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# Estate tax repeal remains possible

President Trump's tax proposals, rolled out at the end of April, included the elimination of the federal estate tax. In a statement accompanying the presentation of the one-page proposal, economics adviser Gary Cohn said: "The threat of being hit by the death tax leads small business owners and farmers in this country to waste countless hours and resources on complicated estate planning to make sure their children aren't hit with a huge tax when they die. No one wants their children to have to sell the family business to pay an unfair tax."

Cohn clarified that the repeal of the estate tax would be immediate, not phased in over a period of years.

We are no closer to knowing the fate of the federal gift tax or the generation-skipping transfer tax, however. It has been argued by some observers that the gift tax must be retained so as to protect income tax revenues. No indication on the fate of basis step-up, or the possibility of taxing unrealized gains at death.

The original target for enactment of the President's tax proposals, before the August recess, now looks unlikely.

# Separate track for IRS reform

Given the controversy over the IRS' targeting of conservative groups and the surprising hard drive failures that emerged during the Congressional investigations of that situation, there is support for restructuring the agency in order to prevent such occurrences in the future. However, that effort will be not included in the general tax reform legislation, according to House Ways and Means Tax Policy Subcommittee Chair Peter J. Roskam (R-Ill.). The IRS "needs to be reformed structurally, we're arguing, and it also needs to be reformed in terms of its disposition," Roskam told reporters on May 2, but that effort will happen after tax reform is completed.

# A new angle on estate tax reform

An executive order signed by President Trump on April 25 established a task force on Agriculture and Rural Prosperity. The panel is charged with identifying laws and regulations to promote preservation of family farms.

Changes to the federal estate tax might by one avenue of inquiry. If the estate tax is repealed, family farmers would want to preserve the basis step-up at death for agricultural assets.

*COMMENT: The Center on Budget Policies and Priorities has argued that making the family farm the poster child for estate tax repeal is misguided, because each year there are only about 50 estates large enough to be taxable that contain agricultural property. However, the Center's studies fail to account for all the farms that are sold to large agribusinesses before death, as part of an estate plan to provide liquidity to heirs to meet death tax obligations. The consolidation of agricultural resources, and the disappearance of family farms around the country, is beyond dispute.*

## Valuation Regs. on the chopping block?

When President Trump ordered a review in April of burdensome tax regulations, estate planners might have been hoping that the valuation Regs. proposed last year on closely held businesses could be candidates for extinction. The Proposed Regs. reportedly received over 10,000 negative comments, many from organizations that lobby for family businesses. Ways and Means Committee Chair Kevin Brady (R-Tex.) applauded the call for reducing tax regulations that impede economic growth, and mentioned estate tax regulations in addition to §385 regulations on debt and equity.

## Perjury in the Michael Jackson case?

In the Tax Court case concerning the value of Michael Jackson's taxable estate, the IRS called an expert witness. On cross examination, the witness was asked if he had worked on similar issues for the IRS in the Whitney Houston case, also before the Tax Court concerning the value of Ms. Houston's intellectual property rights. The witness denied doing any such work. However, when presented with documentary evidence, the witness recanted.

The IRS moved to strike the challenging testimony, or at least to seal it. The estate moved to strike all of the expert's testimony as tainted by perjury. That motion is pending, but in the meantime the Tax Court has refused to seal any portion of the testimony. That fact that the Houston estate is under audit is public information, not protected by the taxpayer privacy rules of IRC §6103.

*—Jackson, Estate of Michael J. et al. v. Commissioner; No. 17152-13*

## Can §1031 be saved?

The favorable tax treatment of "like-kind exchanges" under IRC §1031 has been challenged frequently in the past. For example, the Obama administration proposed restricting like-kind exchanges in every budget request since 2014, including a $1 million cap on exchanges in its fiscal 2017 budget proposal.

From the other side of the aisle, former Ways and Means Chair, Republican Dave Camp's proposed Tax Reform Act of 2014 included elimination of tax favors for like-kind exchanges. The Camp bill was thoroughly developed and priced, so there is some thought that it may be the go-to document for finding revenue raisers as the 2017 tax reform efforts move ahead. Accordingly, advocates for preserving the long-standing tax benefit are gearing up to defend it.

The Joint Committee on Taxation estimated in January of this year a $90.2 billion revenue loss for the gains deferred on like-kind exchanges for fiscal 2016 to 2020.

## A "reasonable excuse" for failing to file a timely estate tax return

Esther Hake died on October 2, 2011, and two sons became executors of her estate. As a result of family disputes over the estate, they were not able to file her federal estate tax return when it was due on July 2, 2012. Their professional advisors filed a request for an automatic extension of time, Form 4768. That filing extended the due date for filing the estate tax return by six months, and it extended the time to pay the estate taxes by one year.

Unfortunately, those professionals advised the executors that the filing date was extended by a year, when it was not. They freely admitted their error in Court.

The executors prepaid $900,000 in estate taxes in February 2013. This turned out to be an overpayment, so they sought a refund of the excess when they filed the estate tax return on July 2, 2013, the date they had been told the estate tax return was due. To their surprise, the IRS not only refused to provide a refund, but it also imposed a fine for the late filing.

Other courts have held that reliance upon professional counsel is not a reasonable excuse for not determining accurately the due date of an estate tax return [e.g., *Knappe v. United States*, 713 F.3d 1164 (9th Cir. 2013); *West v. Koskinen*, 141 F. Supp. 3d 498 (E.D. Va. 2015)]. However, in the Third Circuit the controlling precedent is *Estate of Thouron v. United States*, 752 F.3d 311, 314 (3d Cir. 2014). *Thouron* involved the timely payment of the tax, not the timely filing of the return. The taxpayer had been advised by counsel that deferred payment of the taxes would be available, and so did not remit the tax payments with the estate tax return. The Court of Appeals found that reliance to be reasonable and abated the penalty for late payment.

So also did the District Court in this case. The Court emphasized that it was not making new law, and the result was restricted to the narrow facts of this case. The fact that the executors had been diligent in the management of the estate, and had in fact overpaid the estate tax before it was due, was a factor in reaching this conclusion.

*—Estate of Esther M. Hake et al. v. United States, USDC PA, No. 1:15-cv-01382*

*COMMENT: Compare Janice C. Specht et al. v. U.S., CA-6, No. 15-3095, in which the estate's attorney had terminal brain cancer and was effectively incompetent. The executor had no inkling of the attorney's condition. The attorney's incompetence did not render the executor incompetent, the Court of Appeals ruled, and allowed millions in penalties to stand.*

*ANOTHER COMMENT: The estate's motion to recover attorney's fees required to vindicate its position was denied. The estate was worth between $7 million and $8 million, and fees are not available to those with a net worth greater than $2 million, no matter how thoroughly they prevail. What's more, the court found that the IRS' position was "substantially justified" even though the taxpayer eventually won.*

## Oversight forgiven

D created an irrevocable generation-skipping trust for his three children and their families. Later that year he made a substantial transfer of assets into the trust. D's CPA prepared a gift tax return, in which D and his spouse split the gift to the trust, so as to treat it as made one-half by each of them. However, no allocation of the generation-skipping transfer tax exemption was made for the transfer. The oversight was discovered after D's death. The estate of D and D's spouse now ask the IRS for an extension of time to make the election.

The IRS concludes that the family's reliance upon a qualified tax professional was reasonable, and it grants a 120-day extension for the GSTT election.

*—Private Letter Ruling 201711001*

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