

“TOP TEN” ESTATE PLANNING AND ESTATE TAX DEVELOPMENTS OF 2017

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NUMBER ONE: The Fate of Tax Reform and Estate Tax Repeal

Comment on this development awaits final action by Congress.

NUMBER TWO: The Regulatory Environment in the Trump Administration

Executive Order 13771 (Jan. 30, 2017) requires two regulations to be eliminated for every one regulation added. Executive Order 13777 (Feb. 24, 2017) requires a Regulatory Reform Task Force in each federal agency to search for existing regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; are inconsistent with regulatory reform initiatives; are not transparent; or are based on Executive Orders, etc. that have been rescinded or substantially modified. Executive Order 13789 (April 21, 2017), 82 Fed. Reg. 19317 (April 26, 2017), directed to Treasury, requires Treasury and the Office of Management and Budget to “review and, if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations from the review process set forth in Executive Order 12866” – *i.e.*, a Regulatory Impact Assessment.

In this environment, Part 1 of the 2017-2018 Treasury-IRS Priority Guidance Plan (Oct. 20, 2017) recapitulates the withdrawal of the proposed section 2704 regulations. Part 2, with the heading “Near-Term Burden Reduction,” contemplates action with respect to the proposed regulations addressing basis consistency and extensions of time to make GST tax allocations and elections. Part 4, with the heading “General Guidance,” anticipates, by June 30, 2018, (1) guidance on the basis of grantor trust assets at the grantor’s death, (2) finalization of the proposed “anti-Kohler” regulations regarding the imposition of restrictions on estate assets during the six-month alternate valuation period, and (3) guidance under section 2053 regarding the effect of personal guarantees and present value concepts on deductible estate administration expenses.

NUMBER THREE: An Extreme Family Limited Partnership Case

Estate of Powell v. Commissioner, 148 T.C. No. 18 (May 18, 2017) (reviewed by the Court), addresses a classic “bad facts” case in which a family limited partnership was created with approximately \$10 million of cash and marketable securities by the decedent’s son under a power of attorney a week before the decedent died. Writing for the court, Judge Halpern found that section 2036(a)(2) applied to the decedent’s transfer. He also offered a convoluted and seemingly unnecessary analysis of the effect of section 2043, including what he acknowledged could be “double inclusion” in some cases.

NUMBER FOUR: The Withdrawal of the Proposed Section 2704 Regulations

Executive Order 13789 (April 21, 2017), 82 FED. REG. 19317 (April 26, 2017) directed the Treasury Department to identify regulations, including proposed regulations, issued on or after January 1, 2016, that (1) impose an undue financial burden on United States taxpayers, (2) add undue complexity to the Federal tax laws, or (3) exceed the statutory authority of the Internal Revenue Service. In its first report in response to that directive, Treasury identified eight such regulations, including the proposed regulations under section 2704 released on August 2, 2016. Report dated June 22, 2017, Notice 2017-38 (July 7, 2017), 2017-30 I.R.B. 147 (July 24, 2017). In its second report, Treasury announced its conclusion that the proposed regulations “should be withdrawn in their entirety. “Second Report to the President on Identifying and Reducing Tax Regulatory Burdens” (dated Oct. 2, 2017; released Oct. 4, 2017), 82 FED. REG. 48013 (Oct. 16, 2017). They were withdrawn on October 20, 2017. 82 FED. REG. 48779.

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NUMBER FIVE: Continued Tension Between Congress and the IRS

Decades of congressional suspicion of the IRS, fueled by Congress's own culture of partisanship, has produced substantial reductions in the IRS budget and consequently in its ability to do its job. Reduced training resources are especially evident in interactions by taxpayers and their representatives with the IRS.

NUMBER SIX: Developments with Portability on Several Fronts

The Oklahoma Supreme Court holds that making a portability election is part of the executor's duty to preserve estate assets. *In re Vose*, 390 P.3d 238 (Okla. Jan. 17, 2017).

The IRS extends transitional simplified extensions of time to file portability-only returns through January 2, 2018, and provides permanent relief through the second anniversary of the decedent's death for all decedents dying after January 2, 2016. Rev. Proc. 2017-34, 2017-26 I.R.B. 1282 (June 9, 2017).

Tax Court enforces section 2010(c)(5)(B), allowing the IRS to re-examine the predeceased spouse's estate tax return after the statute of limitations has run, for the purpose of determining the correct DSUE amount available to the surviving spouse. *Estate of Sower v. Commissioner*, 149 T.C. No. 11 (Sept. 11, 2017).

NUMBER SEVEN: Growing Legislative Acceptance of Asset Protection Trusts

Michigan becomes the 18th state to authorize self-settled asset protection trusts by statute.

NUMBER EIGHT: Measured Retroactive Relief for Same-Sex Married Couples

Some retroactive recalculations of marital deductions and generation assignments are allowed, but not claims for refund, after the statute of limitations has run. Notice 2017-15, 2017-6 I.R.B. 783 (Jan. 17, 2017).

NUMBER NINE: Decline of State Estate Taxation

Delaware and New Jersey eliminate their estate taxes. Minnesota increases its estate tax exemption.

NUMBER TEN: Challenges to the Substantiation of Charitable Contributions, Including Continued Challenges to Conservation Easements

The Tax Court denies charitable contribution deductions because of inadequate documentation. *Oatman v. Commissioner*, T.C. Memo. 2017-17 (Jan. 17, 2017) (no contemporaneous acknowledgment); *Luczaj & Associates v. Commissioner*, T.C. Memo. 2017-42 (March 8, 2017) (no contemporaneous acknowledgment); *Izen, Jr. v. Commissioner*, 148 T.C. No. 5 (March 1, 2017) (special requirements for contributions of vehicles); *RERI Holdings I, LLC v. Commissioner*, 149 T.C. No. 1 (July 3, 2017) (failure to disclose basis); *Ohde v. Commissioner*, T.C. Memo. 2017-137 (July 10, 2017) (no credible evidence of contributions to Goodwill Industries).

Certain syndicated conservation easements are now listed transactions. Notice 2017-10, 2017-4 I.R.B. 544 (Jan. 23, 2017). Other conservation easement litigation continues. *RP Golf v. Commissioner*, 860 F.3d 1096 (8th Cir. Feb. 7, 2017), *aff'g* T.C. Memo. 2016-80 (liens not subordinated); *Palmolive Building Investors, LLC v. Commissioner*, 149 T.C. No. 18 (Oct. 10, 2017) (liens not subordinated); *Ten Twenty Six Investors v. Commissioner*, T.C. Memo. 2017-115 (June 15, 2017) (deed not recorded); *Partita Partners LLC v. United States*, ___ F. Supp. 3d ___ (S.D.N.Y. July 10, 2017) (entire façade not preserved); *Salt Point Timber, LLC v. Commissioner*, T.C. Memo. 2017-245 (Dec. 11, 2017) (permitted replacement by a "comparable conservation easement" could permit an unqualified entity to hold the replacement easement); *310 Retail, LLC v. Commissioner*, T.C. Memo. 2017-164 (Aug. 24, 2017) (deed can be contemporaneous acknowledgment); *Big River Development, L.P. v. Commissioner*, T.C. Memo. 2017-166 (Aug. 28, 2017) (deed can be contemporaneous acknowledgment); *BC Ranch, II, L.P. v. Commissioner*, 867 F.3d 547 (5th Cir. Aug. 11, 2017), *rev'g and rem'g Bosque Canyon Ranch, L.P. v. Commissioner*, T.C. Memo. 2015-130 ("tweaking" of homesite boundaries allowed, but valuation and other issues yet to be decided).