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In This Issue

- PPP program fix passed
- New filing date for estate and gift returns and elections
- When does a loan turn into a gift?
- Enforcing the donor's intent
- Grandfather status saved
- Attempted decanting goes badly
- More charitable deductions for non-itemizers

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PPP program fix passed

The House passed the Paycheck Protection Program Flexibility Act of 2020 [H.R. 7010] by a 417-to-1 vote on May 28, and the Senate followed up by unanimous consent on June 3. Key flexibility added with the act:

• businesses have 24 weeks instead of eight to spend the loan proceeds;

• only 60% of the proceeds must be used for payroll;

• loan maturity expanded to five years for the portions of the loan not forgiven;

• qualified employers may defer payroll taxes even if they have received a PPP loan, a result explicitly forbidden in the CARES Act.

When the CARES Act was enacted, most observers expected the economic lockdowns to last for only two weeks, so the original eight-week bridge seemed enough. Unfortunately, as the lockdowns extended on, the federal government was demanding some small businesses spend money on payroll while their state governments were demanding they stay closed. That severely diminished the efficacy of the PPP loan program.

Some were unhappy that the 60% threshold is a cliff, so that an employer who spends 59% on payroll is not eligible for the forgiveness.

—H.R.7010

COMMENT: If a business has a PPP loan forgiven because the proceeds were used for payroll as Congress intended, are those payroll expenses still deductible? No, said the IRS in Notice 2020-32, that would be double dipping. "So what?" some senators have responded, as that was the result that they intended with the law because of the severity of the economic calamity. A bill to reverse the IRS notice, S. 3612 [the Small Business Expense Protection Act of 2020] had advanced in the Senate.

New filing date for estate and gift returns and elections

The initial delay of the 2020 tax return deadline to July 15 by the IRS covered the income tax, not transfer taxes. With *Notice 2020-23*, the Service added a similar rule for estate and gift tax filings. Any Form 706 (estate tax return) or Form 709 (gift tax return) that is due on or after April 1, 2020, and before July 15, 2020, will have its due date pushed to July 15. The delay is an acknowledgement of the difficulty that tax professionals are having in meeting with clients during the pandemic to be able to complete such returns.

—IRS Notice 2020-23

COMMENT: The Service posted a Q&A on COVID-19 Relief for Estate and Gift Tax at: irs.gov/business/small-business-self-employed/covid-19-relief-for-estate-and-gift. For example:
- *the due date is extended to July 15 for filing Form 8971, Information Regarding Beneficiaries Acquiring Property From a Decedent;*
- *claims for refunds of estate, gift, and generation-skipping transfer taxes have an extended date; and*
- *the portability election (DSUE) gets extended along with the estate-tax filing date, and those estates without a filing requirement are also extended.*

When does a loan turn into a gift?

Mary was in the habit of advancing funds to her children as loans, then forgiving a portion of such loans each year in the amount of the gift tax annual exclusion. However, her advancements to her oldest son, Peter, were substantially larger, in order to help him establish his architecture practice. After some initial successes, Peter suffered some financial reverses and was not able to pay the interest on his loans.

In 1995, Mary had a legal document drafted which acknowledged that Peter owed her $771,628, that he would not be able to repay it, and that this amount would be considered an advancement of his inheritance. Peter signed the document.

After Mary died in 2010, that transaction became an estate-tax issue. At first the IRS contended that the document was effectively a note whose value must be included in the estate. That issue was conceded, and the Service argued in the alternative that it was a taxable gift to be taken into consideration when calculating the estate tax.

The Tax Court agrees with the IRS that a gift occurred, but in looking at the entire record, the Court concludes that the gift really took place five years earlier, in 1990. That was when Peter's financial difficulties became severe enough that Mary must have realized his loans would never be repaid.

—Estate of Mary P. Bolles et. al. v. Comm'r, T.C. Memo 2020-71

Enforcing the donor's intent

Universities are happy to accept large donations, but they are not so happy when donors put strings on the money. Often the money is accepted anyway. The question that the donor must resolve is how his or her restrictions on a large donation will be policed and enforced. A recent case in Michigan may be instructive.

James Bellamy was an expert in classical Arabic literature. He joined the Department of Near Eastern Studies at the University of Michigan in 1959, became a full professor in 1968, and continued teaching there until his retirement in 1995.

In 1998 Professor Bellamy created the Bellamy Trust for the management of his estate. In 2011 the trust was amended "to endow a full professorship, named after the Grantor, in the field of medieval classical Arabic literature" at the University of Michigan. Negotiations between Bellamy and the University were undertaken with the supervision of a lawyer in 2011, and a gift agreement was struck matching the terms of the trust. If there was no one on staff that met the qualifications, the University was obligated to look for an outside applicant.

Professor Bellamy's colleague and friend, Trevor Le Gassick, was the trustee of the trust and eventually the executor of Bellamy's estate after he died in 2015. Le Gassick transferred $2.5 million to the University in February 2016 to endow the professorship, and another $1 million in July 2016 to fund a graduate student fellowship.

When the University advertised for applicants for the Bellamy Chair, the notice stated that the position was for an assistant professor, not the full professorship as promised in the gift agreement. The trustee protested, the advertisement was

pulled, and Professor Ali, who already worked in the department, was hired. However, Ali did not have the requisite qualifications, a fact attested to by other faculty members. What's more, on the day that Ali was appointed, the trustee heard the department chair say that "the motive behind Professor Ali's appointment was to alleviate Department budget issues by having the Bellamy Trust rather than the Department pay Professor Ali's salary." The University evidently intended to move away from teaching classical Arabic literature and wished to add Bellamy's gift to its general fund.

Trustee Le Gassick sued the University for breach of contract, breach of fiduciary duty, and for failing to loyally honor Professor Bellamy's wishes. The University asked for summary judgment, saying that Le Gassick had no standing to bring such a lawsuit. Once the gift was complete, a new trust was created to manage the money, one entirely under the University's control. The lower court granted that motion.

The Michigan Court of Appeals now reverses. The relevant law permits lawsuits to enforce a charitable trust by "the settlor, a named beneficiary, or the attorney general of this state, among others." The trustee falls into that final category. As the fiduciary for Bellamy's estate, Le Gassick had a duty to see to it that the terms of the gift were adhered to. The summary judgment was reversed and the case returned to the lower court for additional proceedings.

—Le Gassick, Trustee v. University of Michigan, No. 344971

COMMENT: The most notorious case in this area concerns Princeton and a $35 million donation given to them by the Robertson family in 1961 to support the Woodrow Wilson School of Public and International Affairs. Their objective was the promotion of government service, as they had been inspired by the presidency of John F. Kennedy. Over the next 40 years the fund grew to more than $900 million. The Robertson heirs became unhappy with what Princeton was spending the money on, as well as a perceived loss of emphasis on government service at the Wilson School. They filed suit to have the money moved to another university. Ultimately Princeton settled for the payment of $100 million to the family so that a new, independent foundation could be created in accord with their wishes.

ANOTHER COMMENT: From an internet search it appears that James Bellamy was an academic all of his life. His publications were scholarly and did not reach a mass audience. How was he able to accumulate the wealth for a multimillion-dollar trust on a professor's salary? Professor Bellamy must also have been a shrewd investor.

Grandfather status saved

Before 1985, Father and Mother each created irrevocable trusts for their descendants. The date is important; it means that the trusts are grandfathered and protected from the application of the generation-skipping transfer tax. A son was the trustee of both trusts and was the income beneficiary of those trusts after they died. In that capacity he had the power to distribute trust corpus to himself if needed for his support.

Later, the state passed a new law for interpreting trust provisions. In general, a broad power to make discretionary distributions to oneself will be interpreted as limited to health, education, support or maintenance—in other words, it will be a limited power of appointment. That interpretation applies unless a trust is amended to specifically call for a contrary result, which did not happen in this case.

The IRS holds that when the law changed, the son's general power of appointment was converted to a special power of appointment. However, that will not be treated as a release of a general power causing a constructive addition to the trust. The son has now died, and the termination of his fiduciary power will similarly not be deemed a constructive addition. The result of these conclusions is that the grandfather exemption for the two trusts is preserved, and the GST tax will not apply.

—Private Letter Ruling 202020008

Attempted decanting goes badly

Marian Jackson had a living trust drafted in 1996, had the trust restated in January 2015, and amended the trust twice more before her death. During her life, Jackson was the trustee of her trust. After her death, the lawyer who drafted the trust took over as trustee, and that lawyer's partner became the trust protector. The primary beneficiary of the trust was Gerald Gowdy. At Gowdy's death part of the trust assets would pass to Jackson's children, and Gowdy was allowed to exercise a power of appointment in favor of his own heirs for the balance.

The trust included two important features. First, it provided that any successor trustee must have capital of $100 million, or an insurance policy with those policy limits, or have $100 million under management. Second, there was an *in terrorem* clause. Anyone who brought a lawsuit to change the terms of the trust would lose his or her interest in the trust entirely.

A year after Jackson died, Gowdy became dissatisfied with the trustee's handling of the trust. He felt the trustee's fees were too high, that paying both the trustee and the trust protector amounted to double billing, that there had been a conflict of interest in the trust drafting, and Gowdy was also upset that the trustee refused a distribution request. He asked the trustee to resign, but the trustee did not.

Gowdy then filed a lawsuit to have the trustee removed, and he asked that the trust be decanted into a new trust "to repair drafting errors." Significantly, the new trust omitted the qualifications for successor trusteeship, because Gowdy had been unable to find a successor who met the qualifications.

Unfortunately Gowdy failed to document his damages, if any, and so he lost on the merits. However, even the failed attempt to decant into a trust with materially different provisions did serve to trigger the *in terrorem* clause, and so Gowdy lost his entire trust interest.

—Gowdy v. Cook, 455 p.3d 1201

More charitable deductions for non-itemizers

To provide more people (that is, non-itemizers) a tax incentive for charitable giving, the CARES Act created a temporary $300 "above-the-line" adjustment for charitable gifts. Rep. Mark Walter, R-N.C., hopes to expand that figure dramatically with the Coronavirus Help and Response Initiative Though Year 2022 (CHARITY 2022) Act (H.R. 6490). The bill would create a universal charitable deduction for non-itemizers of about $4,000 for individuals or $8,000 for marrieds filing jointly. Requests to lift the $300 cap have been made by the Congressional Black Caucus, by 144 House members in an April 29 letter to their leadership, and by 30 senators in a May 7 letter.

—H.R. 6490

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