take – 6 month to years
 - 90-days to appeal
 - If no appeal, then tax calculation is required.



Final Acts

- After the examination, appeals or court actions are complete, what is next?
- If there is a balance due - pay all required taxes, penalties, interest, expenses and fees – then:
 - Allocation. Assets may need to be allocated to sub-trusts.
 - Distributions. Trustees or other fiduciaries must be very careful when making distributions to ensure sufficient funds remain to pay any tax bill. The fiduciary, not the beneficiaries, are personally responsible for the tax bill up to the value of the assets in the estate.