planning matters

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Tax Updates From Washington • 2018 Tax Amnesty in New Jersey

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tax updates from Washington

by Elizabeth Candido Petite, Esq.

State & local tax deduction workarounds rejected

The workarounds to the new federal cap on deductions for state and local taxes ("SALT") are not likely to be effective, according to proposed regulations issued by the IRS in late August. The Tax Cuts and Jobs Act, signed into law by President Trump in December 2017, capped the SALT deduction at $10,000 for taxpayers who itemize their deductions. As a workaround, several states (including New Jersey and New York) have permitted municipalities to establish charitable foundations to collect property taxes, thus allowing residents to claim a charitable deduction for the property taxes paid, and the states have enacted state tax credits for such charitable donations. However, the IRS has indicated that these strategies will not work to the full extent envisioned by state and local leaders. The proposed regulations provide that taxpayers who itemize deductions shall be eligible for a federal deduction that equals only a small fraction of the state tax credits for such charitable donations. Local leaders have vowed to challenge these new regulations.

Income tax deductions for trusts & estates confirmed

The Treasury stated in Notice 2018-61 (issued on July 13, 2018) that trusts and estates are entitled to income tax deductions for administration expenses paid solely as a result of being an estate or trust. This guidance was necessary to explain the impact on trusts and estates of Internal Revenue Code Section 67(g), which was added as part of the Tax Cuts and Jobs Act. The new Code section suspends miscellaneous itemized deductions for individuals for tax years 2018 through 2025. Notice 2018-61 clarifies that trusts and estates may continue to deduct certain administration expenses, and states that Treasury intends to issue regulations confirming this position. Regulations will also be issued regarding the deductibility of such expenses for the individual beneficiaries of trusts and estates in the final year of administration, when deductions are typically passed through to the beneficiaries.

2018 tax amnesty in New Jersey

by Robert S. Schwartz, Esq.

The New Jersey Division of Taxation has introduced a tax amnesty program, which will provide taxpayers with an opportunity to pay past due taxes with reduced interest and no penalties. The program applies to returns that should have been filed at any time between February 1, 2009 and September 1, 2017. If you or a business you operate, or an estate or trust you oversee, did not file required New Jersey tax returns or filed a return but did not pay all taxes shown as due during this period, then you can take advantage of this amnesty program. Note that the program will expire January 15, 2019.

Amnesty focuses on tax return filing deadlines instead of tax payment times. Examples of taxes and tax returns covered by amnesty include, but are not limited to, individual gross income tax (NJ Form 1040), corporation business tax (NJ CBT-100), New Jersey sales tax (Form ST-50), New Jersey inheritance tax (Form IT-R), the motor fuels tax, and petroleum receipts tax.

The monetary benefits of timely filing for amnesty and paying amounts shown as due on the returns are fairly reasonable by state amnesty program standards. The Division of Taxation may only collect the taxes shown as due on the "old" tax returns and one-half of the otherwise applicable interest accruing on back taxes.

The reduction of the interest charge to one-half is significant because New Jersey's statutory interest rates on underpaid taxes equate to 3 percentage points over the prime rate. For example, the interest accrual rate for the period from January 1, 2009 to January 1, 2010 is 7%. Under the amnesty program, the rate would be 3.5%.

This version of New Jersey tax amnesty will not allow for future installment payments of past due taxes and interest. Thus, for some desiring to take advantage of tax amnesty, we foresee that timely borrowing in order to meet a January 15, 2019 payment deadline could present difficulties, and therefore recommend applying for necessary loans as soon as possible.

For delinquent taxpayers who have not filed returns but who do not apply for amnesty within the window period, the law provides for an additional, non-negotiable penalty of 5% of all the tax underpayments as might be found in a future tax audit for periods covered by the amnesty program.

The tax amnesty legislation necessarily does not clearly address all situations, such as whether early settlement of an ongoing audit will qualify for tax amnesty.

As of the publication date, the exact dates of the tax amnesty program have not been announced, but it is anticipated that it will run for an unusually short period, beginning no earlier than November 1, 2018 and ending no later than January 15, 2019.

agents acting under a power of attorney

by David G. Hardin, Esq.

One of the useful documents in the estate planner's tool kit is the power of attorney.[1] Briefly, a power of attorney allows a person (the "principal") to name another individual (the "agent" or the "attorney-in-fact") to act on the principal's behalf, typically in financial and health matters. A power of attorney may be "general" or "limited," meaning it can authorize the attorney-in-fact to act broadly on the principal's behalf, or it may restrict the attorney-in-fact's authority to certain enumerated types of conduct (i.e., a limited power of attorney may apply solely to acts involved in the sale of a principal's real estate). In addition to being "general" or "limited," a power of attorney may also be "durable," meaning the power of attorney remains effective in the event of a future disability or incapacity of the principal.[2] For purposes of this article, the power of attorney is to be considered a durable general power of attorney, meaning the power of attorney is effective immediately upon execution, it authorizes the attorney-in-fact to act broadly on the principal's behalf, and it remains effective in the event of any subsequent disability or incapacity of the principal.

The Statutes

New Jersey's Revised Durable Power of Attorney Act, as codified in N.J.S. 46:2B-8.1 et seq. (the "Act"), grants broad authority to an attorney-in-fact to act on a principal's behalf. The Act provides: "All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period when the power of attorney is effective in accordance with its terms, including any period when the principal is under a disability, have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal were competent and not disabled." N.J.S. 46:2B-8.3. This section purports to state that the acts of the attorney-in-fact are binding upon the principal and the principal's successors in interest, suggesting that the acts of the attorney-in-fact have the same effect as if the principal had acted himself or herself. While this is true, the law in New Jersey requires more.

Agent's Additional Duties

New Jersey law imposes a higher duty upon an attorney-in-fact acting on behalf of a principal under a power of attorney. An attorney-in-fact in New Jersey has a fiduciary obligation to the principal and must act "within the powers delegated by the power of attorney **and solely for the benefit of the principal**." N.J.S. 46:2B-8.13.a [emphasis added].[3] A common situation in which a power of attorney may expressly authorize an attorney-in-fact to act, but where the act will be prohibited, involves lifetime gifts.[4] While an individual generally has broad power to make lifetime gifts of his or her own property, unfettered by any restrictions or constraints, an attorney-in-fact operating under a power of attorney does not have that same authority. An attorney-in-fact may not use the principal's resources unilaterally to favor himself or herself in ways that are contrary to the principal's wishes.

Violation of Fiduciary Duty

A case decided in New Jersey earlier this year touched upon this issue. *See* In the Matter of the Estate of Irene Halpecka, No. A-5400-15T1 (App. Div. January 10, 2018) (slip op.) ("Halpecka"). In Halpecka, the decedent executed a power of attorney during her lifetime appointing a neighbor as attorney-in-fact to act on her behalf. The decedent named the attorney-in-fact as executor of her will as well and included the attorney-in-fact among the beneficiaries of her will. Immediately after the power of attorney was executed, the attorney-in-fact began transferring Halpecka's assets to herself, which effectively depleted the estate to be shared by the beneficiaries under the will (thus enriching the attorney-in-fact at the expense of the other beneficiaries). When the lifetime transfers were challenged in court, the judge ruled that the attorney-in-fact had violated her fiduciary duties, concluding that she "used the trust reposed in her by Halpecka to substantially deplete [the] probate estate for the effect of defeating [the] testamentary intent." *Id.* at 3. The court entered judgment in the case requiring the attorney-in-fact to reimburse the estate for all amounts she improperly transferred to herself using the power of attorney in violation of her fiduciary duties to Halpecka and the beneficiaries under the will. To compound the situation, the court ordered the neighbor to pay over $100,000 to reimburse the beneficiaries for the legal fees incurred to protect their interests in Halpecka's estate.

The Halpecka case stands as a clear example of the established principle prohibiting self-dealing by an attorney-in-fact in violation of fiduciary duties. The fiduciary status of an attorney-in-fact is expressly set forth in the Act and it will be consistently enforced in the courts of this state. Any person serving as an attorney-in-fact is well-advised to be cognizant of the responsibilities of the position and the limitations imposed by the Act.

1. The power of attorney is distinguished from the living will, health care proxy, and advance directive for health care, all of which are generally restricted to end-of-life medical situations.

2. Under New Jersey law, a power of attorney is not "durable" unless the principal expressly makes it so. In order to create a durable power of attorney, the instrument must provide that it is not affected by the subsequent disability or incapacity of the principal or the mere lapse of time See N.J.S. 46:2B-8.2. It is generally advisable to establish a durable power of attorney because the onset of a disability or incapacity is the time when it is most appropriate to have an attorney-in-fact in place. A power of attorney can also provide that it is to become effective only upon the disability or incapacity of the principal. Id. This latter type of power of attorney is often referred to as a "springing" power of attorney.

3. An attorney-in-fact should keep a full and complete record of acts undertaken pursuant to a power of attorney. An attorney-in-fact may be called upon to render an accounting by the principal, a guardian or conservator of the principal, the personal representative of the principal's estate, or a court. See N.J.S. 46:2B-8.13.b.

4. The Act provides that a power of attorney does not permit gifts or other gratuitous transfers of the principal's property except where expressly and specifically authorized in the power of attorney. See N.J.S. 46:2B-8.13a.

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