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Selected Recent Developments and Current Trends in Estate Planning



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Trends in IRC Section 7520 Rate

January 2021	0.6%	September 2021	1.0%
February 2021	0.6%	October 2021	1.0%
March 2021	0.8%	November 2021	1.4%
April 2021	1.0%	December 2021	1.6%
May 2021	1.2%	January 2022	1.6%
June 2021	1.2%	February 2022	1.6%
July 2021	1.2%	March 2022	2.0%
August 2021	1.2%	April 2022	2.2%

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Trends in IRC Section 7520 Rate (continued)

May 2022	3.0%	December 2022	5.2%
June 2022	3.6%	January 2023	4.6%
July 2022	3.6%	February 2023	4.6%
August 2022	3.8%	March 2023	4.4%
September 2022	3.6%	April 2023	5.0%
October 2022	4.0%	May 2023	4.4%
November 2022	4.8%	June 2023	???

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Rev. Proc. 2022-38

- \$14,450 threshold for 40.8% rate for estates and trusts
- \$12,920,000 basic exclusion amount and GST exemption
- \$17,000 gift tax annual exclusion
- \$1,310,000 special use valuation reduction limit
- \$1,750,000 IRC § 6166 2% portion
- \$175,000 gift tax annual exclusion for non-citizen spouses

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Rev. Proc. 2022-32

- Simplified procedure to obtain extension of time to elect portability
- Procedure can now be used for up to five years after predeceased spouse's death
- Supersedes Rev. Proc. 2017-34
- Detailed requirements
- Effective date is July 8, 2022

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Treas. Reg. Section 20.2010-1(c)

- Responds to IRC Section 2001(g)(2)
- Decedent won't be treated as having made "adjusted taxable gifts" solely because he or she made gifts within basic exclusion amount and died after such amount was reduced
- What about allocation of GST exemption?

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Anti-Abuse Rule – Prop. Reg. Section 20.2010-1(c)(3)

- Exception to general “anti-clawback” rule of Treas. Reg. Section 20.2010-1(c)(1)
- Anti-clawback rule wouldn’t apply to transfers includable under IRC Sections 2035, 2036, 2037, 2038 and 2042 and certain other transfers (including transfers made by enforceable promise)
- Exception to exception: Where value of taxable portion of gift is 5% or less of total gift value
- Eighteen-month rule similar to IRC Section 2035 three-year rule

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Treas. Reg. Section 300.13

- IRS charges \$67.00 fee for issuing an Estate Tax Closing Letter
- Person liable for the fee is the estate

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Chief Counsel Advice 202142010

- Addresses effect of Estate Tax Closing Letter
- Case involved estate tax return that was accepted as filed and refund issued
- Such letter doesn't bar IRS from examining estate tax return where communications between IRS and estate are "narrow, limited contacts"

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Priority Guidance Plan (11/04/22)

- Final regulations addressing:
 - Basis consistency (IRC Sections 1014(f) and 6035)
 - Personal guarantees and present value concepts in determining deductible amounts (IRC Section 2053)
 - SECURE Act modifications (IRC Section 401(a)(9))
- Regulations addressing:
 - Basis adjustment for grantor trust assets not included in Settlor's estate (IRC Section 1014)

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Priority Guidance Plan (11/04/22) (continued)

- Regulations addressing:
 - Whether anti-“clawback” rule should apply to gifts includible in gross estate (Treas. Reg. Section 20.2010-1(c))
 - GST exemption allocation issues including how and when to obtain extension of time (IRC Section 2642(g)), definition of GST trust and ordering rules when allocation exceeds exemption available
 - Use of actuarial tables to value certain temporal interests (IRC Section 7520)

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PLR 202206008

- Pre-September 25, 1985 GST-exempt trust
- Dispute arose in connection with proposed decanting
- Under settlement agreement, at death of beneficiary for life, beneficiary was to be given general power of appointment over largest amount that wouldn't increase transfer taxes
- IRS ruled:
 - Trust would retain its GST-exempt status
 - Only property subject to GPOA would be includable in beneficiary's gross estate
 - Strange statement that “exercise” of power would cause inclusion

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Chief Counsel Advice 202233014

- Testamentary charitable remainder unitrust
- Unitrust amount was 5%
- 25% of unitrust amount was to go to surviving spouse
- 75% of unitrust amount could be paid to surviving spouse or charity in the Trustee's discretion
- No estate tax marital deduction or charitable deduction
- CCA 202233014 represents a significant course reversal

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Prop. Reg. Section 20.2053-1(d)(6), (d)(7), (f), -3(d) and -4(d)(5)

- Present Value Concepts
 - Would require discounting, using AFR, any administration expense or claim not paid or to be paid within three-year "grace period"
 - Wouldn't apply to unpaid principal of mortgages
- Decedent's Personal Guarantee
 - Must be *bona fide* and in exchange for full and adequate consideration
 - Special rules if debtor is an entity in which decedent had an interest when guarantee was given

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Estate of DeMuth v. Commissioner

- Decedent made gifts by means of eleven checks totaling \$464,000
- Ten checks didn't clear the drawee financial institution until after donor's death
- Tax Court held the amount of seven checks, totaling \$366,000 were includable in gross estate
- Tax Court would have included all ten checks were it not for an IRS concession the Tax Court wouldn't allow IRS to withdraw

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Smaldino v. Commissioner

- Louis transferred LLC interests to his wife, Agustina, "effective April 15, 2013"
- Agustina transferred same interests to Dynasty Trust "effective April 15, 2013"
- Desire was to enable Agustina to use gift tax basic exclusion amount
- Gift-splitting wasn't an option

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Smaldino v. Commissioner **(continued)**

- Tax Court held Louis' transfer to Agustina was actually gift to Dynasty Trust
- Horrific timing and disastrous paperwork deficiencies

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Chief Counsel Advice 202118008

- Commutation of QTIP trust as IRC Section 2519 disposition
- Gift by surviving spouse to remainder beneficiaries
- No offsetting of gifts by spouse and remainder beneficiaries
- Valuation of IRC Section 2519 gift
- Valuation of IRC Section 2511 gift

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Estate of Bolles v. Commissioner

- Mary transferred funds to her five children over many years
- Several transfers were to Peter, whose career started strong and later fizzled
- Mary's estate said transfers to Peter were uncollectible loans having no value
- IRS said transfers were loans includible at face value or were adjusted taxable gifts
- Tax Court held early transfers were loans; later transfers were gifts

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Connelly v. United States

- Michael owned 77.18% and Thomas owned 22.82% of family company
- Stock purchase agreement allowed surviving brother to buy or, failing that, required company to redeem
- Company owned \$3.5 million in life insurance policies
- At Michael's death, company collected insurance proceeds
- Michael's estate and Thomas ignored stock purchase agreement and cut their own new deal

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Connelly v. United States **(continued)**

- District Court held stock purchase agreement didn't establish estate tax value of Michael's shares in the company
- District Court further held insurance proceeds includable in value of company for Michael's estate tax purposes
- Eleventh Circuit's decision in *Estate of Blount v. Commissioner* was considered and rejected

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Buck v. United States

- Gifts of fractional interests in real estate to sons
- Donor claimed 55% discount
- Government argued for no discount because donor didn't own fractional interests before making gifts
- District Court denied Government's motion for partial summary judgment
- Fundamental difference between valuing a donor's gifts and valuing a decedent's estate

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Estate of Jackson v. Commissioner

- Disagreement between estate and IRS regarding valuation of image and likeness (differential was huge)
- IRS expert found to have lied under oath
- Tax Court concluded image and likeness value far closer to that asserted by estate than that asserted by IRS
 - IRS valuation failed to consider decedent's severe reputational damage
 - IRS' expert wildly speculated about uncertain future events

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Grieve v. Commissioner

- Donor gave to irrevocable trusts 99.8% non-voting member interests in two LLCs
- Company owned by donor's daughter held the 0.2% voting member interests
- IRS sought to value the non-voting interests by taking into consideration the "economic realities" that the trusts could purchase the voting interests
- Tax Court rejected IRS' position as impermissible speculation and accepted estate's proposed discounts

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Chief Counsel Advice 201939002

- Settlor transferred to a GRAT stock in a company whose stock was publicly-traded
- Settlor was co-founder and board chairman
- Shortly after transfer, an expected merger was announced, and stock value increased substantially
- Usual rules governing determination of fair market value of publicly-traded stock didn't apply
- Had to use "hypothetical willing buyer-willing seller" approach

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Chief Counsel Advice 202152018

- Settlor transferred closely-held stock to a 2-year GRAT
- Annuity defined as percentage of initial stock FMV
- Settlor determined annuity amount using stale appraisal
- Merger discussions and lucrative offers in hand at time of transfer to GRAT (after appraisal date)

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Chief Counsel Advice 202152018 (continued)

- CCA says:
 - Valuation should have taken merger discussions and offers into account
 - See CCA 201932002
 - GRAT was not qualified under IRC Section 2702 from the outset
 - See *Atkinson v. Commissioner* (11th Circuit 2002)

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PLR 201932001

- Income to Son for life; no principal distributions
- Remainder to descendants
- NJSA terminated trust with actuarially computed amounts going to all beneficiaries
- IRS ruled trust termination was a taxable sale by Son and successor remaindermen to current remaindermen
- Much to dislike about this ruling

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Warne v. Commissioner

- Decedent owned 100% of the equity in an LLC
- Under her estate plan, she gave 75% to charity A and 25% to charity B
- Form 706 reflected LLC's inclusion value in gross estate and charitable deduction value as the same
- IRS maintained fractional interest discounts should apply in valuing what charities received
- Tax Court sided with IRS – with the result that these post-death gifts to charity were partly taxable

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Pinkert v. Schwab Charitable Fund

- After establishing a DAF, Philip became unhappy with the DAF's investments and sued the DAF's sponsor in federal court
- Philip alleged Schwab's DAF investments charged excessive fees
- District Court granted Schwab's motion to dismiss and 9th Circuit affirmed
- Philip's efforts failed because he lacked standing
- Although the DAF and its future beneficiaries may have been damaged, Philip had not been damaged

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Hewitt v. Commissioner

- David and Tammy established a conservation easement
- Deed provided that, if judicially extinguished, charitable donee would retain easement's proportional value minus any post-grant increase in value attributable to improvements
- The "carve-out" for increase in value attributable to improvements violated Treas. Reg. § 1.170A-14(g)(6)
- 11th Circuit, reversing Tax Court, held Treas. Reg. § 1.170A-14(g)(6) invalid because Treasury violated APA in promulgating it
- 6th Circuit's decision in Oakbrook Land Holdings, LLC, reached opposite conclusion as to same regulation

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Prop. Reg. Section 1.401(a)(9)

- Seeks to harmonize qualified plan and IRA minimum distribution rule with SECURE Act
- A few notable provisions:
 - If employee dies before RBD, 10-year rule applies for DB, and no distribution required until end of 10th year
 - If employee dies after RBD, 10-year rule applies for DB, but life expectancy distributions must be made each year and finish at end of 10th year; **but see Notice 2022-53** (October 7)

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Prop. Reg. Section 1.401(a)(9) (continued)

- A few notable provisions (continued):
 - Age of majority is age 21
 - Formerly informal terms now defined: See-through trust; conduit trust; accumulation trust
 - Who gets counted to determine DBs in trust context:
 - Only current beneficiaries and “first-line” remainder beneficiaries

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Prop. Reg. Section 1.401(a)(9) (continued)

- A few notable provisions (continued):
 - Who gets counted to determine DBs in trust context (continued):
 - *Potential* appointees under powers of appointment *not* counted
 - Minor child is EDB only during minority; then, 10-year rule
 - Disabled individual is EDB if disabled at employee’s death
 - QTIP trust would not be EDB

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