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Not so Fast!
7 Steps for Deciding Whether and How To Discuss the Federal Estate Tax Return with the Personal Representative

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NOT SO FAST! 7 STEPS FOR DECIDING WHETHER AND HOW TO DISCUSS THE FEDERAL ESTATE TAX RETURN WITH THE PERSONAL REPRESENTATIVE

by

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I. INTRODUCTION

The idea for this paper came from observing scenarios where the probate of a decedent's estate is started, and then many months later the personal representative of the estate happens to be visiting with a tax attorney, CPA, or financial advisor who mentions something called an "estate tax return"[1]—a term unfamiliar to the personal representative. Confusion ensues – what is the "estate tax return"? Do I need to file one? When is the deadline? Will there be an estate tax liability? Why was this not explained during my interactions with my probate lawyer? This scenario could occur under a variety of conditions, ranging from the situation where the probate lawyer is unfamiliar with the filing requirement, to more nuanced circumstances where the probate lawyer has, after examining the decedent's assets and history, concluded that it was not appropriate to have an in-depth discussion of the federal estate tax return with a personal representative who may already be overwhelmed by other aspects of the probate process. Perhaps more common is the case where the probate lawyer is aware that the current federal estate tax exclusion is above $12 million, knows that the value of the decedent's assets under administration is well below $12 million, and believes that this fact precludes the possibility that filing an estate tax return might be advisable or even required by law.

This paper is primarily geared toward attorneys who do not practice heavily in the area of the federal estate tax, but hopefully it contains at least a few nuggets of information that any probate or trust attorney could find useful. The goal of this paper is to provide some issue-spotting tips and a behind-the-scenes look at some fundamentals involved in the preparation of a federal estate tax return to assist the probate or trust attorney representing the executor of a decedent's estate, administrator of a decedent's estate, or trustee of a decedent's revocable trust in deciding when it may be necessary to discuss the federal estate tax return with the client (or refer the client to seek counsel from a suitable tax practitioner). Throughout this paper, the term "estate tax return" refers to IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

II. SCOPE

This paper provides a basic outline of many elements involved in determining whether filing a federal estate tax return is required or advisable, but it does not touch on all aspects or possible scenarios. This article provides some general rules relating to the items and values that should be considered, but there are many exceptions to these general rules that are not addressed in this article. For purposes of this article, it is assumed that the deceased person ("decedent") was a United States citizen residing in the United States, with the same being true of the decedent's surviving spouse. It is also assumed that all property owned by the decedent and surviving spouse is located in the United States. The scope of this article does not include the Generation Skipping Transfer ("GST") tax or filing requirements to report a GST taxable termination. This paper does not cover the calculation of federal estate tax liability or provide comprehensive details on filing the estate tax return and related forms.[2]

III. DISCLAIMER

This paper was prepared for educational purposes, discussion, illustration, and reference, and it is for the reader's general information. It should not be considered legal advice or used as a substitute for appropriate legal research or analysis related to the facts and circumstances of a particular matter. Any use or reliance on this paper is at the risk of the user.

The discussion of any estate tax issues, income tax issues, and other observations herein are not intended as legal or tax advice and do not take into account the particular objectives, situation, or needs of individual clients. This paper is based upon information obtained from various sources that the author

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[1] Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

[2] For example, Form 8971, Information Regarding Beneficiaries Acquiring Property From a Decedent, and Schedule A.

believes to be reliable, but the author makes no representation or warranty with respect to the accuracy or completeness of such information. Views expressed herein are current only as of the date that this paper is being written and are subject to change without notice.

IV. **STEP #1:** ESTIMATE VALUE OF DECEDENT'S PROBATE AND NON-PROBATE ASSETS

A. Filing Is Required When Gross Estate + Lifetime Taxable Gifts > Basic Exclusion Amount

Filing the estate tax return is mandatory if the combined value of the decedent's gross estate and the decedent's taxable lifetime gifts exceeds the decedent's basic exclusion amount.[3] The gross estate is defined as "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated."[4] The basic exclusion amount is $12.06 million for decedents dying in 2022[5] and $12.92 million for decedents dying in 2023.[6] By way of example, if a person dies in 2022 with a gross estate valued at more than $12.06 million, an estate tax return must be filed even if there is no estate tax due.

It may seem counterintuitive, but when the combined value of the gross estate and taxable lifetime gifts exceeds the basic exclusion amount, filing is mandatory even if the "net" value of the estate (gross estate less liabilities and deductions) is below this threshold. Similarly, when combined value of the gross estate and taxable lifetime gifts exceeds the basic exclusion amount, filing is mandatory regardless of who the beneficiaries are. Even if all of the decedent's assets pass to the surviving spouse (and qualify for the marital deduction) or a charitable organization (and qualify for the charitable deduction), an estate tax return is mandatory if the combined value of the decedent's gross estate and taxable lifetime gifts is over the basic exclusion amount.

When filing the estate tax return is mandatory, numerous negative consequences can be triggered by the personal representative's failure to file a timely return (see Section XI, below) and pay the estate tax (see Section XII, below). Some of the detrimental consequences that can result from a personal representative failing to meet the deadlines for filing a mandatory return and/or paying the estate tax liability are outlined in Section XIII of this paper.

B. Assets and Elements Included in "Gross Estate"

1. Things the Decedent Owned on Date of Death

A decedent's "gross estate" includes everything the decedent owned on the date of the decedent's death.[7] The gross estate includes all of the decedent's interest in real estate, stocks, bonds, cash, bank accounts, and personal property. It also includes claims that the decedent had against third parties, such as loans owed to the decedent and legal claims that the decedent had against others.

It is important to note that the decedent's gross estate is not limited to the decedent's "probate" assets being administered by the personal representative. The gross estate for federal estate tax purposes includes both "probate" and "non-probate" property. Therefore, it is necessary to review the "non-probate" assets passing to others as a result of the decedent's death, such as life insurance proceeds, retirement accounts, financial accounts with transfer-on-death beneficiary designations, and assets held as joint tenants with rights of survivorship.

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[3] *See* I.R.C. § 6018.
[4] I.R.C. § 2031(a).
[5] Rev. Proc. 2021-45, 2021-48 I.R.B. 764.
[6] Rev. Proc. 2022-38, 2022-45 I.R.B. 445.
[7] *See* I.R.C. § 2033; Treas. Reg. § 20.2033-1.

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