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BROOKS & BROOKS, LLP

Estate Planning with Certainty

President's Tax Relief Proposal for Middle Class Families…Watch Out!

In anticipation of the State of the Union Address, President Obama released his tax relief proposal for middle class families, including expanded child care and education and retirement tax benefits and other tax credits to support "working families." Benefits always carry a cost and to fund these benefits the President proposes the following:

1. Eliminate the "Stepped-Up" Basis Rules in the Internal Revenue Code, treating bequests and gifts as taxable events subject to capital gains tax.
2. Increase top capital gains and dividend tax rates.
3. Impose a fee on the liabilities of large US financial firms.

"Stepped-Up" Basis Rules. The White House Fact Sheet, with some rhetorical license, describes Internal Revenue Code § 1014 as the "Trust Fund Loophole." However, by definition, a "loophole" is an unintended benefit which results from tax law or interpretation of tax law. A dedicated section to the Internal Revenue Code established stepped-up cost basis, therefore, it is not a loophole, it is an intentional treatment of property inherited from an individual.

For a Definition of "Stepped-Up" Cost Basis
See our Nov-Dec 2014 Newsletter

Increasing Capital Gains Tax Rates. The President's proposal will increase the total top capital gains and dividend tax rate to 28%. The existing capital gains tax rate is tiered, but most people that consider themselves "middle class" would fall into the top rate of 20%. The President would like to see this increased to 28%. This top rate would be what was in existence when President Clinton was in office.

Exemptions for the Middle Class. The President's proposal does contain some exemptions intended to benefit some middle class taxpayers, as follows:

1. Transfers between spouses would be exempt.
2. Bequests of appreciated assets to charities would be exempt.
3. Each married couple would be allowed to transfer up to $200,000 of capital gains without paying any capital gains tax ($100,000 for a single taxpayer).

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Free Workshops

February 26, 2015

Bartlett Country Club
6:30 to 8:30 p.m.

March 10, 2015

Fredonia White Inn with
Luke Buehler
Summit Wealth Management
6:30 to 8:30 p.m.

March 24, 2015

Gowanda Community Alliance
with Rick Andersen
Andersen Cuddihy, Inc.
6:30 to 8:30 p.m.

President's Tax Relief Proposal, Cont'd.

4. The personal residence sale exemption amount would also remain at $500,000 for each married couple ($250,000 for an individual taxpayer).
5. Tangible personal property other than "expensive artwork and other collectibles" would be exempt completely, freeing families from the burden and expense of creating inventories and appraisals for income tax purposes.

Whether these proposals could pass with a Republican controlled congress is in question. However, we do know what the White House is thinking and who the President is targeting.

Decedent's Estate
When is a Gift Not a Gift?

Time and time again, cases show up in Surrogate's Court (Probate Court) dealing with an alleged gift by the decedent to a donee and someone else contests the validity of the gift.

Such a case usually has the following fact pattern: The decedent, before death, wants to make a gift of some piece of personal property, whether of small value or large, to a particular person. The decedent will tell the person (the donee) of his or her intent to make the gift. The donee usually thanks the donor for the gift and then leaves the item on the donor's property. Why? Because the donor still needed to use it before he or she died, or the donee did not have any space to store it.

Overwhelmingly, the burden of proof is on a donee to establish by clear and convincing evidence that the three basic elements of the gift have been satisfied:

1. That the donor had donative intent at the time the gift was made;
2. The delivery of the gift to the donee (constructive, actual or symbolic) was completed; and
3. That the donee accepted the gift.

When the donee does not have possession of the item, the presumption of delivery and acceptance is not satisfied and the donee has an uphill battle to prove that the gift was made.

A simple statement from case law points out the problem. "If the gift does not take effect as an executed and completed transfer to the donee, either legally or equitably, during the life of the donor, it is a testamentary disposition, good only when made by a valid Will" (or by a trust). *Ross v. Ross Metals Corp., 87 A.D. 3d 579 2011.*

So where does that leave us? If we want to make a gift before our passing, we should do it correctly and give up possession to the donee, and probably put our donative intent in writing to the donee. And of course, the donee has to accept the gift and have possession of it. Lastly, if we had provided in our trust or Will that the item was to be passed to someone other than the donee at our death, we would be well advised to make a change in our estate plan documents so that it is very clear that the item is not to go to anyone else. If you are going to disappoint a beneficiary, better that the beneficiary never know about the gift to begin with!

> "If a cluttered desk is a sign of a cluttered mind, of what, then, is an empty desk a sign?" – Albert Einstein