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Trends & Developments

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Estate Planning

News from the Heckerling Institute on Estate Planning 1

2017 marked the 51st annual Heckerling Institute on Estate Planning, which convened in Orlando, Florida in January. Heckerling is the largest and most prestigious estate planning conference in the country. This year's Institute drew a record crowd of 3,100 attendees, comprised of the nation's leading trust and estate attorneys, financial advisers and service providers.

Several EisnerAmper professionals attended the Institute to report on the hot topics being discussed. Following are summaries of some of the discussions, as they first appeared on eisneramper.com's Personal Wealth Advisors blog.

HIGHLIGHTS FROM RECENT DEVELOPMENTS 2016

By Barbara Taibi, CPA, PFS

Panelists Dennis I. Belcher (McGuire Woods, LLP), Ronald D. Aucutt (McGuire Woods, LLP), and Catherine Veihmeyer Hughes (U.S. Treasury Department, Office of Tax Policy) began the Recent Developments session by informing attendees that, when they met this past summer to discuss this presentation, they all thought that it would be a great year for planning ideas. There was finally stability in the estate and gift tax rates and the overall assumption of an estate tax exemption between $3.5 million and $5 million. Then came the IRC section 2704 proposed regulations and the election of Donald Trump. All stability in estate planning just went out the window!

The panel first addressed the IRC sec 2704 proposed regulations. Ms. Hughes stated that nothing in the proposed regulations was intended to eliminate ALL minority interest discounts and this will be made very clear in the final regulations, along with many other changes. The IRS is currently reviewing over 10,000 comments received and have heard 36 professional witnesses who addressed the panel with their concerns and comments. The panelists would like to see "re-proposed" Section 2704 regulations issued before there are any final regulations in order to assure that the confusion is addressed and all are in agreement as to the facts. As for appraisers, there is really nothing different for them to do now. Proposed regulations have no jurisdiction over current law. However, one interesting suggestion for planners is that for gift returns filed post August 2, 2016 (which is the date of the proposed regulations), it would be prudent, if applicable, to attach a statement to the returns, stating the gift return had been prepared contrary to the proposed regulations under IRC 2704. This should avoid any penalties that may be imposed.

The panelists then discussed President-elect Trump's tax proposals and the Republican House blueprint for tax reform. The consensus was that if there was ever a year for the repeal of the estate tax, it is now. The Republicans have been fighting to eliminate the estate tax for two decades, always saying they would if they could – and, well, now they can. They have no excuse not to move quickly in this area. The unknown is what the estate tax will be replaced with and if they intend to leave the gift tax alone or make changes in the gift tax regime also. The panelists suggested that if the estate tax is repealed, there may be a deemed capital gains tax imposed at death. The capital gains tax will begin for transfers over some threshold amount, such as $10 million.

The gift tax has not been addressed much in the estate tax discussions. The gift tax is needed as an income tax back-stop. It is a way to avoid a family transferring assets to lower income members in a year with a large taxable event and then transferring back when needed. So, what is a planner to do? If you take a wait and see approach, you may have missed some opportunities for clients in the meantime. You may have situations where health or other factors requires the transfer of property sooner than later. The suggestion is to use GRATs, annual exclusions, sales to a defective grantor trust, and other vehicles which allow the transfer and shift of appreciation without a gift tax. The one point all panelists agreed on in this area is that until we have clarity, planners should not suggest lifetime gifts that would incur the payment of a current gift tax.

Lastly, Ms. Hughes discussed many areas the IRS is looking into at this time. One important announcement is that the IRS will no longer be issuing estate closing letters and requests will only be addressed under unique circumstances. The IRS simply does not have the resources to issue these letters. However,

she did suggest that taxpayers can request an "account transcript." If you receive this transcript and it has "CODE 421" on it, the estate is considered closed by the IRS. Hopefully this will be sufficient for banks to release the remaining funds and final distributions to beneficiaries can be made.

RETIREMENT ACCOUNTS IN FIRST AND SECOND MARRIAGES: THE FUN BEGINS

By Stephanie Hines, CPA

Christopher Hoyt (University of Missouri—Kansas City) presented the session "Retirement Accounts in First and Second Marriages: The Fun Begins." Mr. Hoyt opened up by summarizing the current rules and regulations as they relate to retirement accounts, outlining similarities and differences between 401(k)s and IRAs, as well as the related income tax implications. Upon conclusion of the refresher, the discussion moved to the interesting topic involving treatment of inherited IRAs and 401(k)s, the importance of these assets in an estate plan, while considering the possibility of a second marriage and a blended family. Mr. Hoyt emphasized the importance of keeping the desired beneficiaries current, as the decedent's intent will not be considered over the governing jurisdiction. Private Letter Ruling (PLR) 2016-23001 addressed the distribution of retirement assets in a community property state and some of the lessons that are to be learned. In this example, an IRA was held by an individual domiciled in a community property state, who had named his son the primary beneficiary. Upon death of the IRA owner, the court ruled that the surviving spouse was entitled to a percentage distribution of the IRA, regardless of the fact that she was not a named beneficiary. The surviving spouse requested the right to rollover the distribution into an IRA, designating her as the primary beneficiary and alleviating the immediate income tax burden. The IRS denied this request and the distribution was considered a taxable distribution -- not to the surviving spouse, but to the son. The two primary lessons learned:

- Update beneficiary designations, considering state treatment if community property is involved. If the employed individual had named both the spouse and the son, each, as 50% beneficiaries, the need for a disclaimer and a PLR could have been avoided.
- Update beneficiary designations, considering state treatment if community property is involved. If the employed individual had named both the spouse and the son, each, as 50% beneficiaries, the need for a disclaimer and a PLR could have been avoided.

Estate planning, with regard to IRAs, has been successful with the use of a Stretch IRA. The designation of a Stretch IRA allows the IRA to be passed on from generation to generation, assuming certain requirements are met and required annual distributions are made. Distributions are over the life of the beneficiary and, in certain cases of multiple beneficiaries, required minimum distributions may be less than that of the decedent.

Complexity is increased when second marriages and blended families are to be considered. Naming a trust as the beneficiary of an IRA can mitigate the concern an employed individual may have when considering the future well-being of their own children in the event the surviving spouse remarries. Regardless, if the trust is set up as a conduit for the required minimum distributions, or as an accumulation trust, the employed individual will be able to determine the beneficiaries without having to consider the possibility of a second marriage and/or a blended family.

THE EXECUTOR'S JOB GETS TOUGHER: BASIS CONSISTENCY AND SELECTED OTHER INCOME TAX ISSUES FACING EXECUTORS

By Karen L. Goldberg, JD, LLM

Steve Akers (Bessemer Trust Company) discussed the new basis consistency and information reporting rules that are now being imposed on executors. They apply to property reported on estate tax returns filed after July 31, 2015.

These new rules are as follows:

1. Basis Consistency Rule: The basis of inherited property shall not exceed its estate tax value (subject to normal post-death basis adjustments). However, this rule only applies to property that increased the decedent's estate tax liability; therefore, it does not apply to property eligible for the marital or charitable estate tax deduction. Furthermore, a harsh rule applies to any property discovered after the estate tax return is filed or that is otherwise omitted from that return: such property receives a zero basis unless it is reported on a supplemental estate tax return that is filed before the statute of limitations expires.

2. Information Reporting Rule: When an estate tax return must be filed because the decedent's gross estate plus adjusted taxable gifts exceed the basic exclusion amount in effect at the decedent's death, the executor must also file Form 8971 and Schedule(s) A with the IRS reporting the estate tax value of the property in the decedent's estate as well as provide Schedule(s) A to the potential beneficiaries showing what they received or could receive from the estate. Property not required to be reported includes the following: (i) cash, (ii) income in respect of a decedent, (iii) tangible personal property not exceeding $3,000 in value, and (iv) property sold before the information reports are due. This reporting rule applies to property eligible for the marital or charitable deduction even though such property is not subject to the basis consistency rule. Form 8971 with attachments must be filed with the IRS and the Schedule(s) A of Form 8971 provided to the respective beneficiaries 30 days after the earlier of the due date of the estate tax return (including filing extensions) or the date the return is filed. However, if the estate tax return is not timely filed, the deadline is extended to 30 days after the actual filing date. Estates filing solely to elect portability are not subject to either the basis consistency or information reporting rules.

Penalties for not complying with these rules can be steep. If a taxpayer reports a higher basis than the estate tax value, he will be subject to the accuracy-related penalties on underpayments. Furthermore, the penalty if an executor fails to comply with the information reporting rules is generally $260 per failure, with a maximum penalty of $3,193,000 per year. The penalty is generally lowered to $50 per failure, with a maximum penalty of $532,000 per year if the information reporting rules are met within 30 days of the due date.

RECENT INTERNATIONAL DEVELOPMENTS

By Jack Meola, CPA, JD, LLM

Scott A. Bowman (Proskauer Rose LLP), M. Read Moore (McDermott Will & Emery LLP) and Dina Kapur Sanna (Day Pitney LLP) discussed recent developments and focused on sweeping trends in global tax transparency.

One such trend focused on the international client who is a nonresident alien (NRA) and is looking to purchase U.S. real estate. These individuals will need to consider many factors if they are contemplating a real estate acquisition. Many NRAs want to remain as nonresident aliens without being subject to U.S. income taxes on their worldwide income. In the recent past, we would consider the following items when making a choice of establishing the structure we would propose. They are as follows (not an exclusive list):

1. The capital gains tax rate.
2. Whether step-up in basis was important.
3. Whether the client wants to be subject to U.S. estate taxes.
4. Whether the jurisdiction to which the NRA resides recognizes trusts.
5. Whether the property would be rented.
6. How long the NRA wanted to "own" the property or would it be sold? If sold, would there be a replacement property?
7. What is the overall net worth of the client?

8. Does the foreign country have controlled foreign corporation (CFC) rules that apply?
9. Which of the above is the most critical consideration regarding the purchase for the client?

Although this has always been a complex task it has now become even more so since there is a Trump proposal of eliminating federal estate taxes. Furthermore, notwithstanding that the federal estate taxes may be eliminated, should the NRA consider the possibility that an estate tax may be reinstated sometime in the future, presumably after there is a change of administration? Advisors also should consider that many other jurisdictions will likely keep their estate taxes based upon their need for revenues. Most states piggybacked their estate taxes based upon the federal estate taxes with selected differences for the treatment of various items. What will these states do if there is no federal estate tax? NRAs making real estate purchases will undoubtedly continue and advising them will undoubtedly continue to be more complex

The lesson learned from this session is the need for flexibility and the realization that nothing in taxes is permanent.

PORTABILITY: LOTS OF QUESTIONS, FEW EASY ANSWERS

By Patricia Green, CPA, CSEP

Lester B. Law (Abbot Downing) and Howard M. Zarisky (Consulting Council) presented a plenary session on portability, and the fact that there are so many questions, and so few answers. The take away from the session is not to take portability for granted. The executors must consider all the options and make a timely election if they decide it is the best strategy.

Portability came into existence with the Tax Reform Act of 2010 (TRA 2010), which allows the executor of a decedent's estate to transfer the deceased spouse's unused exemption (DSUE) to the surviving spouse. This allows the surviving spouse to use for estate or gift tax purposes the unused amount of the deceased spouse's estate.

Portability is elected by the timely filing of a complete estate tax return for the deceased spouse. Although the generation tax exemption of the deceased spouse is not portable, the executor could make a reverse Qualified Terminable Interest Property (QTIP) election for the marital trust to allocate the decedent's unused Generation-Skipping Transfer (GST) exemption in cases where a marital trust is being funded.

Planning with portability is an art and not a science. Care must be taken to analyze the different options available, including whether to elect portability, and the use of a non-marital trust vs. funding the marital trust. The advantages and disadvantages of the various options must be discussed with the client and decisions documented.

Matters to consider include the size of the estate, potential beneficiaries, type of assets, step up in basis and potential appreciation, keeping in mind that the DSUE amount is fixed and does not appreciate over time.

The surviving spouse can use the DSUE for gift and estate tax purposes. The speakers recommend using the DSUE as soon after the first spouse death as possible. This will help shelter future appreciation and the potential loss of the amount if the surviving spouse remarries. The risk with a second marriage is when the second spouse dies before the surviving spouse uses the first spouse's DSUE, the amount is lost.

Due to the complexity of decisions, the use of professional fiduciaries was recommended to make decisions and manage the property.

Be aware of the various options and timely filing of the estate tax return on the death of the first spouse.

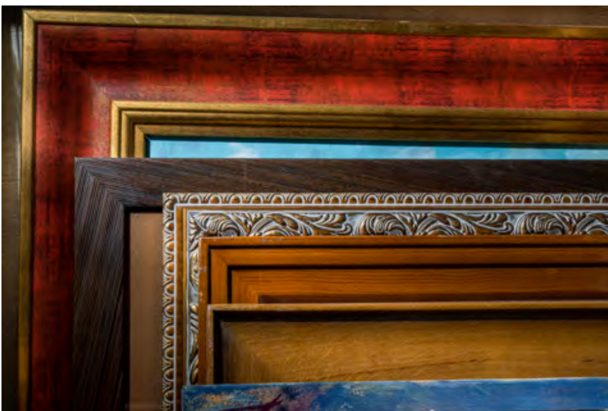
MANAGING INHERITED ART AND ENCOURAGING CLIENTS TO PLAN AHEAD

By Marie Arrigo, CPA

Diana Wierbicki (Withers Bregman LLP, New York), Bonnie Brennan (Christie's, New York), Courtney Both Christensen (Sotheby's, New York), Paul R. Provost (New York) and Jennifer Schantz (The New-York Historical Society, New York) constituted the art panel that discussed a myriad of issues on inherited art.

The first part of the session focused on the legal issues that impact art transactions. Ms. Wierbicki stated that New York State is aggressively investigating alleged sales and use tax noncompliance in the art industry. For instance, the Gagosian Gallery's settlement focused on the Gallery's obligation to collect and remit New York sales tax when art was released to the purchaser's fine art shipper for delivery outside of New York. The issues of nexus and characterization of fine art suppliers should be considered. The take-away is to make sure that the seller arranges the shipment of the art and not the buyer.

The Aby Rosen and Victoria Gelfand cases involved improper use of resale certificates to avoid sales tax. In these cases, the art was not resold, but used personally. The state relied on imposing the New York False Claims Act, where there were false claims and records were made. There were other cases of tax evasion of sales tax where art was purchased, shipped to outside states for a "test drive" and then shipped back to New York. The take-away is that when delivering purchased art, consider the sales and use tax provisions of states in which art is purchased and delivered.



The second part of the session focused on how advisors can help art collectors plan ahead. The art panel discussed the issues to consider when donating fine art to a charitable organization. They suggested that they should first research and determine the appropriate institution whose mission aligns with the art. Planning should also allow adequate time for the institution to go through their internal processes to approve the donation or acquisition. The panel also suggested that outright gifts are preferred to "promise" gifts. Also, a cash bequest designated to be used to maintain the artwork should be considered when donating the artwork.

The art panel also suggested several take-aways when planning art transactions:

- Collectors should be informed about their artwork and know the value of their collections.
- The importance of protecting the art collection, so that the collection's value is retained, cannot be emphasized enough.
- Working with trusted advisors and getting art-specific advice relating to art transactions is an important strategy.
- When you sell your art collection is just as important as where you sell it.
- Make sure that you are not competing with other works when timing the sale of your art collection.
- When executors have art assets, they should consider having appraisers do a walk-through of the property, focusing on safekeeping, security, and paperwork important for authenticating the artwork and its provenance.

The art panel also discussed what the future might hold for art collectors, including changes in technology, the importance of social media, increased regulation and digital art.

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Intellectual Property Protection

The Evolving World of 3D Printing and Intellectual Property

By Lewis Stark, CPA, CFA

Additive manufacturing, commonly known as 3D printing, involves using computer-aided design software or a three-dimensional scanner to reproduce objects—anything from artificial organs to Barbie dolls. The 3D printing market is expected to exceed $30 billion by 2022. With that comes opportunities and challenges—particularly in the area of intellectual property (IP) protection.

IP EXPOSURE

IP owners have a new licensing opportunity into this market and will have to protect their properties from 3D printing pirates. For example, what if someone disseminates a program to print a 3D-made Barbie doll? As the prices for 3D printers come down, many consumers could conceivably make their own Barbie dolls. However, Mattel certainly would take issue with such activities cutting into their $1 billion in annual Barbie sales. As you can see, there are potentially massive ramifications for unauthorized 3D printing of licensed products. In fact, information technology research and advisory company Gartner, Inc. predicts 3D printing will result in the global loss of at least $100 billion annually in intellectual property revenue by 2018.

Additionally, imagine unscrupulous people using 3D printers to manufacture critical airplane parts or medical devices and the safety issues that could arise. The risk of using these inferior products will increase dramatically with the accessibility and enhanced ability of 3D printers.

VENUES

"Basement manufacturers" often obtain source code and blueprint designs legally through open source networks. These are forums where end users can and do review and modify the source code or blueprints for their own needs. However, items printed from unauthorized code or without the IP owner's permission may constitute an infringement on the underlying IP. If this occurs, how do IP owners stop it?

There are also online marketplaces for commercial transactions involving 3D-manufactured products. One such marketplace is Thingiverse, a design community for discovering, making and sharing 3D printable items. Designs are encouraged to be licensed under a Creative Common License that provides a simple, standardized way to use and share creations. Wide acceptance and adherence to such licenses have yet to be determined.

PROTECTIONS

Licensees do have the traditional protections of patent and copyright laws. A patent gives the sole right to exclude others from making, using or selling an invention; whereas a copyright gives an originator the exclusive legal right to print, publish, perform, film or record content.

As 3D technology evolves, laws and protections need to be updated to adapt to these new technologies. Similar to the music industry, licensors and licensees need to work together to develop laws, standards and processes to create an efficient and effective process to license into this market. Laws may even extend to those who enable infringement, such as the sellers of 3D printers, blueprint providers, printer operators and retailers of 3D printed goods.

Similar to how Napster disrupted the music industry in the 1990s, 3D printing is starting to disrupt licensing and manufacturing. Napster was a platform that facilitated the unauthorized sharing of digital music over the Internet. Because Napster's primary function was to enable copyright infringement, it was sued, shut down and later reformed as a legitimate licensed download and streaming service.

Another protection for licensees is the Digital Millennium Copyright Act, which criminalizes production and dissemination of technology, devices or services intended

to circumvent measures to control access to copyrighted works. However, the act's "safe harbor" provisions that grant immunity to digital service providers if they follow certain rules to mitigate piracy have hampered enforcement.

License holders must actively monitor the marketplace and their brands in order to identify piracy as soon as possible. Action must be taken against the facilitators as consumer infringement is much tougher to stop and prosecute than corporate infringement. Just think of the time and costs of initiating lawsuits and sending cease-and-desist letters to thousands of people printing 3D objects at home. It would be virtually impossible. The Recording Industry Association of America pursued this tactic and received significant negative press from suing people such as grandmothers and teenagers.

OPPORTUNITIES

Beyond the risks associated with 3D printing, there are opportunities for IP owners to license their intellectual property to software programmers and 3D printers. Licensing would generate revenue for licensors, licensing agents and licensees and would enable consumers to purchase or print 3D products legitimately, which would curtail piracy. Licensors could also better monitor and control the quality of printed products. This business model is already being employed by Hasbro, the 3D printer Shapeways, and the retail website SuperFanArt for the 3D printing and sale of Transformers and My Little Pony figures.

New industries and new technologies typically pose new problems. Contracts and law evolve as the industries or technologies mature. Attorneys, accounting practitioners and business advisors will have new opportunities to provide services in this area. These professionals will need to familiarize themselves with the unique nuances associated with this technology, the law and the marketplace in order to provide quality client service.

CLOSING

IP owners should be prepared for a bumpy ride while this technology matures. The marketplace needs to be made aware that it must respect IP rights and only utilize legitimate software to print products subject to IP protection or to purchase such printed products. Laws should be evaluated and updated for this technology, and licensors need to embrace the technology early on to avoid the mistakes made by the music industry.

Lewis Stark is the partner-in-charge of EisnerAmper's Royalty Audit and Contract Compliance Group. For more information, please contact Lewis at 212.891.4086 or lewis.stark@eisneramper.com.

EisnerAmper's 2017 Tax Guide Is Online

When talking about your tax plan for the year, are you prepared? Do you have specific ideas in mind? From international opportunities and areas of concern to planning for your children's and grandchildren's future—and most points in-between—EisnerAmper's Tax Guide is a great resource to help you recognize opportunities to minimize tax exposure, accomplish your financial goals, and preserve your family's wealth. Use it to identify areas that may be most pertinent to your unique situation and then discuss the matter with your tax advisor. As always, our tax professionals will be pleased to discuss any of the ideas in this guide or any other planning opportunities which might apply to your personal situation. Take a look!

Will Autonomous Cars Sideswipe the Insurance Industry?

By Dianne Batistoni, CPA, CFE

There's no doubt about it, autonomous vehicles are coming. In fact, they're already on the roads. Google and Tesla are testing self-driving vehicles in several states, and Uber is experimenting with driverless rides in Pittsburgh.

Volvo, Toyota and others expect to offer autonomous cars to consumers by 2020. From there, self-driving cars will accelerate—so to speak—in the marketplace. Through 2030, most new cars will have both an autonomous and a human driving option. And depending on which study you rely, the period from 2030-2050 will see most, if not all, new cars being autonomous-only.

When it comes to autonomous cars, most people wrestle with the safety risks or costs to consumers for this advanced technology. But one thing you hear little about is what role will auto insurance play? If you're the passenger in your own self-driving car and there's a fender bender, what is your liability? Interesting question.

WILL THE TECHNOLOGY SAVE LIVES?

To answer the above, we need to take a step back and consider self-driving technology. Relatively recent advances in auto technology, such as rear-view cameras and collision alarms, have significantly decreased the number of auto injuries and fatalities. However, the technology used in self-driving cars could reduce those numbers exponentially.

Each year, according to the National Highway Traffic Safety Administration, driver error causes 94% of car accidents; this equates to 30,000 mishaps caused by people. Autonomous cars are expected to decrease driver-caused accidents by as much as 80% by 2040.

THE POCKETBOOK IMPACT

Not only can self-driving technology help save lives, there are economic impacts, too. Today, auto insurance premiums total $200 billion. Move the driver to the passenger seat and by 2040 auto premiums are expected to drop to $40 billion. It remains to be seen how much insurance companies will save by paying out less in claims.

Those numbers bode well for consumers. But will they decimate insurance companies, a sector employing a quarter of a million people? Clearly, insurance companies will have to adapt. Here are a few ways they may be able to weather the storm:

1. Continue to insure non-driver-related incidents such as theft, storm damage and vandalism.
2. Insure areas reflective of the new self-driving technology: cybersecurity in the event of hacking or product liability for faulty technology.
3. Expand service offerings into new areas related to other emerging technologies. Drone insurance anyone?

What Drivers Would Do with the Extra Time

Activity	%
Text/Talk with Friends	26%
Read	21%
Sleep	10%
Watch Movies	8%
Play Games	7%
Work	7%
Other	21%

Source: Sparks & Honey

A MATTER OF POLICY

Because autonomous vehicles are not in the marketplace just yet, insurance companies have not had to alter or create new polices. However, there is one UK insurer that is getting a head start. Adrian Flux Insurance Services is offering the first personal insurance policy for people with driverless or

autonomous cars. They are offering coverage related to the technology: hardware system and software failures as well as hacking. As autonomous cars get closer to market, the company plans to update the policy to include liability as well.

DOWN THE ROAD

When those autonomous cars do start driving themselves off the dealership lots—when the rubber literally meets the road—what shape will the coverage take?

One thought is that liability could shift from the driver to the car company or original equipment manufacturer. In this self-insurance scenario, entire product lines would be insured. This is the strategy that Google, Volvo, and Mercedes plan to take with their self-driving vehicles. Or, automakers may partner with insurance companies like Toyota did with Aioi Nissay Dowa Insurance.

Actuaries may have to refocus their attention from measuring the risk profile of different types of drivers to measuring the risk of different types of hardware and software.

As demographics trend toward people moving into urban areas, public transportation and ride-sharing services, such as Uber and Lyft, are gaining in popularity. These organizations may need commercial fleet insurance, and/or use a model where passengers pay for insurance per ride.

There are other scenarios to consider. For example, there will always be people who prefer the pleasure of driving themselves. These drivers' auto premiums will probably be higher. Also, there will be that period where cars are essentially semi-autonomous, with steering wheels and controls so the driver can take over. The technology will then transition to completely autonomous cars with no controls. As such, insurance policies will have to reflect these different levels of autonomy.

UNCLE SAM AND BIG DATA

Let's not forget that insurance is state-regulated, so government does have a place at the table. Based on the nature of the evolving technology, will it make more sense for the federal government to play a larger role?

One thing is certain, better technology means more available data. Autonomous cars will rely on the environment, infrastructure and even other vehicles to instantly gather, analyze and use data to avoid road hazards. This data can then be used in the event of accidents, similar to an airplane's "black box," to determine fault. Better data should lead to better technology, which will make autonomous cars even safer. While Google and Tesla have racked up thousands of autonomous test miles and gotten valuable data, they still haven't tested the cars under every available scenario a driver would encounter. And, of course, the idea of each car having some sort of black box might make drivers uneasy about Big Brother watching.

THE FINISH LINE

Self-driving cars might be as big a leap forward as when we traded in saddles for steering wheels. The insurance sector is just one of many areas that will become disrupted. Those companies that adapt and innovate will lead the pack; those that don't run the risk of being left in the rear view mirror.

For more information, please contact Dianne Batistoni, a partner in our Insurance Industry practice. You can reach Dianne at 732.243.7220 or dianne.batistoni@eisneramper.com.

The Changing World of the EB-5 Program

By Richard A. Cahlin

Currently the EB-5 program is an inexpensive and popular way of becoming a resident of a country — particularly the United States. However, beginning in 2017, changes are going to occur in the U.S.-based EB-5 Program.

BACKGROUND

Congress created the EB-5 Program in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors. Initially the EB-5 applicant had to create an entirely new business. But in 1992, Congress created the Immigrant Investor Program, also known as the Regional Center Program. A regional center is a third-party managed investment vehicle (private or public) that manages the investments and fulfills the requirements for the EB-5 applicant.

The regional center sets aside EB-5 visas for participants who invest in commercial enterprises associated with regional centers approved by U.S. Citizenship and Immigration Services ("USCIS" — a division of the U.S. Department of Homeland Security) based on proposals for promoting economic growth. For example, a developer can form their own regional center in order to solicit EB-5 investment funds to build a hotel or apartments.

USCIS administers the EB-5 Program. Under this program, entrepreneurs (and their spouses and unmarried children under 21) are eligible to apply for a green card (permanent residence) if they:

- Make the necessary investment in a commercial enterprise in the United States; and
- Plan to create or preserve 10 permanent full-time jobs for qualified U.S. workers.

There is a maximum of 10,000 green cards issued every year. Since 2014, there has been over $10B invested into the States with the majority of investments originating from China.

REQUIREMENTS OF THE EB-5 PROGRAM:

- Investment in a new for-profit commercial enterprise or investment in a targeted employment area (TEA) which is defined as an economically distress area (high unemployment) or rural area.
- Evidence that you have invested or are in the process of investing the amount required ($1 million in new commercial enterprise or $500,000 if project is located in TEA). In addition, you must provide evidence that the investment funds were obtained through lawful means (source of funds).
- Job creation – evidence that the new commercial enterprise will create at least 10 full time positions. The number of jobs must be maintained for 2 years.

TRENDING

The rules outlined above are scheduled to "sunset" on April 28, 2017.

The most significant proposed changes are with respect to the minimum investment amounts:

- Increase TEA investment amount from $500,000 to $1.35 million.
- Increase non-TEA investment amount from $1 million to $1.8 million.
- Rules with reference to on sight visits of regional centers/commercial enterprises.
- Better fraud controls.
- Tighter security for the LC Source of Funds compliance.

With the new administration's eye on national security, how will the EB-5 program be overhauled? With the increase in investment, will it weaken the investment appetite by EB-5 applicants? 2017 should be an interesting year and we will keep you updated as rules and regulations progress.

For more information on the EB-5 program, contact Richard A. Cahlin at richard.cahlin@eisneramper.com or 305.371.6200 ext. 1107.

Tax Savings for Start-Ups and Small Businesses - Part 1: R&D Credit Can Now Offset Payroll Tax

By Emmalee MacDonald

The 2015 Protecting Americans from Tax Hikes ("PATH") Act included various changes to the Research and Development credit ("R&D Credit") mostly beneficial for start-ups and small businesses.

PATH enables a qualified small business to elect to claim a certain amount of its R&D credit as a payroll tax credit against its employer portion of FICA liability, rather than against its income tax liability.

A qualified small business for this purpose is defined as a corporation, partnership, LLC or individual that, with respect to any taxable year:

- has gross receipts of less than $5M.
- did not have gross receipts for any taxable year preceding the 5-tax-year period ending with the tax year.

In other words, in order for a company to qualify to utilize the payroll tax offset in 2017, the company must not have more than $5M of gross receipts in 2016. It must also not have had any gross receipts in tax years prior to 2012. The definition of gross receipts is not clearly defined within the section, but many interpretations point to the following guidance: Gross receipts include all sales (net of returns and allowances), service income, interest, dividends, rents and royalties, as well as any income from incidental or outside sources.

The amount of the credit is limited to the lesser of $250,000 per year or the amount of the R&D credit computed on the taxpayer's income tax return. Any credit that exceeds the amount of the taxpayers FICA tax liability in a given quarter may be carried forward to future quarters.

PROCESS FOR CLAIMING THE PAYROLL TAX OFFSET

- Compute the R&D credit on the 2016 or subsequent income tax return on Form 6765.
- Complete Form 8974, which is a new form, to report the credits elected to offset FICA tax.
- File payroll Form 941 with Form 8974 attached for each quarter that there is an offset.

A taxpayer may only claim the election for 5 years for a maximum credit of $1.25 million. Any election to apply the R&D credit to offset payroll tax cannot be revoked without the consent of the IRS.

In summary, these changes afford small businesses and start-ups an excellent opportunity to realize the tax benefit of their R&D credits, whereas in the past they may have had to wait years to reach profitability or even been precluded from using their credits due to various limitations.

During the current tax filing season, consideration should be given to the preparation of elections, calculation of the R&D credit and timely filing of the returns in order to enable taxpayers to obtain the largest possible benefit from the new PATH Act rules.

For more information, please contact Emmalee MacDonald, senior tax manager, at 732.243.7466 or emmalee.macdonald@eisneramper.com.

This content was first published as part of EisnerAmper's Technology and Life Sciences blog.

Tax Savings for Start-Ups and Small Businesses - Part 2: R&D Credit Can Now Offset AMT

By Emmalee MacDonald

The 2015 Protecting Americans from Tax Hikes ("PATH") Act included various changes to the Research and Development credit ("R&D credit") that are mostly beneficial for start-ups and small businesses.

In the past, the R&D credit could not be used to offset Alternative Minimum Tax ("AMT"), with limited exception. The PATH Act provides the ability for certain taxpayers to utilize the credits to offset both regular or AMT for tax credits generated during tax years beginning on or after January 1, 2016. Credits generated in prior years typically will not be eligible to offset AMT, but can continue to be carried forward to offset future regular tax in accordance with previous tax law.

The AMT offset is available only to eligible small businesses. Eligible small businesses are those that are a:

- corporation, the stock of which is not publicly traded,
- partnership, or
- sole proprietorship.

In addition, the average annual gross receipts of such corporation, partnership or sole proprietorship for the 3-taxable-year period preceding the taxable year must not exceed $50 million. For example, if the business wishes to utilize the credit to offset AMT in 2016, its average annual gross receipts for tax years 2013, 2014 and 2015 must not exceed $50 million. Any partner or S corporation shareholder claiming a pass-through credit must also meet the gross receipts test for its pass-through credit to be eligible to offset AMT.

For more information, please contact Emmalee MacDonald, senior tax manager, at 732.243.7466 or emmalee.macdonald@eisneramper.com.

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