Estate Planning Briefs

March 2020

Letters of Transit

Billionaire Daniel Wildenstein set up a trust in the Bahamas in 1998 to manage his art collection. Wildenstein died in 2001 a resident of France. The art had been located in New York City, but had been shipped to a Swiss free port, where it was located at the time of his death. The artworks were shipped back to New York after Wildenstein died.

The trustee of the collection did not file an estate tax return until 2014, when it learned that some of the art in the collection may have been in New York at the moment of death. The issue arose after French authorities undertook a tax fraud investigation of Wildenstein's son and other family members. The trustee filed an amended return in 2017 reporting an estate tax due of $388,000 on 20 pieces of art.

That got the attention of the IRS. After an investigation the Service concluded that the value of 1,000 pieces of art should have been included in the taxable estate, so that the estate tax due came to $223 million (including penalties and interest). The Service's position was that the art was in transit while stored in Switzerland, and so under the tax treaty with France taxation is governed by its destination in New York.

Both the IRS and the trustee moved for summary judgment, but the Tax Court turned them both down. A hearing will be needed to further develop the facts in the case.

- Estate of Wildenstein v. Commissioner, Dkt. No. 3423-18

COMMENT: If the estate loses this case, a portion of the collection likely will have to be sold to pay the taxes.

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The Biden Tax Plan

Presidential candidate Joe Biden's tax plan was scored by the Urban-Brookings Tax Policy Center (TPC) and found to boost federal revenue by $4 trillion over ten years. Key elements of the plan include:

- Applying the payroll tax to all earnings above $400,000;
- Increasing the corporate tax rate to 28%;

- Treating capital gains and dividends as ordinary income above a $1 million threshold;
- Restricting basis step-up at death;
- Replacing the deduction for retirement plan contributions with a 26% refundable tax credit.

According to the TPC analysis, the top 1 percent would pay roughly $300,000 more in taxes, the middle quintile would see their taxes go up by $260, and the bottom 20 percent would pay $30 more.

— https://www.taxpolicycenter.org/publications/analysis-former-vice-president-bidens-tax-proposals/full

COMMENT: The report makes no mention of the effect that these dramatic tax changes might have on economic growth.

Help for Gig Workers

The IRS launched a new Gig Economy Tax Center on IRS.gov to help those in the on-demand or access economy. These workers often don't receive W-2s, 1099s or other information returns for their work. However, their income is generally taxable, regardless of whether they receive information returns.

Key topics include:

- Filing requirements;
- Making quarterly estimated income tax payments;
- Paying self-employment taxes;
- Paying FICA, Medicare and Additional Medicare;
- Deductible business expenses;
- Special rules for reporting vacation home rentals.

— IR-2020-04, https://www.irs.gov/businesses/gig-economy-tax-center

Tortious Interference with an Inheritance Unrecognized

In 2009 Elizabeth Briggs amended her revocable living trust to disinherit her son, Thomas, leaving the trust assets to her daughter, Judith. The amendment stated that Thomas knew the reasons for his disinheritance.

After Elizabeth died in 2013, an attorney for the estate and trust advised Thomas that he received no property from his mother's estate. The notice also advised Thomas that he had 60 days to commence any judicial proceeding against the trust.

Acting as his own lawyer, and within the 60 days, Thomas emailed the county clerk and the attorney a "Notice of Objection to the Trust Instrument of Elizabeth A. Briggs." The nature of objection was not specified, and no relief was requested. No court file was opened.

Some 611 days after Thomas received the 60-day notice, he commenced a judicial proceeding to contest the amendments to the trust. He also alleged undue influence over Elizabeth by Judith, as well as that she breached her fiduciary duties.

In 2010 the relevant state law (South Dakota) was amended to create the 60-day window for lodging an objection to the validity of a trust or a trust amendment. That specific statute of limitations supersedes the more general state statute of limitations governing undue influence claims, the lower court held, and the South Dakota Supreme Court agreed. Thomas' filing of an objection to the trust did not toll the statute; he had 60 days to commence his action, he did not, and so the suit was untimely.

As to the alleged breach of fiduciary duty, Judith was not named as a defendant to the lawsuit.

The trust was not liable for any of Judith's actions as her mother's caretaker, even assuming she exercised undue influence. Accordingly, that claim was dismissed as well.

Unsatisfied with this result, Thomas hired a lawyer and took the matter to federal court, alleging tortious interference with his inheritance. As this tort is not universally recognized, the District Court certified the question to the South Dakota Supreme Court to determine the law of the state. Following a thorough review of the high court cases in states that recognize the tort, those that reject the tort, and those that fall in the middle, the South Dakota court rejected this legal approach. "We are not persuaded to adopt a cause of action for intentional interference with inheritance and expand tort liability to the already existing panoply of remedies available to estate litigants in South Dakota."

— Matter of Certification of a Question of Law, 931 N.W.2d 510 (2019)

COMMENT: Expansion of the law in this direction is the job of the legislature.

Top Five Taxpayer Problems

The Taxpayer Advocate at the IRS has issued the annual report to Congress identifying problems encountered by taxpayers and the most litigated issues during the past year.

The top five problems were:

1. **Customer Service**. The IRS needs to develop a comprehensive customer service strategy that puts taxpayers first and focuses on measurable results.
2. **Modernizing IT**. IRS has a modernization plan for information technology but needs the money to complete it.
3. **Funding**. The Taxpayer Advocate believes more money for the IRS is warranted.
4. **Processing delays**. Refund fraud filters have been slowing refunds for legitimate returns, causing financial hardship in some cases.
5. **Free filing programs**. Changes are needed to meet the needs of eligible taxpayers.

— www.TaxpayerAdvocate.irs.gov/2019AnnualReport