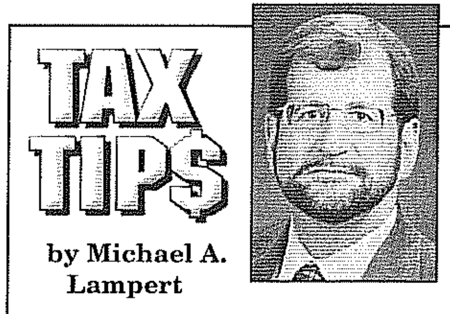
Tax tips for elder lawyers



by Michael A. Lampert

Income tax returns of sick or disabled person

It is not uncommon for an elder lawyer to have sick or disabled clients. Yet these clients often need to file income tax returns. Who can sign a tax return if the client cannot?

For a joint income tax return, the filing (well) spouse can sign for the disabled spouse by simply signing the disabled spouse's name and adding "By Husband (or Wife)" and attaching to the return a statement explaining why the disabled spouse did not sign. For individual returns, the return must be filed and signed by a duly authorized agent, such as a guardian or an attorney-in-fact under a durable power of attorney.

Trap #1

The practitioner representing an incapacitated client should never alone rely on a Form 2848, Power of Attorney and Declaration of Representative, signed while the taxpayer client had capacity. Such a power of attorney, because it is not durable, is revoked upon the taxpayer's incapacity. *Halper v. Commissioner*, 73 T.C.M. (CCH) 1897 (1997).

Trap #2

The statute of limitations on the assessment of additional tax does not begin to run on a return filed without a signature or on a return signed by another who is without authority. *Richardson v. Commissioner*, 72 T.C. 818 (1979) (unsigned return); *Elliott v. Commissioner*, 113 T.C. 125 (1999) (signature of person without authority).

What about filing for an income tax refund? As a reminder, refund claims must normally be filed within three years following the filing of the return or two years after payment of the tax, if later. I.R.C. § 6511.

Tip #1

When assuming representation for an incapacitated person, the practitioner should check to see if all tax returns have been timely filed. The practitioner should also determine whether the taxpayer client might be entitled to any refunds.

But what if the taxpayer client is incapacitated? If the refund deadline is missed, the practitioner should determine whether the limitations period has been tolled on account of the taxpayer's disability. The limitations period on refund claims is suspended during any period in which the taxpayer is unable to manage the taxpayer's financial affairs by reason of a medically determinable physical or mental impairment that can be expected to result in death or that has lasted or can be expected to last for at least one year. No suspension of the statute of limitations occurs, however, if the taxpayer's spouse or other person, such as a guardian or an agent under a durable power of attorney, is authorized to act on the taxpayer's behalf with respect to financial matters. I.R.C § 6511(h)(2)(b).

Tip #2

When requesting a suspension of the limitations period on account of disability, a statement of a physician certifying that the taxpayer had the requisite disability must be submitted. In addition, the person filing the claim for refund or credit must certify that, during the period of disability, no one was authorized to act on the taxpayer's behalf. Rev. Proc. 99-21. Obtaining tax counsel assistance is advisable.

Filing income tax returns upon death of spouse

Who files the income tax return when one spouse dies? The surviving spouse may file a joint return with the decedent for the year of death unless the survivor has remarried before the close of that year. I.R.C. § 6013(a)(2). If a personal representative or other administrator has been appointed before the last day prescribed by law for filing the return, the decedent's personal representative (referred to as executor in much of the I.R.S. guidance) or the administrator must join in the deceased client's income tax return. I.R.C. § 6013(a)(3). The personal representative or the administrator does not have to agree to filing a joint income tax return. If there is no personal representative appointed, the surviving spouse may file a joint return on the couple's behalf, unless the deceased spouse had already filed a separate return for the taxable year. I.R.C § 6013(a)(3). If a separate return had already been filed by the decedent, the surviving spouse may file a joint return only if a personal representative or an administrator is appointed who elects to join in the filing. I.R.C. § 6013(b)(1).

Trap #1

When an executor (personal representative) or an administrator is appointed for a deceased spouse after the surviving spouse has filed a joint return, the executor or the administrator may disaffirm the joint return for one year after the due date for the filing of the surviving spouse's return. I.R.C. § 6013(a)(3). This election is exercised by the filing of a separate return for the decedent. The IRS will then treat the survivor's return as a separate return and calculate the tax accordingly. Be especially careful with this risk when there is actual or threatened fiduciary litigation or disputes between the surviving spouse and children.

In addition to the right to file a joint return for the taxable year of

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the deceased spouse's death, the surviving spouse may also be eligible to file as a qualifying widow(er) and continue to be taxed at joint income tax return rates for up to two taxable years following the taxable year of the decedent's death. I.R.C. §§ 1(a), 2(a)(1)(A). To qualify for this benefit, the surviving spouse must:

1. maintain as the surviving spouse's home a household (I.R.C. § 2(a)(1)(B)), which, for the taxable year, is the principal abode of a dependent son, daughter or stepchild. These terms include adopted and foster children (I.R.C. § 152(b)(2)) for which the survivor is entitled to take a deduction for a personal exemption for that year;
2. not have remarried before the close of the taxable year (I.R.C. § 2(a)(2)(A)); and
3. have been entitled to file a joint return for the taxable year in which the decedent spouse died, without regard to the executor's or the administrator's authority to elect a separate return (I.R.C. § 2(a)(2)(B))

Trap #2

The filing of an income tax return for a decedent is separate from any requirement to file an income tax return for the decedent's estate/trust.

Without proper substantiation, no charitable deduction of household goods

It is not uncommon for a family member to donate some of the decedent's tangible personal property to charity. As is demonstrated in a recent case, proper record keeping is essential. In this case, after his mother's death, the taxpayer deducted nearly $28,000 in charitable contributions for donations of his parents' household goods, clothing and electronic equipment to a qualified charity. The taxpayer combined all of the donation acknowledgments on two blank "tax receipts" provided by the charity and prepared a spreadsheet identifying the items donated and valuing them using lists found on the Salvation Army's website. The tax court held that none of the charitable contribution deductions were allowed because the taxpayer failed to satisfy the substantiation requirements of IRC Sec. 170(f)(8) and (11). He didn't provide evidence to show the goods' condition or obtain an appraisal to support their value. Thad Deshawen Smith, TC Memo 2014-203 (Tax Ct.).

Tip #1

When handling an estate where tangible personal property is donated, make sure that there is proper donation documentation. When the donation is large enough, an appraisal may be needed. In addition, be careful that the intended donor is listed as the charitable donor.

Don't forget other states' tax issues

There are many non-Florida tax issues that need to be considered in both estate planning and in handling decedents' estates. Some include:

Old state taxes: States such as New York continue aggressively to attempt to collect back income and other taxes from their former state residents/now current Florida residents. New York, as an example, has been hiring Florida attorneys to domesticate and collect on New York tax warrants.

State death taxes: Some states' death taxes begin well below the current federal estate tax exemption amount and have an even lower exemption amount for in-state property of non residents.

Change in residency: Remember that bringing a family member client "up north" to "be with the kids" or to be in a care facility closer to the children or other family members can inadvertently change the family member's state of residence. This may result in death taxes (estate and where applicable, inheritance taxes) and state income taxes. Careful planning can reduce the risk of the family member being deemed to be a non-Florida resident.

State taxation of Social Security benefits: Under federal tax law, some portion of Social Security benefits may be included in a taxpayer's adjusted gross income (AGI). Most states with a state individual income tax base the tax on the federally determined AGI. Some states, however, subtract Social Security from AGI, and some states do not base the tax on federal AGI, yet may exclude Social Security benefits.

Trap #1

Be careful if there is a federal income tax adjustment for a tax year when your client was a resident of another state. Not only might there be increased federal income tax, but the former state may increase the state income tax based on the federal change. This arises, for example, in an IRS audit or when the IRS asserts a tax change based on information that it received from a third party, such as a financial institution reporting the client's income to the IRS.

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