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Deductibility of Executor and Trustee Fees under the Tax Cuts and Jobs Act

By: Cullen Boggus

Among the most notable changes in the recently enacted Tax Cuts and Jobs Act is the disallowance of miscellaneous itemized deductions under newly created IRC Section 67(g). Section 67 defines miscellaneous itemized deductions as all itemized deductions other than those listed in Section 67(b), which includes some of the heavy hitters like interest, taxes, and charitable contributions and gifts. Notably, trustee and executor fees are not listed amongst Section 67(b)’s protected deductions.

Does this mean fees paid to executors and trustees are no longer deductible? The answer isn’t as clear as it appears at first blush. These fees are not among the deductions listed in Section 67(b). They are instead specifically provided for in Section 67(e), which contemplates “costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate.” A plain text reading of Section 67(b) alone then implies they are miscellaneous itemized deductions.

However, it is arguable these fees are not miscellaneous itemized deductions as they might not be itemized deductions at all. Section 63(d) defines “Itemized Deductions” as the term is used in Subtitle A (Income Taxes). Section 63(d)(1) specifically excludes from the definition of itemized deductions any deductions “allowable in arriving at adjusted gross income.” Section 67(e), which creates the deductions for executor and trustee fees, is titled “Determination of Adjusted Gross Income in Case of Estates and Trusts,” and provides that the deduction for fees is for use in determining the estate’s or trust’s adjusted gross income. Under this reading, it seems the fee deduction escapes the broad slice of Section 67(g) and remains in spite of the new sweeping limitation on miscellaneous itemized deductions.

Whether the IRS will accept and apply this reasoning under the new act is unclear. However, the above is just one of many arguments put forth in support of preserving the deductibility of trustee and executor fees under the new act, suggesting their disallowance is not the forgone conclusion it might seem.

Author Biography: Cullen Boggus is an attorney practicing in Nashville Tennessee. Cullen’s practice centers on a tax-focused approach to private client services for ultra-high net worth individuals. When not in the office, you can find Cullen either reluctantly engaged in physical exercise or (preferably) following Florida Gator athletics.

Inflation-adjusted Estate Tax Exemption for 2018 is $11.18 Million

By: Melisa Seyhun

The GOP tax overhaul in the 2017 Tax Cut and Jobs Act, effective as of January 1, 2018, doubled the estate tax exemption, also known as the basic exclusion amount. Upon its enactment, the estate tax exemption amount was unclear as the legislation introduced a new method for calculating inflation adjustments. The method for calculating inflation is based on

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“Chained Consumer Price Index for All Urban Consumers” or “Chained CPI.” Historically, inflation was adjusted using the traditional CPI measure. Typically, Chained CPI better reflects changes in consumer purchasing behavior because it gathers data regarding consumer purchases before and after fluctuations in price. As a result, the Chained CPI adjustment tends to be slightly lower than traditional CPI.

On March 5, the Internal Revenue Service announced the new individual inflation-adjusted basic exclusion amount for 2018 as $11.18 million; $22.36 million is the basic exclusion amount for married couples. These changes were adopted in Revenue Procedure 2018-18, published in Internal Revenue Bulletin 2018-10. Practitioners should note that the doubling of the estate tax exemption, granted by the 2017 Tax Cut and Jobs Act, is scheduled to sunset at the end of 2025.

Author Biography: Melisa Seyhun, JD, LLM, is an Assistant Vice-President—Wealth Strategies Analyst at Merrill Lynch Private Bank and Investment Group. Melisa works with affluent individuals and families, advising them on a full range of issues in wealth transfer planning, tax planning, and business planning. Working primarily with ultra-high net worth clients, she is often faced with some of the most unique and interesting cases, including but not limited to, closely-held businesses, planning for clients whose wealth extends internationally, asset protection, pre-IPO planning, life insurance, philanthropy, and multigenerational planning. Melisa works closely with the Private Wealth Advisors to combine her estate planning expertise with a client’s financial plan to develop a holistic strategy that fits the unique needs of each client.

Stand-up Title Opinions—Some Basics

By: Kyla Gunter

A few years ago, when oil and gas companies were making money hand over fist in a number of different “plays” (oil and gas speak for a potentially lucrative geographical area, currently being drilled on by numerous companies) across the U.S., companies had the money to hire both landmen, to research the individual tracts in the “play” and title attorneys to review the research by the landmen and render a full title opinion as to the then-current ownership of the tracts researched.

. . . And then prices for oil fell below $30 per barrel, and things got much . . . tighter.

Now, even though prices are inching back up, companies remain hesitant to spend any extra money, including by hiring both a landman and an attorney to essentially split a job that an attorney could complete from beginning to end. As a result, more companies are hiring attorneys with experience in oil and gas, real property, and researching title to complete what’s commonly known as a “Stand-Up Title Opinion” (STO).

While STOs don’t always pay more than traditional Title Opinions, they definitely have their benefits. For one, anyone who has tried to read and successfully interpret a field landman’s notes knows that it can be difficult to figure out what the landman found at the courthouse or title plant and why the landman included that information in his runsheets. Doing your own research avoids that complication—you know what you were thinking when you made that note or pulled that document—no translation required!
There are a number of common issues and pitfalls you might run into doing your first few STOs, but those issues and pitfalls are outside the scope of this article. Usually, your best bet in the courthouse when researching title is the same as in any other courthouse scenario—be respectful of and friendly to the court staff—they know where everything is located, and might be able to give you some hidden gems of information if you get stuck.

Best of luck!

Author Biography: Kyla Gunter, Attorney at Law, is a solo practitioner, practicing in Fort Worth, Dallas, and surrounding areas. Her primary areas of practice include real property law; oil and gas law; and wills, estates, and probate law. Her love of “all things property” started when she was a Notes & Comments Editor for the Texas Wesleyan (now Texas A&M) School of Law’s Journal of Real Property Law, and continued during her work as an oil & gas landman, examining title in, among other locations, the Permian Basin in Texas and the Utica Shale Play in Eastern Ohio.

NEWS AND ANNOUNCEMENTS

Call for Article Submissions

We Need Authors! The YLD RPTE Committee’s quarterly newsletter and 101/201 articles provide young lawyers a unique opportunity to have articles published and distributed to thousands of other young lawyers across the country. If you are interested in submitting an article for publication for 101/201 articles or for the upcoming summer 2018 newsletter, please submit a brief description of your proposed article topic by July 6, 2018, to Content Editors Andy Peluso (andy.peluso@hwhlaw.com) and Daphna Davidovits (ddavidovits@ecjlaw.com). For article topics that are approved, authors must submit draft articles by July 20, 2018. Articles for the newsletter should discuss recent legal developments and be 200 to 600 words in length.

Teleconferences and Webinars

The YLD RPTE Committee will be hosting teleconferences and webinars in the near future. Be on the lookout!

Upcoming Events

- May 9–12, 2018 30th Annual RPTE Spring Symposia & Leadership Meeting; Orlando
- May 10–12, 2018 Spring YLD Conference; Louisville
- August 2–7, 2018 ABA Annual Meeting; Chicago

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