Recent Developments Affecting Estate Planning

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A. **FY 2017 Budget Proposal—basis consistency reporting rules would be extended to marital deduction property and taxable gifts**. The Obama administration's Fiscal Year 2017 Budget Proposal, published on February 9, 2016, made only one new proposal relating to the estate and gift tax. From the FY 2017 Greenbook: "The proposal would expand the property subject to the consistency requirement imposed under section 1014(f) to also include (1) property qualifying for the estate tax marital deduction, provided a return is required to be filed under section 6018, even though that property does not increase the estate's federal estate tax liability, and (2) property transferred by gift, provided that the gift is required to be reported on a federal gift tax return…. [T]he exclusion from the application of the consistency requirement of property qualifying for the estate tax marital deduction is significant because an unlimited amount of property may qualify for the estate tax marital deduction in a decedent's estate tax proceeding. Although it is true that the value of such property passing to the decedent's surviving spouse may be increased without incurring any federal estate tax, and a high estate tax value provides a high cap on the recipient's permissible basis, current law contains provisions to prevent an inaccurately high estate tax valuation. Specifically, the executor certifies to the accuracy of the information on the estate tax return under penalties of perjury, and significant underpayment penalties are imposed on the understatement of capital gains and thus income tax that would result from an overstatement of basis. "

B. **Account transcript in lieu of estate tax closing letters.** In a June 16, 2015 update to its frequently asked questions and answers on the IRS website, the Service announced that for estate tax returns filed after June 1, 2015, closing letters will be issued only on request of the taxpayer. The reason given for the change was that "[t]he volume of estate tax returns filed solely to make the portability election continues to increase tying up limited resources." The announcement advised that practitioners should wait at least four months after filing the return to request a closing letter. The premise of the change of procedure is that the IRS believes that it will issue fewer closing letters if taxpayers have to ask for one. This is questionable, as nearly all executors will want to have a closing letter before terminating the administration and distributing the estate.

1. **New procedure**. In response to concerns raised by the AICPA and others, on December 4, 2015, the IRS announced on its Office of Information and Regulatory Affairs website that a new procedure can be used by tax professionals to determine that the Service's review of an estate tax return is closed. "Account transcripts, which reflect transactions including the acceptance of Form 706 and the completion of an examination, may be an acceptable substitute for the estate tax closing letter. Account transcripts are available online to registered tax professionals using the Transcript Delivery System (TDS) or to authorized representatives making requests using Form 4506-T." Under this new procedure, the Service will mark account transcripts for estate tax returns with Transaction Code 421 that says "closed examination of tax return."

2. **But this new system isn't working.** Carol Cantrell (Houston) has advised me that, from her personal experience and the experience of others, this new procedure is not working as planned. Carol and others have had the experience of one CPA who emailed the AICPA: "My experience in getting an account transcript in lieu of a closing letter has been frustrating. I am on the POA for the estates for which I have attempted to get the transcript. However, the IRS website said my CAF was denied. I called the IRS and the agent said I was denied because I wasn't marked to receive notifications on the POA. A partner who was marked to receive such notifications

on the POA also tried to pull the transcript and also had his CAF denied. Thus, we have no choice but to call the IRS for all estates. This new process is tedious and time consuming."

a. Eileen Sherr, AICPA Senior Technical Manager, sent this email in response to a CPA's inquiry: "We are hearing good and bad news regarding the closing letters. Good news - It appears that when someone calls the IRS and gets through and the estate is closed, they are getting the closing letter in about a week. Bad news - If the estate is not closed yet, they need to keep calling to get it. It would be good if their initial call request could be noted in the IRS system so they do not need to keep calling back and wasting their and IRS time in repeated requests. Bad news - We have heard from several practitioners that there seems to be a stumbling block with POAs not working easily (as they should) for practitioners to get transcripts instead of closing letters. Instead, the practitioners need to fax in repeated POAs and often end up having to call to get the closing letter. There seems to be an issue with the IRS system's POA approval function, resulting in practitioners not able to easily get the transcripts with the closing letter code."

b. Ms. Sherr emailed this concern to Alfredo Valdespino, Acting Director, IRS SB/SE Specialty Examination Policy, and received this response via email on July 20, 2016: "Thanks for sharing this concern. I'm working with my staff to assess the issue and determine what might be the causing the CAF to be denied. I will keep you posted on what we find out."

II. Section 401—Qualified Plans and IRAs

A. **Inherited retirement benefits: Five-year payout limit for beneficiaries other than spouses, minor children?** Under the Obama administration's Fiscal Year 2017 Budget Proposal (also included in the 2014, 2015 and 2016 Budget Proposals), except for spouses (who could continue to make spousal rollovers), minor children, disabled or chronically ill beneficiaries, and beneficiaries less than ten years younger than the participant, beneficiaries could no longer stretch out required minimum distributions over their life expectancy. Instead, payouts would be limited to five years after the decedent's death. Roth IRAs would be subject to the same five-year rule.

1. No new developments on this issue; Congress hasn't acted on it.

B. **What are the consequences if a community property IRA names someone other than the surviving spouse as beneficiary?** That was the situation in Ltr. Rul. 201623001. H and W were married and had a child C. H named C as beneficiary of three IRAs. After H's death, W filed a claim against H's estate for her one-half interest in community property. W and C negotiated a settlement under which W's community property interest in the estate was determined. A state court approved the settlement, and ordered that the IRA custodians assign Amount of the inherited IRA for C to A "as a spousal rollover IRA."

The family dynamics must have been interesting. The ruling did not concern the "usual" pattern of a divided family, involving a second spouse and children by a first marriage. C was the child of H and W, and H named the child rather than his spouse as IRA beneficiary. Interesting!

1. **State law governs spouse's interest in community property IRA.** W made four ruling requests. In request 1), W asked that the Amount of the IRAs naming C as sole beneficiary be classified as W's community property interest. The Service declined to issue the requested

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