Current Developments Jan-Apr 2019, New Ideas and More

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A KEY ESTATE PLANNING GUIDE

Current Developments Jan-Apr 2019, New Ideas and More

By: Martin Shenkman, Esq., Jonathan Blattmachr, Esq. and Jeremy Belsky

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- Boys Town
  - Jeremy Belsky
  - (402) 498-1058
  - jeremy.belsky@boystown.org

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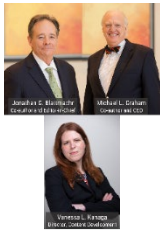
- InterActive Legal
  - Vanessa Kanaga
  - (321) 252-0100
  - sales@interactivelegal.com



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  - Brandon Cintula
  - (888) 544-6775
  - bcintula@peaktrust.com

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199A QBI Deduction

Trust, Basis and Other Complexities

199A and Multiple Non-Grantor Trusts

- An important focus of the 199A Regs, especially the final corrected Regs, is eliminating what the IRS perceived as abuses practitioners had discussed with the use of multiple non-grantor trusts to secure 199A deductions when the taxpayer herself may not have qualified.
- "*Part I of subchapter J provides rules related to the taxation of estates, trusts, and beneficiaries. For various subparts of part I of subchapter J, sections 643(a), 643(b), and 643(c) define the terms distributable net income (DNI), income, and beneficiary, respectively. Sections 643(d) through 643(i) (other than section 643(f)) provide additional rules. Section 643(f) grants the Secretary authority to treat two or more trusts as a single trust for purposes of subchapter J if (1) the trusts have substantially the same grantors and substantially the same primary beneficiaries, and (2) a principal purpose of such trusts is the avoidance of the tax imposed by chapter 1 of the Code. Section 643(f) further provides that, for these purposes, spouses are treated as a single person.*"

199A and Multiple Non-Grantor Trusts

- The Final Regulations attempt to quash the ability to use non-grantor trusts to circumvent the 199A threshold limitation and take a harsher view then the Proposed Regulations had.
- "*The final regulations clarify that the anti-abuse rule is designed to thwart the creation of even one single trust with a principal purpose of avoiding, or using more than one, threshold amount. If such trust creation violates the rule, the trust will be aggregated with the grantor or other trusts from which it was funded for purposes of determining the threshold amount for calculating the deduction under section 199A*."
- The Final Regs take a more stringent view of trust used to circumvent the taxable income threshold under 199A so that even a single trust can be disregarded if it is created or funded to avoid the rule. For practitioners that created a non-grantor trust for this purpose, it should be evaluated to determine the impact.

199A and Multiple Non-Grantor Trusts

- *(2) a principal purpose of such trusts is the avoidance of the tax imposed by chapter 1 of the Code. Section 643(f) further provides that, for these purposes, spouses are treated as a single person*."
- The Final Regs merely reiterate the 643(f) Code provisions for multiple trusts here and near the end of the Regs. The examples from the Proposed Regs have been eliminated. It would appear that if the strictures of Code Section 643(f) can be avoided the multiple trust rule will not apply but the anti-avoidance rules of the Final Regs will still have to be grappled with.

199A and Wages

- The 50% of wages (or 25% of wages and 2.5% of UBIA) test might result in some clients restructuring business operations to enhance their 199A benefit. This should all be considered in the analysis of any estate plan as it might affect a range of planning issues. "*The definition of W-2 wages includes amounts paid to officers of an S corporation and common-law employees of an individual or RPE. Amounts paid as W-2 wages to an S corporation shareholder cannot be included in the recipient's QBI. However, these amounts are included as W-2 wages for purposes of the W-2 wage limitation to the extent that the requirements of §1.199A-2 are otherwise satisfied*."
- Consider whether this creates an incentive to restructure an entity as an S corporation to enhance the 199A deduction. If that is done, consider the client's estate plan. Do current entity owners include, or might planning to secure the temporary estate tax exemption result in, trusts owning interests in the entity?

199A and Wages

- The 50% of wages (or 25% of wages and 2.5% of UBIA) test might result in some clients restructuring business operations to enhance their 199A benefit. This should all be considered in the analysis of any estate plan as it might affect a range of planning issues.
- The Final Regs provide: "*The definition of W-2 wages includes amounts paid to officers of an S corporation and common-law employees of an individual or RPE. Amounts paid as W-2 wages to an S corporation shareholder cannot be included in the recipient's QBI.*

199A and Wages

- *Regs cont'd: "However, these amounts are included as W-2 wages for purposes of the W-2 wage limitation to the extent that the requirements of §1.199A-2 are otherwise satisfied*."
- Consider whether this creates an incentive to restructure an entity as an S corporation to enhance the 199A deduction. If that is done, consider the client's estate plan. Do current entity owners include, or might planning to secure the temporary estate tax exemption result in, trusts owning interests in the entity? If so, do those trusts meet the requirements to own S corporation stock? Does the client's will include appropriate S corporation provisions for QSSTs and/or ESBTs? Have the disadvantages of S corporations as to refinancing, etc. been considered?"
- Have the disadvantages of S corporations as to refinancing, etc. been considered?"

199A and Basis Adjustment on Death

- “*The preamble to the proposed regulations provides that for property acquired from a decedent and immediately placed in service, the UBIA generally will be its fair market value at the time of the decedent’s death under section 1014…The final regulations provide that for qualified property acquired from a decedent and immediately placed in service, the UBIA of the property will generally be the fair market value at the date of the decedent’s death under section 1014*.”
- This is important for estate planning and helpful in context of the focus on basis maximization. Further, the regulations provide that a new depreciable period for the property commences as of the date of the decedent’s death.

199A and 754 Elections

- The Final Regs provide: "…*section 743(b) basis adjustments should be treated as qualified property to extent the section 743(b) basis adjustment reflects an increase in the fair market value of the underlying qualified property*."
- This is a favorable change made in the Final Regs and will be helpful to estates, and in other circumstances. Practitioners should be mindful to address whether the governing documents for the entity involved provide the client/estate the right to require a basis adjustment. If the decedent was not a controlling partner or member there may be no ability to force the partnership to make the election absent a provision in the governing instrument.

199A and Insurance Sales

- The sale of insurance may avoid the taint as an SSTB "*Overall the Final Regs provide valuable leniency to those selling insurance. However, insurance consultants should be careful to delineate what ancillary or other services they provide as those may be tainted as an SSTB. Perhaps the insurance and non-insurance financial related activities should be separated into different businesses. If an insurance consultant charges for time, not a commission, that revenue might be subsumed under the consulting category above or the finance category here*."
- Later the Final Regulations provide: "…*commission-based sales of insurance policies generally will not be considered the performance of services in the field of investing and investing management for purposes of section 199A*."

199A and Insurance Sales

- If a wealth adviser earns fees on investment product, e.g. 1% AUM and the adviser includes in the array of services offered estate planning and insurance planning, might that change the result? What if a financial planner charges hourly as a fee only adviser on services rendered and also sells an insurance policy? Is that something other than a purely “commission-based” fee?”

199A and ESBTs

- ESBTs will have one threshold amount for 199A purposes. The Final Regulations provide: "*an ESBT being two separate trusts for purposes of chapter 1 of subtitle A of the Code (except regarding administrative purposes), the S portion and non-S portion...Although an ESBT has separate portions, it is one trust. Therefore, in order to provide clarity, the final regulations state that the S and non-S portions of an ESBT are treated as a single trust for purposes of determining the threshold amount*."
- This change in the Final Regs seems reasonable and merely closes what some might have viewed as a loophole."

199A and DNI

- There were concerns with the how the Proposed Regulations treated trusts and in particular in that they ignored the DNI deduction.
- The Final Regulations restored more reasonableness to this: "*Multiple commenters suggested that distributions should not be counted twice in determining whether the threshold amount is met or exceeded, saying this is counter to the statute and beyond the regulatory authority of the Treasury Department and the IRS. Further, sections 651 and 661 are fundamental principles of fiduciary income taxation...The Treasury Department and IRS agree with the commenters that distributions should reduce taxable income because the trust is not taxed on that income. The final regulations remove the provision that would exclude distributions from taxable income for purposes of determining whether taxable income for a trust or estate exceeds the threshold amount.*"

199A and DNI

- *"The final regulations specifically provide that for purposes of determining whether a trust or estate has taxable income that exceeds the threshold amount, the taxable income of the trust or estate is determined after taking into account any distribution deduction under sections 651 or 661*."
- This is a very significant and favorable change made by the Final Regs that addresses a concern raised on the Proposed Regs. Trusts will deduct distributions/DNI shifting taxable income to the beneficiaries receiving distributions.
- This will permit planning to spread taxable income as between a complex or non-grantor trust and the beneficiaries of that trust, perhaps enabling increasing the 199A deduction at both the trust and beneficiary level."

199A Allocate QBI to Trust Beneficiaries

- Trust allocations to beneficiaries for 199A purposes remain a consideration. The Final Regulations provide: "*the final regulations continue to require that a trust or estate allocates QBI (which may be a negative amount) to its beneficiaries based on the relative portions of DNI distributed to its beneficiaries or retained by the trust or estate*."
- The election to treat distributions after year end, the 65-day rule, as from the prior year may be important to planning."

Aging

Later Life Planning,
Elder Abuse

Aging and Abuse

- Senior citizens may lose nearly 25 times more to scammers than what is reported.
- 200,000 cases of elder financial abuse are reported annually to U.S. authorities with losses of $1.17 billion.
- Actual number may be 5 million cases with losses of $27.4 billion a year.
- A lot of the financial abuse is perpetrated by family members or people the elderly trust, so they are reluctant to report it; they may be ashamed they got scammed, or they may not realize it.
- 1 in 10 people in the US over the age of 65 fell victim to elder fraud in the last year.

Aging and Abuse

- Practitioners need to make later life planning, and planning with safeguards to minimize the risks of elder financial abuse, standard. Common planning steps for aging, like preparing a durable power of attorney, need to be rethought in light of these risks. What safeguards can be built in? What monitor relationships external to the document can be created for the client? Might a revocable trust with a trust protector and co-trustees provide a better set of checks and balances?
- Traditional estate planning in many ways still seems mired in the historic view of intact families in first marriages and family loyalty that in many situations is inappropriate or simply does not exist. The common approach of naming spouse then children in age order as agents perhaps should be discussed in detail with clients along with other planning options.

FINRA Rule 2165

- Financial professionals can restrict distributions from accounts if they have a reasonable belief that the client/account owner is being subjected to financial exploitation.
- The adviser must have names and contact data for trusted contact persons to reach out to.
- FINRA rule also appropriately broadens the discussion to include not just elderly clients (which most articles unfortunately restrict their discussion to) but clients with other health or cognitive challenges that make them susceptible to abuse. "*…the term "Specified Adult" shall mean: (A) a natural person age 65 and older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests*."

Assisted Suicide

NJ Becomes the 8th State to Permit

Assisted Suicide - Background

- The preamble to the bill proposed provides insights into the right to die movement and the realities of the legislation enacted in other states.
- “*Recognizing New Jersey’s long-standing commitment to individual dignity, informed consent, and the fundamental right of competent adults to make health care decisions about whether to have life-prolonging medical or surgical means or procedures provided, withheld, or withdrawn, this State affirms the right of a qualified terminally ill patient, protected by appropriate safeguards, to obtain medication that the patient may choose to self-administer in order to bring about the patient’s humane and dignified death;*

Assisted Suicide - Background

- *Statistics from other states that have enacted laws to provide compassionate aid in dying for terminally ill patients indicate that the great majority of patients who requested medication under the laws of those states, including more than 90% of patients in Oregon since 1998 and between 72% and 86% of patients in Washington in each year since 2009, were enrolled in hospice care at the time of death, suggesting that those patients had availed themselves of available treatment and comfort care options available to them at the time they requested compassionate aid in dying*;
- *The public welfare requires a defined and safeguarded process in order to effectuate the purposes of this act, which will.*

Assisted Suicide – NJ Requirements

- Be an adult, defined as 18 or older.
- A resident of New Jersey. This might preclude a transfer of a patient from a state not permitting assisted suicide into New Jersey to avail herself of the New Jersey statute.
- Be mentally capable (means having the capacity to make health care decisions and to communicate them to a health care provider, including communication through persons familiar with the patient’s manner of communicating if those persons are available).
- Be terminal which means that the patient is in the terminal stage of an irreversibly fatal illness, disease, or condition with a prognosis, based upon reasonable medical certainty, of a life expectancy of six months or less. A patient shall not be considered a qualified terminally ill patient until a consulting physician has: examined that patient and the patient’s relevant medical records; confirmed, in writing, the attending physician's diagnosis that the patient is terminally ill…

Assisted Suicide – NJ Requirements

- …Verified that the patient is capable, is acting voluntarily, and has made an informed decision to request medication that, if prescribed, the patient may choose to self-administer.
- The attending physician has determined to be terminally ill as defined.
- Who has made an informed decision. This means a decision by a qualified terminally ill patient to request and obtain a prescription for medication that the patient may choose to self-administer to end the patient's life in a humane and dignified manner, which is based on an appreciation of the relevant facts and after being fully informed by the attending physician of...

Assisted Suicide – NJ Requirements

- …after being fully informed by the attending physician of:
  - The patient's medical diagnosis.
  - The patient's prognosis.
  - The potential risks associated with taking the medication to be prescribed;
  - The probable result of taking the medication to be prescribed; and
  - The feasible alternatives to taking the medication, including, but not limited to, additional treatment opportunities, palliative care, comfort care, hospice care, and pain control.
- To obtain self-administered medication to terminate her life.

C Corporations

Personal Holding Co. (PHC) Tax

Personal Holding Co Tax

- With the rush to C corporation status in light of the low 21% tax rate, the personal holding company ("PHC") tax could be a significant concern for some C corporations. A recent letter ruling is relevant to those that that have C corporations involved in their planning. PLR 201901002, Feb. 4, 2019.
- Personal holding company income ("PHCI") is determined by taking specified deductions from the C corporation's income. PHCI may include the following (but there are a host of exception and special rules): dividends, rents, mineral, oil and gas royalties, amounts received from contracts for personal services, income reported by a corporate beneficiary of an estate or trust, etc.
- A personal holding company must meet an income and ownership test.

Personal Holding Co Tax

- The income test requires that PHCI comprises 60% or more of its adjusted ordinary gross income for the year. The ownership test requires that for the last half of the tax year more than 50% of the stock is owned directly or indirectly by five or fewer individuals. Constructive ownership rules apply. IRC Sec. 544. These will attribute to a particular shareholder shares in the C corporation that are owned by controlled entities, etc.
- So, if a C corporation passes the income and ownership test it could be subject to an additional 20% tax. So, planning can be done to avoid or fail the ownership or income test. For example, a C corporation could buy a business that produces significant gross income to enable the post-sale corporation to fail the 60% of income test.

Personal Holding Co Tax

- But what if a C corporation meets both tests. Can something be done to avoid paying the additional 20% PHC tax? Yes, the corporation may be able to pay a dividend to its shareholders to avoid the penalty tax. More specifically, the PHC can pay what is known as a “deficiency dividend” and avoid the PHC tax. IRC Sec. 547.
- The recent ruling pertained to this process. In the Private Letter Ruling the IRS granted a C corporation an extension on the period of time during which it could make the election to pay a consent dividend and avoid the PHC tax.
- The IRS granted the C corporation a 60-day extension to make the election for a consent dividend under Code Section 565.

Charitable Bequest

Valuation and Post-Death

Value of Charitable Bequest

- A recent case considered the impact of post-death events on the determination of an estate tax charitable contribution deduction finding that the post-death events should be applied to modify the valuation determined at the date of death. The Dieringer v. Com'r, case was initially decided by the Tax Court in 2016 and was recently affirmed by the Ninth Circuit.
- Stock in a closely held business was bequeathed to a charitable foundation. An appraisal was obtained as of the decedent's date of death. After the decedent's death, another appraisal was completed and the decedent's shares were redeemed by the company. The post-death appraisal reflected substantial minority discounts. The estate claimed a charitable contribution, deduction based on the date of death value the Court held that the post-death events had to be considered and a lower value had to be used for the contribution.

Value of Charitable Bequest

- A charitable contribution deduction cannot exceed the value of the property received by the charity. While that is generally determined based on the value of the property included in the decedent's gross estate at the date of death, that is not always the case.
- Similar to the facts in other recent cases that have been resolved unfavorably to the taxpayer, in the instant case the decedent's son was executor, trustee of her trust, trustee of the foundation, and a shareholder and officer in the company. In those capacities he controlled all sides of the transaction and orchestrated a redemption based on a valuation reflecting a minority discount, but claimed a charitable contribution on a valuation not reflecting a discount.
- V.E. Dieringer, CA-9, Mar. 14, 2019, aff'g 146 T.C. No. 8, Dec. 60,566.

Charity

House Donation

House Donation Case

- Detailed fact specific case offers valuable lessons on several important charitable giving topics. Lawrence P. Mann et ux. v. United States, No. 8:17-cv-00200.
- Valuation construct wrong.
  - The taxpayers hired appraisers to value the house and personal property. The appraiser used a sales comparison approach to value the house based on its highest use which the appraiser determined was based on keeping the house intact and moving it to another site for use as a residence. A second appraisal was premised on a conveyance of the entire house to the charity and used the estimated cost to reconstruct the house to determine value.
  - The property to be donated was not moved to a new location and used as a house which the first appraisal presumed. Instead, the property was dismantled as part of a training exercise so only salvage value remained.

House Donation Case

- Partial interest rule.
  - The IRS asserted that no deduction was permitted under Code Sec 170 for a partial interest in a house. The taxpayers asserted that they had donated a discrete and separable interest in the house.
  - The determination as to whether the interest donated is the taxpayer's entire interest and hence deductible, or rather is a partial interest and not deductible depends on state law property rights.
  - Sate law provided that recorded ownership is what governs the determination of who owns an interest in real property. So, the contract the taxpayer signed with the charity, because it was not recorded, did not satisfy this requirement. So, while the taxpayer could sever the ownership of the house from the land because it was not recorded that severance did not occur.

Charity

Private Foundation Self-Dealing

Private Foundation Self-Dealing

- A self-dealing transaction must be corrected. This includes filing Form 4720 – “Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the IRC,” and the required excise tax must be paid.
- Hot button issues to be considered with respect to private foundations and disqualified persons include the following:
  - A self-dealing transaction occurred, but no Form 4720 was filed.
  - Loans were made from the foundation to a disqualified person.
  - The foundation's property was used by a disqualified person.
- Th IRS has suggested several audit tips to be followed by agents examining possible self-dealing transactions. These include:
  - Investigate records of the private foundation to identify transactions between the foundation and disqualified.

Private Foundation Self-Dealing

- Review contracts, meeting minutes, interviews, personnel and payroll records to identify such transactions.
- Review balance sheets.
- Review assets listings and depreciation schedules.
- Determine the location of all assets, even fully depreciated ones, and identify who is using them.
- If the foundation owns real property determine whether disqualified persons might be using it for hunting or other personal uses.
- If there are fully depreciated vehicles might a disqualified person be using one?
- If the foundation owns artwork confirm where it is listed as being held on the foundation’s books (e.g., in "storage") and also determine where it is actually being held. Might art be in a disqualified person’s residence or business?

Private Foundation Self-Dealing

  - If fully depreciated assets were disposed of determine if they still had value. How and to whom were the disposed of? Were they given to a disqualified person?
  - Tour buildings and real estate assets to determine how and who is using them. Might a disqualified person be using it?
  - Review rental agreements, sales contracts, agreements, etc. Be alert for “side deals” between a foundation and a disqualified person.
- Reg. §53.4941(e)-1(c).

Clawback of Temporary Exemption

Why wait to use it?

Clawback of Temporary Exemption

- Regulations were issued confirming that a taxpayer's use of the temporarily enhanced gift tax exemption will not result in a recapture or clawback when the exemption declines.
- The "off the top" gift tax issue was negatively resolved. Assume that a taxpayer makes a gift of $5M in 2019 and makes no further gifts. If the taxpayer dies after 2025 and the enhanced exclusion no longer provides benefit. Some had speculated that gift would have been made off the top of the exclusion amount would possibly have left the remaining exclusion intact, but that was not addressed in the proposed Regulation and it appears the intent was to negate the ability to make a gift of the top portion of the exclusion.
- Prop. Regs. 20.2010-1(c); Reg-106706-18.

Clawback of Temporary Exemption - Planning

- The fact that the clawback issue has been resolved should serve as a strong incentive for “moderate wealth clients (“moderate” relative to the current high exemptions) should be encouraged to plan now, certainly before 2026 when the exception is going to decline, but perhaps even before the 2020 election. If the “blue wave” of the 2018 mid-term election continues, the exemption amount could be reduced before the 2026 scheduled halving of the exclusion. For example, the estate tax proposal by Bernie Sanders proposed a mere $1 million gift exemption and a $3.5 million estate tax exemption, much less than the 2026 anticipated reduction. Practitioners should proactively educate and encourage clients to plan and hopefully avoid a repeat of the 2012 deluge of clients trying to get planning done just prior to a possible change in the exemption. Also, consider more robust planning than many executed in 2012.

Clawback of Temporary Exemption - Democrats

- But will claw back really be avoided?
- If the Democrats gain control in 2020, what might they make the effective date of any new estate tax legislation?
- Will they change the status of no-clawback?
- Practitioners might also caution clients about the risks of gifts not succeeding because of this uncertainty.

Decanting

Not a Guarantee

Decanting Not Always Available

- Decanting has become so common that it is surprising to see a case challenge an attempt to decant. It shouldn't be.
- The Nevada Court considered a district court order granting a motion to decant half of a trust's assets from a charitable trust into a new charitable trust. The Nevada Supreme Court reversed the order denying the right to decant. The facts in the case included that the trust instrument required unanimous vote of the trustees to make a distribution. Only 1 of 2 co-trustees wanted to decant 50% of the trust into a new trust. That new post-decanting trust would continue the purpose of the transferor trust but just one trustee as the sole trustee. The transferor trust would retain 50% of the assets and have the other co-trustee solely in charge. The court determined that the requirement of the governing instrument for both trustees to agree had to be met.
- In the Matter of the Fund for the Encouragement of Self Reliance, An Irrevocable Trust, 135 Nev. Adv. Op. No. __ (March 21, 2019).

Estate Tax Proposal – Bernie Sanders

"For the 99.8 Percent Act"
S. 309 116th Cong.
(2019)

Thanks to Bob Keebler from some of the slide info

"For the 99.8 Percent Act" Exemptions

- Gift Tax Exemption:
  - $1,000,000 in 2020
  - Not indexed for inflation
- Estate and GST Exemption:
  - $3,500,000 in 2019.
  - Indexed for inflation.
  - "Portability" retained.
- Would radically transform planning for many clients most of whom are ignoring planning with the current high exemptions.
- Clients should plan now if this might ever become law.

"For the 99.8 Percent Act" New Basis Consistency Rule

- Basis consistency rules.
  - Basis must also be consistent with the amount reported on gift tax returns.
  - Similar reporting regime as under § 1014(f). This might add substantial costs to gift tax return filings which, with a $1M exemption could expand substantially.

"For the 99.8 Percent Act" Help For Small Business/Farms

- Sec. 2032A - Special Use Valuation Changes.
  - Increase to reduction in FMV from $750,000 to $3,000,000.
  - Applies after 12/31/19.
- Sec. 2031(c) - Conservation Easement Changes.
  - Increase reduction in FMV from $500,000 to $2,000,000.
  - Increase to reduction in fair market value from 40% to 60%.
  - Applies after 12/31/19.
- These will be helpful under the new lower exemptions.

"For the 99.8 Percent Act" Valuations and Discounts

- General Valuation Rules.
  - The "Non-business" assets of an entity transferred are valued as if the asset were transferred directly (non-actively traded interests) – no discounts of any nature.
  - Non-business assets means any asset not used in the active conduct of a trade or business. What of working capital?
  - "Passive assets" not treated as used in active business.
- Discounts.
  - No discount allowed if the transferee and family members have control or majority ownership (non-actively traded interests). This eliminates the discount "elixir" that has propelled much of modern estate planning.
- Clients needing discounts to make a transaction succeed should proceed before a law change.

"For the 99.8 Percent Act" GRATs No Longer GREAT

- GRAT Changes
  - Minimum 10-year term. This eliminates the common rolling or cascading GRAT technique. Taxpayers cannot count on re-GRAT'ing payouts from existing GRATs.
  - Maximum term of the life expectancy of the annuitant plus 10-years. This eliminates the so-called 99-year GRAT that is an interest and valuation play.
  - Remainder interest not less than amount equal to the greater of:
    - 25% of trust value.
    - $500,000.
    - This eliminates the Walton or Zero'ed out GRAT.
- Is there any benefit to GRATs left?

"For the 99.8 Percent Act" Grantor Trusts Emasculated

- Grantor trust changes are harsh and emasculate a favored planning tool.
  - Estate includes
    - Assets in grantor trusts.
    - Distributions from grantor trusts during the life of the deemed owner.
    - The assets of a grantor trust when the trust changes to a nongrantor trust.
- This effectively would eliminate the use of grantor trusts after the effective date of the act. When might that be? Should taxpayers create grantor trusts now hoping for grandfathering? Might the possible benefit of a grandfathered grantor trust outweigh the current income tax benefits of a non-grantor trust?

“For the 99.8 Percent Act” GST Tax

- GST Changes
  - Inclusion ratio of any trust other than qualifying trust must be 1 meaning no GST benefit.
  - Qualifying trust must terminate not greater than 50-years after the trust is created. That eliminates the tax benefit of long term/perpetual trusts.
  - Pre-existing trusts must terminate within 50-years of enactment. Might this eliminate grandfathering? Might this suggest that the sooner a trust is created perhaps the more likely to be grandfathered if grandfathering is permitted?
  - This would radically change trust and intergenerational planning as we know it.

"For the 99.8 Percent Act" Annual Exclusion Gifts Restricted

- Annual Exclusion Gifts.
  - $10,000 limit per donee.
  - $20,000 limit per donor.
- This would transform planning for clients of all wealth levels including the ubiquitous irrevocable life insurance trust ("ILIT").
- Clients with ILITs and other trusts that are accustomed to using annual gifts should evaluate making a larger gift now using available exemption to fund those trusts to avoid the need for future gifts which would require the filing of a gift tax return and which after $20,000 would reduce the $1M lifetime gift exclusion.
- Gift planning would be transformed.

“For the 99.8 Percent Act” Rethink Upstream Planning

- Many practitioners have touted the use of “upstream” planning to salvage otherwise unusable exemptions that elderly relatives of clients have.
- Example parent has an estate of only $4 million, child could create a trust with $7 million, and give parent a general power of appointment (“GPOA”) over that trust. The intent of the plan was that parent’s estate would include the assets in the trust and those assets would garner an estate tax free adjustment (hopefully step-up) in income tax basis on parent’s death.
- If the exemption is reduced to the $3.5 million as in the Sanders’ Act, most or all upstream planning would be obviated. If that occurs practitioners might want to review that planning to be certain that the estate inclusion in the upstream plan does not inadvertently trigger an unintended estate tax on the senior generation’s death. While many such upstream plans were likely crafted to only include in the senior generation’s estate an amount that does not trigger an estate tax, the more prudent course of action would be to confirm that. Clients who only recently had planning updated to address the inclusion of GPOAs to a higher generation will likely be frustrated by the yo-yo tax law changes and ongoing planning updates.

Gift Tax

Protective Claim for Refund

Protective Claim for Gift Tax Refund

- A taxpayer can file a protective claim for a refund for gift taxes. While the gift tax law does not permit filing a protective refund claim, it does not prohibit such a filing. Therefore, the IRS in a recent CCA saw no reason to deny it.
- Background.
  - There are several authorities addressing filing a protective refund claim, but none addressed doing so in the context of a gift tax.
  - The IRS noted that a prior CCA 200938021 discussed protective refund claims.
  - The Internal Revenue Manual I.R.M. 21.5.3.4.7.3.1 explains protective refund claims.
  - The requirements for a protective refund claim was set forth in U.S. v. Kales, 41-2 USTC ¶9785, 314 U.S. 186.
- Code Sec. 6402; CCA 201906006, Mar. 11, 2019.

GST Late Allocations

Plan Now

GST Allocation of Temp. Exemption

- A taxpayer can allocate increased GST exemption to modify the inclusion ratio of a trust created in a prior year.
- Taxpayers should evaluate old trusts that are not GST exempt, or which have an inclusion ratio of more than zero, to determine if they should use current elevated GST exemptions in a late allocation to make that trust GST exempt.
- This might be coupled with a decanting of the trust to a newer trust that has longer term provisions. For example, if the old ILIT distributed all trust corpus to the beneficiary at age 35, extending the term of the trust for the beneficiaries lifetime, or as long as the rule of perpetuities permits, may be worthwhile as well. Considering that some tax proposals, e.g. Bernie Sanders, call for the elimination of Crummey powers, capping the duration of a GST exempt trust to 50 years, and reducing the exemption, this type of planning may be valuable if grandfathered.
- Joint Committee on Taxation's Blue Book for the Tax Cuts and Jobs Act Footnote 372, p. 89.

IRA Secure Act

Expanded IRA Benefits

IRAs and the Secure Act

- Proposals have been made to modify and enhance retirement savings. The so-called "Secure Act," is a proposal that many might consider likely to be enacted in 2019.
- Proposed changes include eliminating the age limit on IRA contributions, deferring the Required Minimum Distributions ("RMDs") from age 70½ to age 72, etc. The revenue costs of these changes intended to deal with the realities of longevity would be paid for by restricting stretch IRAs, a revenue raiser that has been discussed for many years.
- The implications of this while important to many may not change most planning techniques but rather will affect more detailed decisions and likely will have a meaningful impact on financial forecasts for aging clients that avail themselves of the new rules, if enacted.
- Consider the impact of such a change on Qualified Charitable Distributions ("QCDs")? Might deferring the age for RMDs also defer the age for QCDs?
- H.R. ___ Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019.

Life Insurance

Regs Address new Reporting

Life Insurance Reporting

- The 2017 tax act included new rules on life insurance reporting and also the determination of the income tax basis for a life insurance policy. Regulations discussing these rules were issued.
- Prop Reg REG-103083-18; Prop Reg § 1.101-1, Prop Reg § 1.6050Y-1, Prop Reg § 1.6050Y-2, Prop Reg § 1.6050Y-3, Prop Reg § 1.6050Y-4.
- New tax reporting rules for life settlement transactions were enacted. Reporting requirements apply to the purchase of an existing life insurance contract in a reportable policy sale. A reportable policy sale means the acquisition of an interest in a life insurance contract, directly or indirectly [such as through a partnership], if the acquirer has no substantial family, business or financial relationship with the insured apart from the acquirer's interest in such policy).

Life Insurance Reporting

- The information reported by the buyer about the purchase is: (1) the buyer's name, address, and taxpayer identification number ("TIN"), (2) the name, address, and TIN of each recipient of payment in the reportable policy sale, (3) the date of the sale, (4) the name of the issuer, and (5) the amount of each payment. The statement the buyer provides to any issuer of a life insurance contract is not required to include the amount of the payment or payments for the purchase of the contract. On receipt of a report described above, or on any notice of the transfer of a life insurance contract to a foreign person, the issuer is required to report to the IRS and to the seller: (1) the name, address, and TIN of the seller or the transferor to a foreign person, (2) the basis of the contract (i.e., the investment in the contract within the meaning of IRC Sec. 72(e)(6)), and (3) the policy number of the contract.

Loans

Step Interest?

Stepping/Deferring Interest Payments under a Note

- Assume a client is going to engage in a note sale to a grantor dynasty trust (a so-called Intentionally Defective Irrevocable Grantor Trust or "IDIGT"). But the entity whose interests are being sold has current cash flow needs for business research and development. As a result, distributions will be difficult/limited for several years.
- Can the purchasing trust backload the scheduled payment dates of the interest that accrues under the term of the note? During the first X years of the note, the purchaser pays interest every year at a rate of say 1%. The remaining and unpaid 2% interest (assuming a 3% AFR) will compound at the same 3% AFR rate until it is paid. Thus, the note will have negative amortization during the first X years of its term. After the first X years, the purchasing trust will pay the full interest that accrues every year on a current basis (or if advisable from a cash flow perspective another "step" in rate can be used). During the remaining term of the note, the purchaser also will pay the compounded shortfalls in interest payments that arose during the first X years of the note.

Stepping/Deferring Interest Payments under a Note

- The delayed payment during the first X years of the note of the interest that accrues should not by itself cause the note that the purchaser gives to the seller to be recharacterized (e.g. as an invalid indebtedness, a gift, as equity instead of debt, etc.).
- Code Sec. 7872 provides rules for the tax treatment of loans with below-market interest rates. Code Sec. 7872(a)(1) recharacterizes the below-market-rate demand loan as a two-step transaction: (1) The lender treated as having transferred on the last day of the calendar year an amount equal to the forgone interest (the prevailing federal rate of interest less the loan's actual interest rate) to the borrower; and (2) The borrower/trust is then treated as retransferring that amount back to the lender as imputed interest.
- if interest accrues and is not paid the original issue discount (OID) rules will apply. The OID rules would have the taxpayer report a pro rata amount of the overall amount of the OID over the life of the loan using a constant yield method under the Regulations under Code Sec. 1272. But on a sale to a grantor trust the OID complications appear to be obviated. So, while these rules should apply, they should have no income tax significance.

Loans

Valid Indebtedness

Loan Validity

- The issue in question in this case was whether or not an LLC would be entitled claim a deduction for a worthless debt. The court found that the indebtedness was bona fide The existence of a bona fide debt is a critical issue in many planning transactions.
- 2590 Associates, LLC, TC Memo. 2019-3, Dec. 61,404(M), Feb. 1, 2019.
- Factors to consider:
  - The debt was evidenced by a promissory note.
  - The note had a fixed maturity date.
  - The rate of interest on the note was set at an above market rate.

Loan Validity

- The lender intended to collect the debt, believed that the borrower would repay the debt, and had the legal right to enforce collection of the debt.
- If there was a default a higher default interest rate would apply and the debtor would be entitled to attorney fees to collect.
- The debt, however, was unsecured.
- The repayment of the debt was not limited to solely the income from the borrower.
- The borrower was not thinly capitalized. There was an appraisal by an unrelated lender indicating that the borrower had substantial equity.

Longevity

Wealthy Live Longer

Longevity and Wealth

- “Men in the top one-fifth of America by income born in 1960 can on average expect to reach almost 89, seven years more than their equally wealthy brethren born in 1930. (Life expectancy for men in the bottom wealth quintile remained roughly stable at 76.)”
- Consider what the above longevity statistics mean to planning. Using table life expectancies will understate actual life expectancy for the wealthy clients almost all advisers serve. Also, in the discussion of societal goals and the estate tax, the shocking statistics of expanding life expectancy for the wealthy and stagnant life expectancy for the lower tiers of wealth may well serve as an incentive for the proposals of universal health care to be paid for by a harsh estate tax.
- Simone Foxman, “U.S. Billionaires Are Living Longer Than Ever, Making Heirs Wait,” Apr 3, 2019, Bloomberg.

Malpractice

Recent Case Might Suggest Practice Changes

Malpractice – The Case

- A recent malpractice complaint filed in New Jersey has significant implications to estate planners in all disciplines.
- https.1/www.law.cornlnjlawjouma/12019/02/04//lowenstein-faces-malpractice-lawsuit over-creation-of-dynasty-trustl.
- The case involves a malpractice claim against a well-respected law firm, and national CPA firm, for planning what appears to be from the descriptions in the complaint, common estate planning steps of using GRATs, gifts, and note sales to dynasty trusts, etc. to reduce the potential estate tax obligations.
- We have little information on the case, the facts and how it will develop, but nonetheless there are important lessons practitioners might learn from the mere fact of such a claim being filed, regardless of outcome.

Malpractice – The Complaint

- Merely because the planning techniques are commonly used does not necessarily make those techniques appropriate for the particular client. While the resolution of this issue is uncertain, practitioners should exercise caution in applying common planning techniques without first understanding each client's unique situation and circumstances.
- The potential for increased income tax consequences to the beneficiaries of the plan due to the loss of a potential step-up in basis on assets transferred out of the estate, and the income tax cost on negative basis real estate assets if the grantor trust to which they were transferred becomes non-grantor.
- The income tax consequences that will be experienced when grantor trust status is lost or toggled off.
- Another significant component of the complaint is the client's position that it was not informed of these risks. While the actual facts of this aspect of the case cannot be known, the mere issue itself has significance to practitioners and perhaps should change the standards of practice.

Malpractice – Time to Reconsider Practice Policies?

- How practitioners might modify how they practice to perhaps reduce liability exposure?
  - Should different or additional language be added to retainer agreements?
  - Might different approaches be worthy of consideration to apprise clients of the risks inherent in so many estate planning transactions? What approaches might be useful? What approaches might be counter-productive?
  - Is it time for rules of professional conduct governing attorneys to be reconsidered as to restrictions on liability limitations given the current planning environment?
  - How do other allied professionals address liability limitations and what might that mean to estate planning attorneys?
  - Might mandatory arbitration provisions be beneficial? If beneficial are they permissible if attorney ethics rules proscribe their use?

Malpractice – Time to Reconsider Practice Policies?

- Every estate plan is subject to a myriad of variables and options.
- Every form of tax planning is always subject to risks that the law may change, economic assumptions underlying the planning may change, client goals may evolve, family dynamics can transform, and any of the myriad of other assumptions underlying any plan can change. A change in interest rates can have a dramatic impact on the ultimate tax consequences of a GRAT. If the donor/settlor of a GRAT dies during the term of the GRAT the plan is often presumed to fail. To the contrary, if the value of the assets inside the GRAT and interest rates have risen sufficiently less than all the GRAT assets will have to be included in the donor/settlor's estate. Yet what control does any practitioner have over the value of the assets or interest rates?
- At high levels of wealth planning, such as that in the instant case, when polling nationally known practitioners on the best approach or technique to use as part of a plan it is likely none will provide you with the identical answer.
- In fact, on many seemingly commonly used planning points practitioners will disagree vehemently.

Malpractice – Possible Implications

- If the plaintiffs' allegations succeed it could undermine much of traditional estate tax planning. But regardless of the outcome of the case, practitioners might consider different approaches to planning and practice.
- Tax planning is not a science with correct and incorrect solutions that can be confirmed in a laboratory. The estate planning "laboratory" includes the vicissitudes of changing tax laws, uncertainties over economic changes, the impact of how a client might operate a business successfully or not, family dynamics, and an infinite number of other details.
- The reality is that estate planning is at best an art, not an exact science, and no practitioner should be held to an impossible standard. All any estate planner can do is a reasonable job based on the practitioner's perception of the facts, the overall goals expressed by the client, and guestimates as to the future, and so on.

Malpractice – Time to Reconsider Practice Policies? Risk Listing

- Create and use additional procedures to disclose risk factors.
- In the heyday of the tax shelter syndication days in the 1980s every private placement memo had a long risk factors section in the front of the document. While many of these points were boilerplate in most deals, better crafted private placement memorandum also had customized risks associated with the particular transaction.
- Perhaps some practitioners might consider the use of a somewhat generic, somewhat customized, list of risk factors. Sending a "Listing of Some Risk Factors that May Affect Your Plan" prophylactically to clients who wish to engage in various estate planning endeavors (such as DAPTs, SLATs, IDGTs, GRATs, etc.) might prove helpful in explaining some of the risks involved in a proposed plan.
- Such a step would also clearly seem to communicate to the client that there are risks involved in every estate plan.

Malpractice – Time to Reconsider Practice Policies? Risk Listing

- This is not presently standard practice nor required.
- While nothing requires a practitioner to lay out all issues in writing, and in fact there may be reasons not to provide the IRS (and perhaps other creditors) with a roadmap as to the purposes and intentions behind an estate plan, later proving the advice and cautionary comments provided by the professional to the client (after the client has died or become incapacitated) may be difficult without some level of contemporaneously created documentary evidence.

Malpractice – Time to Reconsider Practice Policies? – Safe Writing

- Given the nature of a number if the issues raised in the complaint in the instant case perhaps practitioners might possibly consider being [phraseology intentional] more attentive to the choice of words used in letters and memorandum.
- In the complaint it states: "In this memorandum, Mr. Weinstock stated that the recommendations "are designed to achieve the following planning goals to the **maximum** possible extent [highlight added]."
- Given the nature of the litigious environment we apparently face, perhaps practitioners should instead of phrases like the above instead use language like: "……may achieve some of the following planning goals………"
- Perhaps banish the use words like "assured," "will," "optimal," "maximum," and instead only use words suggestive of possible results. While clients no doubt prefer shorter and clearer language, is it worth the risk? Certainly, if we state that net tax savings "might" be achieved that suggests that they also might not be.

Malpractice – Time to Reconsider Practice Policies? – Retainer Agr.

- "No Guarantee/Risks: Results of any plan are not guaranteed. Many aspects of many, if not most, estate and related plans are not only uncertain, but subject to a wide spectrum of different views by other advisers, the courts, the IRS, and other authorities. Most strategies have negative consequences (e.g. save estate tax, lose basis step-up). Many common strategies, techniques and transactions are subject to tax as well as other legal, financial, and other risks and uncertainties. While we endeavor to identify some of the risks of a plan, all risks and issues with each component of a plan are not possible to identify or communicate.
- Creating a collaborative team may help identify more issues. Further, the fact that we communicate verbally or in writing certain risks should never be interpreted as an indication that any such listing or communication is a comprehensive listing or communication of every risk involved.

Malpractice – Time to Reconsider Practice Policies? – Retainer Agr.

- The risks of any transaction can be further compounded by improper administration of the plan, a failure to regularly review and update the plan in order to address changes in the tax and other laws that may reduce hoped for benefits or even result in more costly results then had no planning been pursued as well as the potential implications of changed goals, desires and family and business objectives.
- Annual or other meetings with a collaborative advisor team may help identify existing or new risks and help to identify provisions of the plan (or its administration) that may be beneficial in addressing changes in the law and mitigation of risks, but even such vigilance will not provide certainty. The failure to regularly re-evaluate the plan with the assistance and input of a collaborative team of advisers may have adverse consequences and result in your plan failing to succeed."

Malpractice – Time to Reconsider Practice Policies? – Retainer Agr.

- "Audit and other Risks: To the extent that you engage us, or engaged us in the past, to perform tax, estate, asset protection and other planning, which may include, or may have included, estate, gift, wealth preservation and/or wealth transfer planning and other services, we may have suggested a number of strategies, and may have assisted in implementing strategies, that the IRS or state tax authorities, or others, could challenge. Possible challenges could be asserted even though we communicated several of the risks associated with such strategies. Possible challenges could be asserted also for risks that were not discussed, including challenges by the government that could cause inclusion of assets previously transferred out of your estate in your estate. Assets that had been transferred out of the estate as part of the recommended strategies will most likely not be adjusted to their date of death value, which could result in a capital gains tax liability, possibly a depreciation recapture tax liability, and/or a negative capital account recapture liability. You agree that we shall not be liable, to any extent, for any assessments of tax, interest, or penalties resulting from recommended strategies or previously implemented strategies."

Malpractice – Time to Reconsider Practice Policies? - Billing

- Many common billing programs permit adding standard text, e.g. footers, to certain types of bills or even to all bills.
- Consider adding some variation of the above “no guarantee” provision and “audit” provision as a standard footer to all bills. Clients reminded of these limitations on each bill, especially if they pay the bill without objection, may have a more difficult time maintaining that they were not aware of these risks and limitations on what the practitioner can provide.

Malpractice – Reconsider Practice Policies? – Caveat to Memos

- Has any financial firm, trust company wealth adviser, or life insurance firm ever issued a forecast, memorandum or other client specific communication without cautionary language?
- But why is the same procedure not routinely used by estate planning attorneys and CPAs? Perhaps it should be.
- No client has ever authorized an unlimited budget for a memorandum, so every memorandum is necessarily constrained by the time and budget limitations. That assuredly has to limit the issues that can be identified and the research that can be done.
- Given the inherent uncertainties of the estate planning process, many memoranda can simply not provide assurance on some or many of the points addressed.

Malpractice – Reconsider Practice Policies? – Caveat to Letters

- Perhaps practitioners might add a paragraph on risks and issues to cover letters used to transmit wills, trusts and other significant estate planning documents. That paragraph might address:
  - Estate planning is inherently complex, subject to varying interpretations, and laws that frequently change.
  - Ongoing review and maintenance of every plan and document is essential.
  - There is no assurance that any particular result will be realized.
  - There are risks and negative consequences to every planning step and technique, all of which have not been enumerated in this letter or other communications.
  - By proceeding with this plan, you accept these risks.

Malpractice – Consider What Allied Professions Provide

- Assume that an estate planning attorney is involved in a complex estate plan for a large client. What are the respective liability exposures of each of these professionals? The attorney cannot limit his or her liability as that would violate rules governing attorney ethics.
- The CPA and appraiser may include, and many do, stringent limitations on their liability on the matter. They may limit the dollar value of their liability to their fees earned. They might also limit the time period during which a claim can be brought, providing further protection.
- The wealth adviser may limit its liability by stating clearly that it does not provide legal or tax advice thereby perhaps shifting the burden back to the attorney and CPA .
- Assuming a trust company is involved in a directed trustee capacity. That is common in planning transactions for closely held business interests, real estate and other private equity type assets. As a directed trustee the institutional trustee may have liability that is subject to a willful conduct standard. Willful misconduct is more than no liability as the absence of liability might negate the existence of a valid trust.

Partnerships

754 Elections

754 Elections

- Increasing income tax basis has become the focus of much planning. When assets are held in an FLP/LLC the benefit of the income tax basis step up is not achieved unless the partnership can increase its inside basis as to the asset involved. But to accomplish this the partnership must make an election to adjust its basis under Code Sec. 754.
- This election must be made in a written statement that is filed with the partnership's timely filed return (including any extension) for the tax year during which the distribution or transfer occurs. Reg. Sec. 1.6031-1. The statement must include the name and address of the partnership, and a declaration that the partnership elects under section 754 to apply the provisions of section 734(b) and section 743(b). If a valid election has been made under section 754 for a preceding taxable year and not revoked a new election is not required to be made. The election must be signed by any one of the partners.
- The IRS granted an extension of time for a partnership to make the basis adjustment election. In the ruling the taxpayer had inadvertently failed to file a timely election to adjust the basis of a partnership property. The IRS found that the taxpayer acted reasonably and in good faith. LTR 201852013, Feb. 4, 2019.

Probate

Transferee Liability For Estate Tax

Beneficiaries Liable for Estate Tax

- Decedent owned property jointly with children. Estate tax return filed 8 years following death. The beneficiaries had made a few payments towards the estate tax liability, but it remainder largely unpaid.
- For there to be transferee liability, the IRS show that the estate tax was not paid and that the transferee/beneficiary received property that was included in the gross estate. Code Sec. 6324(a)(2).
- Decedent forgave loan between the decedent and the grandchild was a transfer within three years of death and included in the gross estate under Code Sec. 2035 upon which no estate tax was paid. The decedent had retained a life estate in the family farm so that it was included in the gross estate under Code Sec. 2036.
- Each beneficiary was held liable for his or her proportionate amount of the estate tax.

Transferee Liability

- Estate consisted of stock in a hotel business and the estate elected to defer estate tax under Code Sec. 6166. Assets of the estate passed to a trust which was later liquidated pursuant to an agreement that acknowledged the deferred estate tax. The executors could not avoid liability for unpaid tax by the contract signed with the beneficiaries terminating the trust to which the residuary estate was distributed.
- If the estate tax due is unpaid, a transferee such as a beneficiary, who received property that is included in the gross estate under Code Sec. 2034-2042, is personally liable for the unpaid estate tax. Code Sec. 6324(a)(2).
- The assessment of unpaid tax against a beneficiary must be made within one year after of the assessment period against the estate. Code Sec. 6901.
- U.S. v. Johnson, (CA10 3/29/2019) 123 AFTR 2d ¶2019-565.

Trusts - QTIP

Extension of Time to File

Extension for QTIP Election

- The executor was granted an extension of time to make a qualified terminable interest property ("QTIP") election under Code Sec. 2056(b)(7). The executor hired an attorney to prepare the estate's Form 706, but the estate was believed to be less than the basic exclusion amount so no QTIP election was made.
- However, after the estate tax return was filed an additional asset was discovered that made the estate taxable and hence the need for a QTIP election.
- PLR 201903014, Feb. 18, 2019.

Trusts - ESBT

New Regs

NRAs and ESBTs post-2017 Act

- Nonresident alien ("NRA") beneficiary of an ESBT is subject to income tax. Prior to the 2017 tax act, nonresident aliens ("NRA") were not permissible beneficiaries of an ESBT. Post-2017 tax act a nonresident alien individual still cannot be a direct shareholder of an S corporation or it disqualifies the S corporation but an NRA can be a current beneficiary of an ESBT without causing disqualification of the S corporation election.
- A trust can be both a grantor trust and an ESBT. If a non-resident alien is allocated income under the grantor trust rules, in certain instances that might result in avoiding of income tax.
- The proposed regulations require that certain S corporation income of an ESBT must be included in the S portion of the ESBT income, and not allocated to an NRA as an owner under the grantor trust rules.
- REG-117062-18, Apr. 18, 2019.

Trusts – State Income Taxation

Supreme Court

Kaestner

- The U.S. Supreme Court granted certiorari on January 11, 2018 to hear a case involving the issue as to whether a state can tax a trust's income solely on the basis of an in-state beneficiary.
- Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Dept. of Revenue, 814 S.E.2d 43 (N.C. June 8, 2018), aff'g 789 S.E.2d 645 (N.C. App. 2016).

Wandry

Drafting Wandry Clauses Post-Powell

Wandry Post-Powell

- Wandry – Reconsider Classic Wandry Clauses in light of Powell?
- Many practitioners believe a Wandry clause provides security to deflect a valuation challenge by the IRS of a transfer to, for example, an irrevocable trust. Other practitioners might view the protection as less secure
- Wandry et al., 103 TCM 1472, CCH Dec. 59,000(M), TC Memo. 2012-88.
- A response to this uncertain and potentially expansive view of Code Sec. 2036(a)(2) under Powell/Cahill might be to reconsider the traditional Wandry adjustment mechanism and use a different approach to assure that no equity remains with the transferor in order to assure that the transferor cannot "in conjunction with" control any of the entity interests transferred.

Wealth Management

Potpourri

Wealth Management – Next Gen

- Cerulli reported that 45% of high-net-worth practices have had limited interactions with their clients' children, while only 59% have established relationships with clients' spouses."
- The implication of the statistics and the discussion in the article is that all practitioners should endeavor to open dialogues not just with clients, but with client heirs. Carol A. Sherman, "The Great Wealth Transfer Wake-Up Call," Apr 12, 2019

Wealth Management – Time

- Advisers divide their time as follows: 55.3% client facing activities including meeting time with current clients, acquisition of new clients, client services and plan preparation. 21.2% administrative activities such as compliance, back office matters, etc. 17.4% investment management including research, due diligence and asset management, and 6.1% professional development.
- Morningstar issued a report “Five Ways Portfolio Outsourcing May Help Grow Your Practice”
- CPAs and attorneys need to understand this landscape. How much of an estate planning attorney’s time is client facing? 10%?

Wealth Management – Client Age

- "The average age of wealth management clients now stands at 64, according to data from global consulting firm Simon-Kucher & Partners…"
- Amanda Schiavo, "Advisors should change fee structures to attract next-gen clients, Jan 7 2019.

Valuation

Closely Held Stock

S Corporation Valuation

- The value of closely held stock transferred to family members was determined by considering comparable companies and applying relevant discounts. The closely held stock was owned primarily by the donors' family, directors, and employees.
- Value gifts of minority interests in a Subchapter S corporation (S corp) operating company, Green Bay Packaging, Inc. (GBP). In those experts' reports, a Subchapter S corp was first valued on a C corporation (C corp) equivalent basis, which included tax-affecting the entity's earnings, followed by quantitative and qualitative adjustments to address whether any economic adjustment/benefit should be ascribed to the Subchapter S election (the C to S method).
- Kress, DC Wis., Mar. 28, 2019.

Questions or Comments

- Jeremy Belsky

  Jeremy.belsky@boystown.org
- Jonathan Blattmachr
  jblattmachr@hotmail.com
- Marty Shenkman
  shenkman@shenkmanlaw.com

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