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For decades, IRC Section 2053(a)(3) and its predecessors have allowed an estate tax deduction for amounts paid to settle or satisfy claims and expenses of an estate. Almost from the beginning, however, considerable controversy arose over the proper interpretation of this deceptively simple provision. Some courts, following the rationale of Ithaca Trust v. Commissioner, 279 U.S. 151 (1929), ruled that the value of a claim is determined as of the date of death, with no consideration of post-death events. Other courts, looking to the language of the statute, held that “... the claims which Congress intended to be deducted were actual claims, not theoretical ones,” ruling that a claim must be actually paid in order to be deductible. See Jacobs v. Comm., 34 F.2d 233 (8th Cir., 1929), cert. den. 280 U.S. 603 (1929).

Citing this inconsistency, the IRS finally issued a notice of proposed rulemaking in 2007, clarifying that, with a few exceptions, the amount deductible under IRC Section 2053(a)(3) is indeed limited to the amount actually paid. See REG-143316-03, “Background,” 2007-1 C.B. 1292. Final regulations, published in 2009, generally maintain this approach, although they do add a broad exclusion for aggregate claims with a value of $500,000 or less. T.D. 9468, 2009-44 I.R.B 570.

The final regulations, like the proposed regulations, broadly permit otherwise time-barred amounts to be claimed through a protective claim for refund. T.D. 9468 does not, however, set out the mechanics for making such a claim; instead, the hapless executor is told that “further procedural guidance” will be issued.

Fast forward two years—and enter Revenue Procedure 2011-48, 2011-42 I.R.B. 527, a mind-numbing 20 page compilation of new administrative rules. Section 4 of this procedure (pp. 3-13) details how to file the protective claim, while Section 5 (pp. 13-20) tells how to notify the Service once that claim is ready for consideration.

The first unpleasant surprise is that the Revenue Procedure applies retroactively to all decedents dying on or after 10/20/09. Executors concerned “as to whether [a]prior filing meets the requirements of this new procedure” are invited to refile. This is an invitation that few prudent executors will feel ready to refuse.

The second unpleasant piece of news is that the Service plans, in 2012, to issue a new, highly specialized form, Schedule PC, designed to be attached to Form 706 and used to apply for Section 2053 protective refunds. For no apparent reason, executors are also permitted to file protective claims using Form 843 (the standard protective claim form), provided that “the notation ‘Protective Claim for Refund under Section 2053’ is entered across the top of page 1 of the Form.” A separate Schedule PC or Form 843 must be filed for each claim or expense for which a protective refund is desired. Yet another trap for the unwary executor: whenever more than one Schedule PC is filed with the Form
The heart of the notification provisions is Subsection 5.03. For estates of decedents dying after October 19, 2009 and before 2012, notification means filing one or more updated, signed and properly marked Forms 843, together with copies of the originally
filed section 2053 protective claims. Estates of those dying on or after 1/1/12 have a choice. They can either follow the procedure (using Form 843) for pre-2012 decedents — or they can file an updated, signed and properly marked Form 706, “including each schedule affected by the allowance of the deduction(s) whose amount has been established and including an updated Schedule PC for each section 2053 claim or expense that has become deductible.” And, of course, copies of the originally-filed section 2053 protective claims must be attached to the Form 706. (There are also special, tortuous documentation requirements for transferees of the original fiduciary of all post-October 19, 2009 estates.)

A final word of caution. The purpose of this summary is simply to alert practitioners affected by Revenue Procedure 2011-48 to a few of its hazards. There is no substitute for your own first-hand and thorough analysis of this extraordinarily complex administrative guidance.

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