

The Year in Review: An Estate Planner's Perspective on Recent Tax Developments

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Keeping Up with Tax Changes Can be a Bear!



Dematteo –
**What is that old
policy really
worth?**
p. 2

Do you have to value a long-held life insurance policy based on its interpolated terminal reserve (plus unexpired premium), or can you get a real appraisal based on the policy's value in the secondary market?

What is the interpolated terminal reserve, anyway?

Cinader –
Reverse split
dollar life
insurance
pp. 3-5

The Tax Court has before it a case that may decide whether the IRS can value pure life insurance protection (Table 2001) differently depending upon whether it is provided to the insured or someone else.

If the taxpayer wins, this will open a useful technique for lifetime transfers of wealth with reduced or no gift taxes.

Levine –
Intergenerational
family split-dollar
life insurance
works – sort of
pp. 5-8

Tax Court, in a memo decision by Judge Holmes, holds that intergenerational-split dollar life insurance can effectively transfer wealth without gift or GST taxes.

This analysis is not really different from the less favorable decision in *Morrisette* (pages 6-10). *Levine* just had better facts.

***Connelly – Insurance
Proceeds Paid to
Corporation and
Used to Redeem
Decedent’s Stock
Added to Value of
Corporation’s Assets***

pp. 8-9

District Court agreed with a 2004 Tax Court memo decision and disagreed with the 11th Circuit decision reversing it, that life insurance death benefits paid to a corporation and used to redeem the stock of the deceased insured shareholder are themselves assets of the corporation that should be taken into account in valuing its shares.

Oakbrook Land Holdings, Hewitt, and others – Circuits split over how to divide proceeds from an involuntary termination of easement property; Tax Court torn over how to proceed pp. 10-14

The 6th and 11th Circuits split over the validity of Regs. that require, if a conservation easement is terminated involuntarily (usually because of fire or eminent domain), the proceeds be divided between the donor and the donee solely in proportion to their respective shares (based on the original gift) of the value of the property on the date of termination. Specifically, the regs do not let the donor receive full repayment of the value of the donor's post-gift improvements to the property.

The 6th Circuit (*Oakbrook Land Holdings*) and the Tax Court held that the regs complied with the Administrative Procedure Act.

The 11th Circuit (*Hewitt*) held that the regs did not comply with the Administrative Procedure Act and were invalid.

The Tax Court follows *Hewitt* in cases appealable to the 11th Circuit, but not if the impermissible adjustment in the proceeds relates to something other than post-contribution improvements.

Off to the Supreme Court?

*Pickens Decorative
Stone, LLC – Don't
rush the easement
donee*

pp. 19-20

Donors can retain the right to change conservation easement property with the written consent of the donee.

Can they require that the donee give consent within a specified amount of time?

*Hickory
Equestrian, LLC --
Don't skimp on
the appraisal
summary
p. 22*

Taxpayers must file IRS Form 8283 (Noncash Charitable Contributions) for any noncash gift of more than \$500. The regulations require basis information as part of this form. Is a Form 8283 that does not include basis information ever sufficient?

**Proposed
retirement
benefit
regulations
p. 24-40**

This is Exhibit A in support of my contention that the tax laws on retirement benefits are the least intuitive part of the Code.

You know what the Code is trying to do, but both it and the regulations seem to deviate from their objectives with surprising frequency.

***Rum Collins is not
just a cocktail –
It can be easy to
show willfulness of
FBAR failures
pp. 42-51***

Cases like *Collins, Rum, Bedrosian*, and many others show that many facts can be used to prove that a taxpayer's failure to file the Foreign Bank Account Report (FBAR) is willful.

The penalties for willful failure to file can be very high.

Bittner -- Supreme Court will decide how to calculate the penalty for nonwillful FBAR penalties -- the difference can be huge
pp. 51-55

In *Bittner*, the 5th Circuit held that the \$10,000 penalty for non-willful failure to file FBAR is based on the number of foreign accounts that were not reported and imposed annually.

In *Boyd*, the 9th Circuit held that the penalty is based on the number of FBARs that are not timely filed and imposed annually.

Cert granted in *Bittner*.

Perspective -- the difference in the two calculations in *Bittner* was a penalty of \$2.7 million versus a penalty of \$50,000.

***Toth, Kahn, & Kimble* -- Is there still a \$100,000 cap on willful FBAR penalties? pp. 55-58**

The \$100,000 cap on the penalty for willful failure to file FBAR was removed from the Code, but the regs were never changed. Does the penalty cap still exist?

Most judges have said no. See *Toth* (1st Cir.), *Rum* (11th Cir.), and majority in *Kahn* (2nd Cir.), as well as many district courts. On the other side, see the dissent in *Kahn*.

Schwarzbaum --
\$100,000
penalties
imposed on
empty FBAR
accounts
p. 59-60

The district and appellate courts argued over how to calculate the penalty for willful failure to file FBAR, but both approved assessment of a \$100,000 annual penalty on each of three empty accounts and each of six accounts the balances on which were only estimated.

Mikulin -- Most trustees can't represent the trust in court

p. 65-66

The grantor was also the trustee of an irrevocable trust.

Both the district court and the 5th Circuit held that he cannot represent the trust in court, just because he is not a lawyer.

**Proposed
boomerang regs
clawback the
basic exclusion
amount
pp. 69-71**

In 2019, Treasury issued final regs preventing a clawback where an individual uses the temporarily doubled basic exclusion amount to shelter taxable gifts from gift tax, and then dies or makes additional taxable gifts after December 31, 2025.

And now, the exceptions.

Rev. Proc. 2022-32 -- IRS extends to 5-Years the time to elect portability if no 709 was otherwise due pp. 71-73

IRS now allows executors up to 5 years after decedent's death to file 706 electing portability, but still only if no return was otherwise required because the estate was under the filing threshold.

*Sec. 2053 proposed
regs on deducting
contingent future
payments, loan
guarantees, and
other stuff*

pp. 79-82

Proposed regs. would give guidance on

- **Deducting the present value of a contingent future payment;**
- **Deducting interest on estate taxes and penalties;**
- **Deducting interest on other estate debts;**
- **Deducting personal loan guarantees.**

**IRS will now
charge \$67 for an
estate tax closing
letter – but will
speed improve?
p. 84**

The IRS will now charge \$67 for an estate tax closing letter, but it promises to make them easier to obtain.

Be skeptical. They used to be automatic, and they were not that easy to get then.

***Nelson -- Defined
value clauses
work only if
done correctly
p. 89-91***

**Taxpayer sells and gives limited
partnership interests to family.**

**Taxpayer uses a defined value clause
to avoid any surprise increases in
gift tax.**

It didn't work very well.

CCM
202152018
– GRAT retro-
actively dis-
qualified for
really bad
valuation
pp. 100-103

The IRS Chief Counsel's Office retroactively disqualified a GRAT because the grantor misvalued the contributed asset.

Weren't GRATs supposed to adjust for that automatically?

*Treasury Green
Book –the
President doesn't
always get what he
wants (especially
this one)*

pp. 106-115

The Treasury's Green Book explaining the tax proposals accompanying the Administration's Budget for FY 2023 would, among other things:

- Impose a minimum tax on the unrealized gains of the wealthiest taxpayers;
- Recognize gains and losses on gifts and transfers at death of appreciated property;
- Eliminate most GRATs;
- Tax most sales to irrevocable grantor trusts;
- Require consistent valuation of promissory notes; and
- Limit the duration of GST-exempt status from allocation of the GST exemption.

Taxes Matter, but Estate Planning is Really About Families

