Preparation of Estate Tax Returns

By Marc S. Bekerman

1. Is an Estate Tax Return Due?

    a. Federal exemption of $2,000,000

        i. Scheduled to go to $3,500,000 for 2009, then unlimited in 2010, then $1,000,000 indexed for inflation from 2001

        ii. Reduced by amount of lifetime gift exemption used

    b. States may have different requirements

2. Gross estate

    a. Types of assets

        i. Bank accounts & cash

        ii. Stock & securities owned by the decedent

            1. Certificate held by decedent

            2. Account at brokerage house

        iii. Benefits payable to the estate

            1. Life insurance

            2. Death benefits

        iv. Retirement accounts

1. Accounts maintained by decedent

2. Accounts maintained by employer

v. Real estate

1. Residential

2. Investment

vi. Tangible personal property

vii. Miscellaneous (Partnership interests, closely held stock)

b. Need to distinguish between testamentary assets and non-testamentary assets

i. Testamentary assets

1. Pass through estate

2. Rightfully collected by fiduciary

3. Assets in decedent's name alone

4. Assets held in joint name or with a designated beneficiary where other party predeceased the decedent

ii. Non-testamentary assets

1. Do not pass through estate

2. Payable directly to named beneficiary

3. Assets held:

a. Joint with Right of Survivorship (but be careful of "Convenience Accounts")

b. In Trust For (also known as "totten trusts")

c. Payable on Death

4. May be reached for payment of estate taxes if appropriate

5. May be reached for funeral expenses or other administration expenses if estate is insolvent

c. Transfers subject to "String" provisions

i. Revocable

ii. Retained life estate

iii. Reversion

iv. Government's position re interests in partnerships

v. Transfers within 3 years of death

1. At this point, only applicable to life insurance and string provisions

d. QTIP Property

e. General powers of appointment

f. Life insurance and retirement benefits are generally included in gross estate

g. Gift taxes paid within 3 years of death

3. Valuation

a. Fair market value of property included in estate as of date of death

    i. Can elect alternate valuation only if it will reduce estate tax

    ii. AVD is sooner of 6 months after death or date of disposition (sale or distribution) of asset

    iii. AVD election is all or nothing

b. How valued

    i. Fair market value – Willing buyer, willing seller, neither being under compulsion to buy or sell and both having knowledge of all material facts

4. Deductions

    a. Funeral and administration expenses

        i. Professional fees (attorney, accountant, appraisers)

        ii. Commissions

        iii. Court fees

    b. Claims

    c. Losses

    d. Marital transfers

    e. Charitable transfers

    f. State death taxes

5. Issues in Deductions

a. Marital and charitable transfers

    i. Recipient must qualify

        1. Spouse must usually be a citizen

            a. Non-citizen spouses require special planning

        2. Charity must be recognized by IRS

    ii. Transfer must be in proper form

        1. Outright qualifies

        2. Transfers in trust have special considerations

            a. Surviving spouse must have income for life and a non-terminable interest

            b. Trusts with charitable and non-charitable beneficiaries must meet certain requirements

b. Administration expenses

    i. Must be reasonable in amount

    ii. Can only be deducted on either estate tax return or fiduciary income tax return

    iii. Must be paid or expect to be paid

    iv. Valuation issue – What about ongoing expenses such as attorney fees for litigation that will continue after filing of estate tax return? See regulations issued in 2007.

6. Gross estate less Deductions is Taxable Estate

7. Prior taxable gifts not included in gross estate

8. Taxable estate plus prior taxable gifts is Tax Base

9. Tentative tax is computed by applying tax rates to tax base – Maximum rate is 45%

10. Credits

    a. Applicable exemption amount – Currently $2,000,000; $3,500,000 for decedents dying in 2009

    b. Gift taxes paid

    c. Foreign death taxes

11. Tentative tax is reduced by credits to calculate tax liability

12. Return is due nine months after decedent's death

    a. Extension of six months available for filing of return

    b. Estate tax is due nine months after decedent's death regardless of whether an extension to file return has been granted (there is a possible application of relief provisions for estates with little or no liquidity, or have certain assets – see IRC §§6161-6166)

MARC S. BEKERMAN

Marc S. Bekerman received his Bachelors of Arts in Mathematics from the State University of New York at Binghamton, his Juris Doctor from Fordham University School of Law, and his Masters of Laws in Taxation from New York University School of Law. Marc is the Associate Director of the Graduate Tax Program at New York Law School where he also serves as an adjunct professor teaching a variety of courses related to trusts and estates in both the JD and LLM programs. Marc continues to maintain his private practice in trusts and estates.

Marc currently serves on the Council of the Real Property, Trust and Estate Law Section of the American Bar Association and as vice-chair of the section's standing committees on Continuing Legal Education and Community Outreach. Marc is a member of the Section's standing committee for Planning and is its Liaison to the Section Officers Committee Task Force on Continuing Legal Education. Marc is involved in the planning of the section's Skills Training for Estate Planners program and has published articles in numerous publications, including Probate & Property, Estate Planning and The Practical Lawyer. He is a frequent lecturer for the American Bar Association, New York State Bar Association, New York County Lawyers Association, Practicing Law Institute, and other professional organizations on a variety of topics related to trusts and estates.