PRACTICAL PLANNER NEWSLETTER
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More Info:

- Publications: Sign up for an e-version of this newsletter at www.laweasy.com.
- Seminars: Monthly planning seminars begin May 26 with "Estate and Tax Update" at Bergen County Community College, Moses Family Training Center, TEC-128, 400 Paramus Road, Paramus, NJ 07652 Parking Lot B. 8-11 am 3 CPE and CFP credits. Call 201-201-447-715 for info. Following sessions: June 1 - Charitable Giving: Income, Gift and Estate tax Planning; July 27 -Income Taxation of Trusts: State Tax and Situs Issues; Passive Losses; Partnerships. More to follow.

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PLANNING POTPOURRI

Doctor Protection. Physicians are more worried about malpractice then they are the estate tax (and they don't love the estate tax!). Doc can set up a self settled asset protection trust (and related LLCs) in a few jurisdictions and remain, along with family, a discretionary beneficiary of an independent trustee. There are obvious risks and issues but this may protect the dough from Doc's future malpractice claimants. Doc might sell assets to the trust. Since it is a "grantor trust" Doc doesn't recognize any gain if the sale approach is used. Alternatively, Doc can transfer assets to the trust without the gift being complete (not taxed for gift tax purposes). The assets should have some protection from malpractice claimants. There's another approach. Dick Oshins, the well tanned estate tax maven from Las Vegas, prescribes a planning approach that he affectionately refers to as a "BDIT," to give doctors that restful night sleep. Instead of Doc setting up the trust and facing the risks involved, Mom sets up the trust. Mom expressly does not reserve any of the powers that would make the trust a grantor trust to her. The trust includes an annual demand or Crummey power. This is almost standard fare for the typical insurance trust. Doc is the only beneficiary of this trust. Doc's Crummey power (withdrawal right) makes the trust a grantor trust as to Doc. Doc can therefore sell assets to the trust without gain, and obtain some asset protection. The protection might be better since Doc didn't set up the trust, Mom did. But ya'd better get your asset protection trust or BDIT in place well before you face a malpractice claim.

Family Ties. If you're not into the fireworks that accompany most estate disputes, take some proactive steps to lessen the likelihood of explosions. Here are a few ideas: A letter from the testator explaining the plan, and guiding heirs, may have a significant impact. Some estate experts recommend dictating a letter the attorney can edit. Don't video tape without careful evaluation as it can preserve mistakes and most estate litigators caution against it. Use a no contest or mandatory mediation provision in the estate planning documents. Add conflict management provisions to estate planning documents. Courageously have uncom-

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PRACTICAL PLANNER

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TAX TIPS FOR UNCERTAIN TIMES

Summary: When we were kids we'd take turns twisting each other's arm's until someone screamed "uncle." Accountants across the country are screaming "Uncle" as in "Uncle Sam" as they continue to get barraged by new tax rules and related changes, court cases and other developments. The following tidbits are barely a drop in the proverbial bucket but hopefully will alert you to some of the planning ideas or tax changes you might have missed.

The Dark Side of Estate Planning. Lower the limbo stick for this one, 'cause you're gonna sink way low (if you miss the play on words with "limbo" Google the term). Neither Darth Vader nor Jack Kevorkian would even go where this planning tip goes. Consider the following idea that a well known estate planning guru recently advised at a conference. The guru suggested that attorneys contact any client whose age or health indicates that they may not survive the 2010 year. There is no estate tax in 2010 (well so far!) The guru recommended advising these clients of the tax consequences of dying in December 2010 versus January 2011. He then suggested that the client might make a decision about updating his living will and health care proxy. Hey what a Christmas present! Pull the plug just before year end. If there is no estate tax this year and in 2011 we get a $1 million exclusion and 55% rate that could be a whopping gift to the kids. But why stop there. The guru then intimated that perhaps the client might take a trip to Washington State or Holland? Those aren't red or blue on the CNN map. They're Kevorkian Black. The only point he left out was buy a one way ticket and save more bucks for the heirs.

Generation Skipping Transfer (GST). The GST tax remains repealed. This could mean a once-in-a-lifetime opportunity or a costly tax trap if the GST tax is retroactively reinstated. Consider outright transfers of property to skip persons (e.g., grandchildren). Simple -- just write a check to a grandchild. If there is a family trust that is not exempt from the GST tax (e.g. a bypass trust for grandma when grandpa passed away) and grandchildren are beneficiaries, the trustee can just write checks to the grandkids. The gift should be made outright and not to a trust (custodial accounts are treated like trusts). If the GST tax is reinstated the gift or distribution to a trust may later be subjected to GST tax so keep it simple and outright. If your gift triggers gift tax the rate now is 35% not 45% (like 2009 law) or 55% (which is what it will be next year if Congress doesn't act). Doing an Alfred E. Neuman -- "What me worry?" Then use techniques to hedge your GST tax bets. If the grandkid is tax savvy, they can refuse (renounce) the gift if the GST tax is reinstated. Don't trust the grandkid to give the dough back? Make the gift subject to the grandkid's obligation to pay GST tax if there is any. If you gift interests in a family business, the grandkid won't have the cash and will have to renounce. Need to hedge the bet on a trust distribution? The trustee can make the pursuant to a formula. The grandkids get the amount of the gift x a fraction. The numerator is the maximum amount that can be given away GST tax free (that's the whole shebang right now). The denominator is the value of the entire interest given. If the GST is reinstated and you've used up all your GST exemption, the grandkids get nothing but tax is avoided. Another GST approach is to put big bucks into a marital trust (QTIP) for your spouse. The trust should say that if

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CHECKLIST: ASSURE AN AUDIT

Summary: Your CPA is having a tough year. Here are steps you can take to increase the likelihood of an IRS audit of an estate tax return and the cost of handling the audit. Go ahead, help your CPA fund his kids' 529 plans. While some of the items below might seem odd or silly, according to two IRS Appeals agents these are some of the most common and easy audit triggers to avoid.

√ Use an out of date tax form. This will pretty much assure IRS attention. Seems rather lame, but according to the IRS, not uncommon.

√ Don't complete both the extension of time to file and the extension to pay tax on Form 4768 when you file it.

√ Don't attach a copy of the actual fully signed will and trust of the decedent to the estate tax return. Leave out of the package key supporting and back up documents and materials.

√ Forget to include the complete appraisal for all assets for which appraisals are required. A common goof is to submit the summary of the appraisal without the full report, or to enclose the complete valuation report but leave out the exhibits the report refers to.

√ Don't use summary pages

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...Tax Tips for Uncertain Times

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spouse renounces the funds go to grandchildren. If the GST is not reinstated your spouse can renounce within 9 months and the dough passes outright to grandchildren. This gives you a 9 month Ouija board to see the status of the GST tax. If the GST is reinstated file a gift tax return electing the unlimited gift tax marital deduction and skip renouncing. If the GST is not retroactive then your spouse can renounce and bring Kodak smiles to the grandkids.

<u>Carried Interests</u>. Hedge fund fat cats are struggling. It's tough to get by on a few hundred million a year when you have to pay income tax. So, they want those buckaroos taxed as favorable capital gains, not as compensation subject to ordinary income tax rates and payroll taxes. The tax tide may be turning and "carried interests" may be taxed as ordinary income regardless of the tax character engineered at the partnership level. HR 4213. The tax revenue from these changes could be $24 billion. Green book JCX-59-09 p.5. Code Section 83 may be amended to tax partnership carried interests as compensation. New Code Section 710 will tax flow through items from partnerships as ordinary income without regard to normal flow through rules of partnerships. What is especially cool about this proposed new provision is it gives us tax geeks a new acronym "ISPI." That's important because if proposed legislation eliminates GRATs, this will avoid a disruption in the force by replacing the useless GRAT acronym with a new one of equal size. Just to give you a leg up on the others in your golf foursome, ISPI stands for Investment Services Partnership Interest. That's an interest in a partnership attributable to services rendered with respect to "Specified Assets" (you'll have to wait for your decoder ring to decipher that one.) Code Section 1402 may be amended to make carried interests subject to employment tax. While you might not lose sleep over fat cats paying more tax, be wary of the Congressional approach of using a sledgehammer instead of a scalpel. Lots of business deals on main street (e.g., real estate development) may get snared too. There could be lots of collateral damage.

<u>Expatriation Provision</u>. A tough mark to market exit tax applies to US citizens and green card holders who expatriate or give up their green card. Folks may assume expatriation doesn't apply but the rules cast a wide and unsuspecting net. Green card holder executives if reassigned back to their home country could lose their green card. That may trigger the expatriation tax. IRC 877A; Notice 2009-85. Thanks to Michael A. Spielman, Ernst & Young LLP.

<u>FBAR Goes to Far</u>. Persons with signature authority over foreign accounts, but no interest in them, have an extension to June 30, 2011 to file for FBAR relief. An agent holding power of attorney over foreign assets has to file even if the foreign entity would not respect the US document. Notice 2010-23, 2010-11 IRB 441, 02/26/2010. If you make an FBAR filing, inform agents under your power of attorney and possibly the trustees under your revocable trust.

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<u>Re-think Testamentary Charitable Gifts</u>. If you bequeath money to charity in your will, that bequest won't save any estate tax as it had in the past (since there is no estate tax). So, instead of a tax-useless charitable bequest, make a specific bequest to your heirs with a non-binding request that they make the requested charitable contribution. The heir will obtain an income tax charitable contribution deduction which is quite a tax improvement. Great tax deal, but let's hope Junior is able to resist writing the check out for a Porsche.

<u>Probate Appraisals</u>. Executors may be deferring obtaining appraisals until the law becomes clear. It is not certain today whether the appraisal should maximize value under the carryover basis rules (to get a bigger basis to save future capital gains) or minimize value under the estate tax rules if reinstated (to lessen estate tax). Any appraisal done now may have greater credibility than if done in the future when the law is clear. PP

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Review: *Andrew Wolfe, CPA, JD.*

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...Checklist: Assure an Estate Tax Audit

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and general outlines. In other words, make it a real hassle for the reviewing IRS agent to understand the return and find the information they need when making a preliminary assessment. And definitely don't provide a table of contents and tabs for a complete compilation of all exhibits.

√ Don't bother verifying whether the prior gifts reported is accurate. Ignore the fact that the decedent may have gone to a prior CPA and filed gift tax returns and that current CPA/attorney doesn't know about them. Missing prior gift tax returns is apparently such a common goof that some tax experts have questioned whether there would be a negligence penalty applied for not knowing about the prior returns. So don't make any effort to ascertain what was filed in the past. Don't order past returns from the IRS tax practitioners' hotline (you'd need a Form 2848 power of attorney to do this). Skip filing a request for a transcript for gift tax returns.

√ Whenever you include assets from a non-spousal joint account on the decedent's estate tax return at less than 100% of the value of the account, don't bother explaining why less than the entire account is reported in an attached deduction. For example, if the decedent owned an account "Don Decedent and Sam Survivor as tenants in common" and only ½ the value is included since Sam had contributed ½ the assets in the account, don't attach that explanation or proof of Sam's contributions.

√ If the decedent had made transfers to GRATs, CLTs and other planning vehicles, don't attach detailed calculations and values, just pop a number on the return and leave it at that.

√ When you send a check skip putting a letter "V" at end of Social Security number to indicate it is an estate check. That way the IRS computers will assume it is from a live taxpayer, not a decedent and the likelihood of a mix up will be maximized.

√ Don't file a proper protective claim for refund on Form 843. The Regulations under Section 2053 prohibit estates from taking certain expense deductions for items that haven't been paid. What the IRS recommends is that estates file Form 843 Claim For Refund and write in red on top "PROTECTIVE," to keep the time period in which the estate can file to claim the expenses open beyond the 3 year period. Then the estate can file a formal Form 843 claim for refund. Given the importance of this when you file a protective claim for refund don't bother getting it stamped by the IRS, or sent certified mail, to prove timely filing.

√ Don't get copies of all key documents from clients so that they will be available to submit with the estate tax return: e.g. patents, contracts, etc. Leaving out key documents will assure the IRS will seek more info.

√ The IRS routinely asks for all Forms 1040 and Forms 1041 for decedents for the 3 years prior to death to look for gifts or other transfers in contemplation of death. The IRS looks at checks written, reviews income from assets (business or rental property), and verifies that the asset is on the estate tax return and that the value is reasonable relative to the prior distributions or income. Don't prepare in advance. Don't test these items or make disclosures on the return, to minimize the issues arising on audit. Hey, why bother. PP

Recent Developments

<u>"Cadillac Tax" on High-Cost Health Plans</u>. Recent tax changes add an excise tax on high-cost employer-sponsored health coverage as a 40% non-deductible excise tax on insurance companies. It's based on premiums that exceed certain amounts. It's expected that employers and workers will ultimately bear this tax in the form of higher premiums passed on by insurers. Remember, the phrase about paying the piper? The new tax applies for tax years beginning after December 31, 2017. Gee that's after the current administration is out of office! The tax will apply when annual premium exceeds $10,200 for single coverage, and $27,500 for family coverage. The tax will apply to self-insured plans and plans sold in the group market, but not to plans sold in the individual market (except for coverage eligible for the deduction for self-employed individuals). The dollar amount thresholds will be automatically increased if the inflation rate for group medical premiums between 2010 and 2018 is higher than the Congressional Budget Office (CBO) estimates in 2010. Huh? Employers with age and gender demographics that result in higher premiums could value the coverage provided to employees using the rates that would apply using a national risk pool. Employers will be required to aggregate the coverage subject to the limit and issue information returns for insurers indicating the amount subject to the excise tax. Thanks to I. Jay Safier, CPA, of Rosen Seymour Shapss Martin & Company LLP.

<u>Foreign Trusts</u>. If a foreign trust holds assets used by US beneficiary or grantor it will be treated as the equivalent of a distribution to the US person equal to the fair market value of the use of that property. So if a foreign trust owns your family vacation home, and you as a beneficiary stay there, you have two choices. Either treat it as if you received a distribution from that trust equal to the fair rental value, or actually pay a fair rent. The tax effect of the deemed distribution will likely be similar to any other cash distribution you receive