PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 21 | Issue 3 Article 1

4-15-1994

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Recommended Citation

John M. Janiga and Louis S. Harrison *The Case for the Retention of the State Death Tax Credit in the Federal Transfer Tax Scheme: "Just Say No" to a Deduction*, 21 Pepp. L. Rev. Iss. 3 (1994)
Available at: https://digitalcommons.pepperdine.edu/plr/vol21/iss3/1

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The Case for the Retention of the State Death Tax Credit in the Federal Transfer Tax Scheme: "Just Say No" to a Deduction

John M. Janiga*
Louis S. Harrison**

I. INTRODUCTION

The Internal Revenue Code[1] imposes taxes in addition to the income tax.[2] One type, referred to as the federal estate tax,[3] taxes the transfer of property at death.[4] Not all testamentary transfers, however, result in

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1. Unless otherwise indicated, references to sections are to the Internal Revenue Code of 1986 as amended through December 31, 1993 [hereinafter the Code].

2. As with the income tax, the justification behind these additional taxes, often referred to as excise taxes, is based on one or more policy objectives.

3. *See, e.g.*, I.R.C. §§ 2001-2207B. Among the justifications for the estate tax are (1) the need to prevent accumulated wealth from passing from generation to generation, thereby avoiding a permanent aristocracy, (2) a desire to keep younger generations more economically motivated by decreasing family wealth, and (3) the generation of revenue for the federal treasury. *See generally* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223 (1956). Under the current scheme of estate taxation, where the maximum marginal rate is effectively 60%, only the third justification, the need to raise revenue, can be supported. *See* I.R.C. § 2001(c)(3). For example, suppose that an individual passes $3,000,000 to his children. This $3,000,000 is subject to an estate tax of $1,098,000. After payment of the estate tax, $1,902,000 remains for the children. Thus, the Code fails to accomplish the purposes relating to the substantial diminishment of the amount passing to younger generations.

4. Although the estate tax is generally designed to tax transfers at death, it may

the imposition of a federal estate tax[5] because, for various policy reasons, Congress provides certain estate tax deductions (deductions)[6]

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also have some application to certain gifts made within three years of death and to inter vivos transfers that become complete upon the death of the donor. *See* I.R.C. §§ 2035-2038, 2042.

5. The following formula can be used to calculate the federal estate tax due, if any:

	Gross estate (I.R.C. §§ 2031 - 2046)
-	Deductions (§§ 2053 - 2056A)
=	Taxable estate (§2051)
+	Post-1976 taxable gifts (§ 2001(b))
=	Federal estate tax base
x	Unified transfer tax rate(s)
=	Tentative estate tax (§ 2001(c))
-	Credits (§§ 2010 - 2016, 2001(b)(2))
=	Estate Tax Due

Prior to enactment of the Tax Reform Act of 1976, the federal tax imposed on gratuitous transfers varied depending on whether the transfer was inter vivos or testamentary. DAVID T. LINK & LARRY D. SODERQUIST, LAW OF ESTATE AND GIFT TAX § 2001(a):1 (1987). Inter vivos transfers were subject to the federal gift tax, whereas testamentary transfers were subject to the federal estate tax. *Id.* Each tax was governed by different rules and tax rates and gift tax rates were generally lower than the estate tax rates. *Id.*

The Tax Reform Act of 1976 eliminated much of the distinction between the federal estate taxes and gift taxes. *Id.* Of particular significance was that it replaced the separate gift and estate tax rate schedules with a unified transfer tax rate schedule. *Id.* Thus, under current law, gratuitous transfers and testamentary transfers are subject to the same marginal tax rates. *See* I.R.C. § 2001(c)(2). The marginal rates vary from a minimum of 18% to a maximum of 55%. *Id.* An additional 5% rate applies to the amount of taxable transfers that exceed $10,000,000, but do not exceed $21,040,000. I.R.C. § 2001(c)(3).

6. Two prominent deductions include the marital deduction and the charitable deduction. I.R.C. §§ 2055-2056. The marital deduction provides an unlimited deduction for transfers between spouses. I.R.C. § 2056. It reflects a policy judgment that spouses should be entitled to transfer property freely between themselves, as they deem appropriate, without tax implications. *See id.* For a discussion of the current law marital deduction, see Roy M. Adams et al., *The Economic Recovery Tax Act of 1981: Big Changes in Store for the Trust Industry*, TRUSTS & EST., Oct. 1981, at 16; Jonathan G. Blattmachr & Ira H. Lustgarten, *The New Estate Tax Marital Deduction: Many Questions and Some Answers*, TRUSTS & EST., Jan. 1982, at 18.

The charitable contribution provides an unlimited deduction for certain transfers made to qualified charities. I.R.C. § 2055(a). It reflects a policy judgment that the tax law should provide an incentive to encourage charitable giving. For a general discussion of the charitable contribution deduction, see CHARLES LOWNDES & ROBERT KRAMER, FEDERAL ESTATES AND GIFT TAXES §§ 43.1-43.7 (2d ed. 1962).

Other deductions include certain expenses, indebtedness, and taxes of the estate, and certain casualty and theft losses experienced by the estate during settlement. I.R.C. §§ 2053-2054. These deductions are allowed because the federal estate tax is intended to tax "net," rather than "gross," transfers.

and estate tax credits (credits)[7] in computing the federal estate tax due.[8]

Although both deductions and credits reduce the federal estate tax, they function very differently. Whereas a deduction reduces the estate tax by an amount equal to the deduction multiplied by the estate's maximum marginal tax rate, a credit reduces the estate tax dollar-for-dollar.[9] Thus, the use of a credit in lieu of a deduction results in greater federal tax savings for an estate, and, hence, smaller federal estate tax revenues.[10]

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7. Credits include the unified credit against estate tax (unified credit) and credits for state death taxes, gift taxes, tax on prior transfers, foreign death taxes, and death taxes on remainders. I.R.C. § 2010-2015. For a general discussion of these credits, see James Ridley, *Estate Tax Credits, Other than the Unified Credit, Offer Planning Possibilities*, 15 EST. PLAN. 358 (1988).

The unified credit, which serves to insulate smaller estates from the federal estate tax, was established as part of the sweeping structural changes to the federal estate and gift taxes contained in the Tax Reform Act of 1976. LINK & SODERQUIST, *supra* note 5, at § 2001:1. Originally, the unified credit was set at $47,000, but the Economic Recovery Tax Act of 1981 provided a gradual, yet dramatic, increase in the unified credit. *Id.* Under current law, the unified credit is $192,800, which shields transfers up to $600,000 from estate and gift taxes. I.R.C. § 2010.

There has recently been a substantial amount of discussion concerning the benefit of using the unified credit during one's lifetime to reduce estate and gift taxes. *See, e.g.*, Louis S. Harrison, *IRS Rulings Demand More Careful Use of Revocable Trusts to Make Gifts*, 17 EST. PLAN. 332 (1990).

For a discussion of the policy reasons underlying the credit for state death taxes, see *infra* note 11 and accompanying text. The credits for gift tax, tax on prior transfers, foreign death taxes, and death taxes on remainders were generally enacted as the result of equity considerations. *See* I.R.C. §§ 2012-2015.

8. For a formulaic expression of the estate tax due, see *supra* note 5.

9. For example, under current law, an estate tax base of $3,100,000 generates a tentative estate tax of $1,345,800. A $100,000 deduction reduces the estate tax base to $3,000,000, and the tentative estate tax to $1,290,800. The $55,000 tax reduction represents the deduction amount, $100,000, multiplied by the estate's maximum marginal tax rate of 55%.

If the estate were entitled to a $100,000 credit, instead of a $100,000 deduction, the estate's tax base would remain unchanged at $3,100,000. The credit, however, would directly offset the tentative estate tax of $1,345,800, resulting in an estate tax due of $1,245,800. Based on these facts, a credit of $100,000 produces $45,000 ($1,290,800 less $1,245,800) more tax savings than a deduction of $100,000.

10. Conversely, the use of a deduction in lieu of a credit results in less tax savings for a decedent's estate, and, hence, greater federal estate tax revenues.

In 1924, Congress created a credit, rather than a deduction, for state death taxes (state death tax credit).[11] Although it has been modified over time, the state death tax credit still exists.[12]

In 1987, a bill introduced in the House of Representatives included a provision that called for replacing the credit for state death taxes paid with a deduction.[13] Although it was explained in an amorphous way, the apparent objective of the provision was to raise revenue.[14] The provision, however, was not included in what ultimately became the Revenue Act of 1987.[15]

Since that 1987 House Bill, there have been no congressional bills containing any similar proposal. Nonetheless, the need to augment federal revenue is a pressing concern, and eliminating the state death tax credit in favor of a deduction is currently under consideration by Congress and the Clinton administration.[16] However, in balancing the need

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11. Revenue Act of 1924, ch. 234, § 301(b), 43 Stat. 253 (1924). The original purpose of the state death tax credit, which continues to apply, was to eliminate the incentive for states to lure residents by imposing little or no state death taxes. For example, Florida and Nevada repealed their state death taxes in 1924 and 1925, respectively, in hopes of attracting wealthy individuals to establish domicile in their states.

In addition, the state death tax credit reflected Congress' perception that death taxes should primarily be within the province of the states. For further discussion of the background and purpose of the state death tax credit, see Lawrence B. Gibbs, *Emerging IRS Attitude Toward State Death Tax Credit and Its Impact on Installment Payment of Estate Taxes*, FOURTEENTH ANN. UNIV. OF MIAMI INST. ON EST. PLAN. 1800 (1980); Advisory Committee on Intergovernmental Relations, *Report on Coordination of State and Federal Inheritance, Estate and Gift Taxes* 32-35 (1961).

12. The state death tax credit was originally limited to 25% of the federal estate tax, but this limitation was removed in 1926. Under current law, the credit is determined pursuant to the graduated tax rate schedule reflected in I.R.C. § 2011(b).

13. H.R. Rep. No. 391 (II), 100th Cong., 1st Sess. 1041 (1987).

14. *See supra* note 11 and accompanying text; *see also* H.R. Rep. No. 391 (II), *supra* note 13, at 1041 (discussing the committee's justification for dispensing with the credit). The committee report states:

> The dollar-for-dollar credit operates as a form of revenue sharing between the Federal government and the States. Imposition of a State death tax up to the creditable amount shifts revenues from the Federal government to the States without changing the estate's total estate tax burden. Revenue sharing programs are more efficient and politically accountable if operated through direct subsidy rather than tax credit.

Id.

15. Revenue Act of 1987, Pub. L. No. 100-203, §§ 1000-10, 714, 101 Stat. 1330-82 (1987).

16. *See Chapter on Revenues From Congressional Budget Office Report, "Reducing the Deficit: Spending and Revenue Options,"* Daily Tax Rep. Special Supplement (BNA) No. 54, at 5-40 (March 22, 1994) [hereinafter *Chapter*]. This report outlines several revenue enhancement options including the conversion of the state death tax credit to a deduction. *See infra* notes 95-101 and accompanying text.

to raise revenue with the potential adverse effect of replacing the credit, Congress should undertake a thorough examination of the merits of such a change.

A shift from a state death tax credit to a state death tax deduction would raise serious policy issues and practical concerns.[17] An appreciation of these issues and concerns requires an understanding of the current environment surrounding the state death tax credit. Parts II through IV of this Article provide this background.

Part II focuses on the state death tax credit and how states have amended their tax laws to incorporate the credit.[18] Part III discusses how estate planning documents have been carefully drafted in light of state death tax laws and the state death tax credit to minimize the overall burden of death taxes.[19] Part IV analyzes state death tax payment strategies.[20]

Part V of this Article explores the implications of replacing the state death tax credit with a deduction.[21] The discussion examines in detail the overriding factors which may cause Congress to raise the issue,[22] the likely response by state legislatures and the chaos that would result in estate planning if Congress were to enact such a change.[23]

II. THE IMPACT OF THE STATE DEATH TAX CREDIT ON STATE DEATH TAX LAWS

A. *The State Death Tax Credit*

Section 2011 of the Code provides a credit in determining federal estate tax due for "the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate."[24] The credit is

17. *See infra* notes 102-21 and accompanying text.
18. *See infra* notes 24-45 and accompanying text.
19. *See infra* notes 46-73 and accompanying text. This Article will not discuss methods of reducing state death taxes. For an extensive discussion of this topic, see David T. Riedel, *State Death Taxes Can Have an Adverse Impact on an Otherwise Well-Planned Estate*, 16 EST. PLAN. 350 (1989).
20. *See infra* notes 74-94 and accompanying text.
21. *See infra* notes 95-121 and accompanying text.
22. *See infra* notes 95-101 and accompanying text.
23. *See infra* notes 102-21 and accompanying text.
24. I.R.C. § 2011(a). The term "gross estate" means the gross estate for federal

not allowed for state death taxes paid with respect to the estate of a person other than the decedent[25] or which are deducted from the decedent's gross estate as a transfer for public, charitable, or religious purposes.[26]

In addition, the state death tax credit amount cannot exceed a specified limit.[27] The starting point for computing the limit is the "taxable estate," which is the gross estate minus allowable deductions.[28] Next, $60,000 is deducted from the taxable estate to arrive at the "adjusted taxable estate."[29] Finally, based on this amount, the maximum credit allowed is determined using the table set forth in section 2011(b).[30]

B. *State Death Tax Laws: The Response to the State Death Tax Credit*

States[31] responded to the enactment of the state death tax credit by incorporating the credit into their death tax schemes.[32] States employ

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estate tax purposes, not the gross estate for state death tax purposes. *See* I.R.C. § 2031(a). Thus, no credit is allowed for state death taxes concerning property included on the state death tax return but not included on the federal estate tax return. *See, e.g.*, Second Nat'l Bank v. United States, 422 F.2d 40 (2d Cir. 1970); Brock v. Commissioner, 16 B.T.A. 1358 (1929).

25. For instance, if a first decedent's estate pays the state death taxes attributable to a second decedent's estate, the first decedent's estate is not eligible for the credit as to that amount paid. *See, e.g.*, Fletcher v. Commissioner, 29 B.T.A. 503 (1933), *aff'd*, 74 F.2d 1014 (5th Cir. 1935).

26. I.R.C. § 2011(e). Under certain circumstances, § 2053(d) allows an executor to elect to take a deduction for state death taxes paid with respect to transfers for public, charitable, or religious purposes. I.R.C. § 2053(d)(1). This situation is unusual, but to the extent so used, the estate is not entitled to a credit for the state death taxes deducted. I.R.C. § 2053(d)(2).

27. I.R.C. § 2011(b). The pragmatic effect of the limit is that the amount of the state death tax credit will equal the lesser of the actual state death taxes paid or the maximum credit amount determined pursuant to § 2011(b). *See* I.R.C. § 2011(b).

28. For a formulaic expression of the taxable estate, see *supra* note 5.

29. I.R.C. § 2011(b) (last sentence).

30. *Id.* The table appears as Exhibit I to this Article. The following schedule illustrates the computation of the maximum state death tax credit amount (note: the taxable estate amount is assumed):

	Taxable estate	$2,100,000
-	Reduction amount	(60,000)
=	Adjusted taxable estate	$2,040,000
	Maximum credit amount (based on the table in § 2011(b)):	$106,800

31. For purposes of this Article, the term "state" or "states" encompasses the District of Columbia.

32. The incorporation of the state death tax credit into state death tax schemes has occurred over several decades. Several sources provide insight into the status of state death tax laws at various points in time. *See, e.g.*, EUGENE M. WYPYSKI, THE LAW OF INHERITANCE IN ALL FIFTY STATES (4th ed. 1984); U.S. Dep't of Veteran Bene-

one of three different schemes to accomplish this objective: (1) an estate tax;[33] (2) an inheritance tax plus an additional estate tax;[34] or (3) a preliminary estate tax plus, in certain situations, an additional estate tax.[35]

The dominant scheme, employed by twenty-eight states,[36] imposes an estate tax equal to the maximum state death tax credit allowable on the federal estate tax return.[37] This tax scheme is commonly referred to as a "pick-up" tax because it picks up the credit for state death taxes allowed by the federal estate tax.

The second most popular scheme, used by eighteen states,[38] involves a combination of an inheritance tax[39] and an additional estate tax.[40]

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fits, *Digest of Inheritance Laws: States and Territories of the United States* (1966); Committee on State Death Taxation, Probate and Trust Division, *Survey of State Death Tax Systems and of Selected Problems of Double Taxation of Real Property Interests*, 14 REAL PROP., PROB. AND TR. J. 277 (1979). Exhibits II-IV of this Article contain a summary of the death tax schemes employed by the various states, effective February 1, 1993.

33. *See infra* notes 36-37 and accompanying text.

34. *See infra* notes 38-41 and accompanying text.

35. *See infra* notes 42-45 and accompanying text.

36. For a listing of the states using this scheme, see Exhibit II of this Article.

37. For example, in Illinois, the amount of estate tax equals:

> [T]he maximum state tax credit allowable with respect to the taxable transfer reduced by the lesser of:
>
> (1) the amount of the state tax credit paid to any other state or states; and
>
> (2) the amount determined by multiplying the maximum state tax credit allowable with respect to the taxable transfer by the percentage which the gross value of the transferred property not having a tax situs in Illinois bears to the gross value of the total transferred property.

ILL. REV. STAT. ch. 120, ¶ 405A-3 (1989).

38. For a listing of the states using this scheme, see Exhibit III of this Article.

39. An inheritance tax imposes a tax on a beneficiary who receives property from an estate by inheritance. *See* RICHARD B. STEPHENS ET AL., ESTATE AND GIFT TAXATION ¶ 1.02 (6th ed. 1991). The typical inheritance tax statute divides beneficiaries into various classes depending on the degree of relationship to the decedent, and assigns different exemptions and tax rates to each class. For example, the Connecticut inheritance tax divides beneficiaries into four classes. *See* CONN. GEN. STAT. ANN. § 12-344(a) (West 1993). Class AA provides an exemption of $300,000 for a surviving spouse, and Class A provides an exemption of $50,000 for parents, grandparents, adoptive parents, and any natural or adopted descendants. *Id.* Class B provides an exemption of $6,000 for more distant relatives, and Class C provides an exemption of $1,000 for all other beneficiaries. *Id.* All four classes are taxed under different rate schedules ranging from 3% to 14%. *Id.* § 12-344(b).

40. The additional estate tax is designed to absorb the maximum state death tax

Generally, the additional estate tax equals the amount, if any, by which the maximum allowable state death tax credit exceeds the state inheritance tax paid.[41]

The least utilized tax scheme, adopted by five states,[42] provides for an estate tax,[43] plus an additional estate tax.[44] The additional estate tax typically equals the excess, if any, of the maximum state death tax credit allowed over the estate tax.[45]

III. Drafting Estate Planning Documents Based on Current State Death Tax Laws and the State Death Tax Credit

One objective of estate planning is to reduce a married couple's overall exposure to death taxes.[46] Given this objective, estate planners have developed drafting strategies based on the state death tax credit and current state death tax laws.[47] These strategies revolve around the interaction between the state death tax credit and credit shelter/marital deduction formulae.[48]

A. *Credit Shelter/Marital Deduction Formulae*

Credit shelter/marital deduction formulae provide the manner in which estate planners can implement a married couple's objective of

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credit allowable on the Federal estate tax return.

41. For example, under Connecticut law, the amount of the tax is: "the amount by which the federal credit allowed for such taxes under the provisions of the federal internal revenue code . . . exceeds the aggregate amount of all estate, inheritance, legacy, transfer and succession taxes actually paid to the several states and territories of the United States, including this state." CONN. GEN. STAT. ANN. § 12-391 (West 1991).

42. For a listing of the states using this scheme, see Exhibit IV of this Article.

43. Generally, the estate tax structure is similar in nature to the federal estate tax version, but the amount of the tax varies considerably among the states because of differing tax rate schedules and exemption or deduction amounts.

44. The additional estate tax is designed to absorb the maximum state death tax credit allowable on the federal estate tax return.

45. For example, Ohio law provides, "In addition to the [estate tax], a tax is hereby levied . . . in an amount equal to the maximum credit allowable [under federal tax law], for any taxes paid to any state." OHIO REV. CODE ANN. § 5731.18(A) (Anderson 1991).

46. Other objectives of estate planning include disposing of property to the natural objects of one's bounty and establishing strategies, such as trusts, which prevent the immediate enjoyment of property by one's beneficiaries.

47. *See infra* notes 57-73 and accompanying text.

48. *See infra* notes 49-56 and accompanying text.

minimizing death taxes. The formula represents the critical aspect of a tax minimization plan which determines the death taxes due at two future points in time—at the first spouse's death and at the surviving spouse's death.

In the majority of situations, the plan includes consideration of a federal estate tax credit, known as the "unified credit,"[49] and the marital deduction.[50] The unified credit of $192,800[51] effectively shields transfers up to $600,000 from estate tax.[52] The marital deduction allows a decedent to transfer an unlimited amount of property to a surviving spouse free from federal estate tax.[53]

The typical plan focuses on eliminating the federal estate tax at the first spouse's death[54] by carving out of such decedent's estate a "credit shelter share" to take advantage of the unified credit, and leaving the remaining share of the estate to the decedent's surviving spouse to qualify for the marital deduction.[55]

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49. *See supra* note 7.
50. *See supra* note 6.
51. I.R.C. § 2010(a).
52. *See supra* note 7.
53. I.R.C. § 2056(a); *see supra* note 6.
54. In large estate situations, it may be worthwhile to incur some federal estate tax at the first spouse's death to take advantage of the graduated federal estate tax rates.
55. A plan that leaves all of a decedent's estate to the surviving spouse also eliminates federal estate tax at the first spouse's death due to the unlimited marital deduction. Such a plan, however, fails to minimize the couple's overall death taxes because it would waste one spouse's unified credit.

A comparison of a plan that employs solely the marital deduction versus a plan that utilizes both the unified credit and the marital deduction underscores the significance of wasting one spouse's unified credit. Under a "marital deduction only" plan, no federal estate tax is due upon the death of the first spouse. At the surviving spouse's death, a maximum of $600,000 may pass to noncharitable beneficiaries free of estate tax as the result of the surviving spouse's unified credit. (No federal estate tax results if property is left to qualified charities because of the unlimited charitable contribution deduction under § 2055.)

A combination credit shelter/marital deduction plan yields a dramatically different result. At the first spouse's death, a credit shelter share is established to pass property to either nonspousal, noncharitable beneficiaries or to a trust in which the surviving spouse is a beneficiary (and may even be a trustee if the trust is properly drafted), but is not includable in the surviving spouse's gross estate for federal estate tax purposes. The credit shelter share produces three benefits: (1) it passes free from federal estate tax because of the unified credit (the marital deduction is not applicable to the credit shelter share because the property does not "pass" to the surviving spouse); (2) at the surviving spouse's death, the value of the credit shelter share

Thus, the critical aspect for the successful implementation of a tax minimization plan focuses on the credit shelter share and the formula used to determine it. The formula is established under the estate planning documents and determines the amount of property which will pass to the credit shelter share.

Although the unified credit effectively shields transfers up to $600,000 from federal estate tax, that does not mean that the credit shelter share formula should be drafted to automatically equal $600,000. Rather, the credit shelter share formula has to take into account several variables,[56] including the state death tax credit.

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passes to the designated beneficiaries free from estate tax (the credit shelter share is not included in the surviving spouse's gross estate for federal estate tax purposes); and (3) the surviving spouse is able to pass additional property free from estate tax to the extent of the surviving spouse's unified credit. Thus, at the surviving spouse's death, a maximum of $1,200,000 (plus appreciation and income earned on the credit shelter share created at the first spouse's death) may pass to the beneficiaries free from estate tax.

56. These include prior adjusted taxable gifts, other property included in the gross estate passing to beneficiaries that does not qualify for the unlimited marital or charitable deductions, and expenditures that are not taken or allowed as deductions for federal estate tax purposes.

The following example illustrates how one of these variables, prior adjusted taxable gifts, might impact the credit shelter share. Assume the following facts: (1) the decedent has a gross estate of $2,000,000, administration expenses of $100,000, and has made lifetime taxable gifts of $300,000; (2) under the terms of the decedent's will, $600,000 of the decedent's estate was specifically bequeathed to the credit shelter share and the remainder was given outright to the surviving spouse; and (3) the administration expenses are taken as deductions on the federal estate tax return, not as income tax deductions.

Based on these facts, the marital deduction equals $1,300,000, which is the $2,000,000 gross estate minus the $700,000 portion of the gross estate that does not pass to the surviving spouse (the $600,000 credit shelter share and the $100,000 of administration expenses). Subtracting the allowable deductions, which total $1,400,000 (the marital deduction of $1,300,000 plus the administration expenses of $100,000), the taxable estate is $600,000. Adding the taxable estate of $600,000 to the lifetime taxable gifts of $300,000 results in a federal estate tax base of $900,000. The tentative federal estate tax on this amount is $306,800. To arrive at federal estate tax due, this amount is reduced by the amount of total gift taxes "which would have been payable" with respect to lifetime gifts made by the decedent. I.R.C. § 2001(b)(2). In this case, the total gift taxes payable are zero (the transfer tax on $300,000, which is $87,800, minus $192,800, the unified credit, results in a negative number). Subtracting the unified credit of $192,800 from the tentative tax of $306,800 results in a federal estate tax due of $114,000.

This situation results in a tax due because the credit shelter share should not have been fixed at $600,000. A portion of the unified credit, $87,800, was used to prevent the gift tax from being assessed on the $300,000 lifetime taxable gifts. Accordingly, the credit shelter share should have been reduced from $600,000 to $300,000. This reduction would have correspondingly increased the credit shelter share qualifying for the marital deduction to $1,600,000. The federal estate tax base

B. *Reference to the State Death Tax Credit in Credit Shelter/Marital Deduction Formulae*

The particular formula used for calculating the credit shelter share must be careful in its reference, actual or by omission, to the state death tax credit. Suggested provisions setting forth the formula include: (1) "the maximum amount of property that will result in no increase in federal estate tax payable because of credits and deductions (other than the marital deduction) allowed to my estate;" (2) "the amount necessary to increase my taxable estate to the largest amount that will result in no (or the minimal) payment of federal estate tax;" and (3) "the residue after distributing the minimum amount of property that can pass under this Article without incurring any federal estate tax." Generally, in determining whether the formula should also refer to the state death tax credit, reference should be made to whether the state in which the couple resides employs a pick-up tax scheme or a non-pick-up tax scheme.

1. Drafting for Pick-up Tax Schemes

Calculating the credit shelter share by referring to the unified credit and the state death tax credit may unintentionally increase the state death taxes paid under pick-up tax schemes. This, in turn, may cause the credit shelter share amount to exceed $600,000.

The following example illustrates this situation. Assume these facts: (1) decedent Jane Jones died in Illinois owning property only in Illinois; (2) Jane's will left all of her property to her husband, Jack Jones, via a formula provision which provided that the credit shelter share was the largest amount of property which would result in no increase in federal estate tax because of the unified credit *and the state death tax credit allowable* to Jane's estate; (3) Jane made no lifetime taxable gifts;[57] and

then would have been $600,000 ($300,000 taxable estate plus $300,000 in lifetime taxable gifts). No federal estate tax would have been due because the unified credit would have fully offset the tentative tax on this amount.

57. The federal estate tax base is made up of the taxable estate, which is the gross estate less allowable deductions, I.R.C. § 2051, plus post-1976 taxable gifts, I.R.C. § 2001(b). Post-1976 taxable gifts refers to lifetime gifts made on or after January 1, 1977, as reduced by the annual gift tax exclusion. I.R.C. § 2001(b)(2). The annual gift tax exclusion equals $10,000 per donee per year and applies to any gift of a present interest. I.R.C. § 2503(b). To illustrate, suppose during 1993 Jane Smith makes gifts of $25,000 each to a nephew and a niece. In this case, the total amount

(4) all debts and expenses of Jane's estate are allowed as deductions on the estate tax return.[58]

Based on these facts, if the credit shelter share were funded with $600,000, the tentative federal estate tax would be $192,800.[59] Because of the $192,800 unified credit, no tax would be due. However, this result ignores the mandate of the formula to consider both the unified credit *and* the state death tax credit. To account for the state death tax credit, the initial credit shelter share would need to be raised to $642,425.[60] This would increase the tentative federal estate tax by $15,697,[61] to $208,497.[62] Despite the increase, there still would be no tax due. The tentative tax would be offset by $192,800, the unified credit, and $15,697, the state death tax credit on $642,425.

The state death tax credit, however, will only be available if the $15,697 state death tax is actually paid. Because payment of the state death taxes must be from the credit shelter share,[63] the credit shelter share would need to be adjusted from $642,425 to account for $15,697 in state death taxes.

Jane's formula, therefore, ultimately results in a $626,728 credit shelter share, producing the following positive effects: (1) the marital share decreases by $42,425, thereby preventing the future payment of estate tax on this amount; and (2) the credit shelter share increases by $26,728. This amount, plus any appreciation and income therefrom, escapes federal estate tax at Jack's death.

A negative effect is that the $15,697 in state death taxes must be paid. That tax otherwise might have been eliminated, or at minimum, de-

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of gifts, $50,000, would be reduced by two annual exclusions, $20,000, resulting in 1993 taxable gifts of $30,000. Upon Jane's death, her federal estate tax base would include this amount as well as any other post-1976 taxable gifts that she made during her lifetime. I.R.C. §§ 2001(b)(2), 2503.

58. Certain expenses of the estate, such as administration expenses under § 2053(a)(2), can be deducted on either the estate income tax return, Form 1041, or on the estate tax return, Form 706, but not both. *See* Treas. Reg. § 1.642(g)-1 (1960).

59. The tentative tax on $600,000 equals $155,800, plus 37% of the excess of such amount over $500,000, which is $37,000, for a total of $192,800.

60. If the credit shelter share, and therefore the taxable estate, were in excess of $642,425, the increase in the federal estate taxes owed, at a marginal 37% rate, would not offset the increase in the state death tax credit then available, at a 4.8% rate. Thus, if the credit shelter share exceeded $642,425, federal estate tax would be due.

61. This amount is rounded to the nearest dollar as is reflected in all calculations made in this Article.

62. The tentative tax on $642,425 equals $155,800, plus 37% of the excess of such amount over $500,000, which is $52,697, for a total of $208,497.

63. Payment of the state death taxes cannot come from the marital share because that would decrease the amount of the marital share qualifying for the marital deduction, thereby resulting in additional federal estate tax.

ferred and decreased, had the state death tax credit not been considered.

In the case of a surviving spouse with no taxable estate, payment of state death taxes at the first spouse's death fails to minimize the couple's overall death tax burden. Different conclusions may result when a surviving spouse has a taxable estate.

If the surviving spouse's maximum marginal federal estate tax is 37%, then the payment of state death taxes at the first spouse's death results in no overall death tax savings. The $15,697 of state death taxes paid in the first year allows an extra $26,728 to pass to the credit shelter share ($42,425 minus the state death taxes owed, $15,697). Even if the $26,728 experiences no appreciation[64] between the first and second spouse's death, a minimum of $26,728 will pass free from estate tax at the surviving spouse's death. If the state death taxes had not been paid, then an extra $42,425 would be included in the surviving spouse's gross estate. The federal estate tax on $42,425 at a marginal tax rate of 37% is $15,697, leaving a net $26,728 to the beneficiaries.

In contrast, if it is anticipated that the surviving spouse will have a taxable estate subject to federal estate tax at a rate in excess of 37%, then paying $15,697 in state death taxes will decrease the federal estate tax payable at the surviving spouse's death. For example, if state death taxes of $15,697 are paid in the first year, then an extra $26,728 ($42,425 minus $15,697) passes to the credit shelter share. The credit shelter share, plus appreciation and income thereon, will pass at the surviving spouse's death free from an additional federal estate tax. Thus, if the credit shelter share earns 10% and the surviving spouse dies at the beginning of the second year following the first spouse's death, an additional $29,401 ($26,728 plus $2,673) passes free from federal estate tax at the death of the surviving spouse. Had there been no state death taxes paid at the first spouse's death, the surviving spouse would have had an extra $46,667 ($42,425 plus $4,242)[65] in his or her estate. At a 55% marginal federal estate tax rate, the additional federal estate tax is $25,667, leaving only $21,001, rather than $29,401, to pass to the beneficiaries. Therefore, payment of state death taxes at the first spouse's death generates a tax savings of $8,401.

64. The effects of appreciation are omitted for sake of clarity. Even if appreciation were accounted for, the discussion's ultimate conclusion would remain unchanged.
65. This represents the $42,425 multiplied by the assumed growth rate of 10%.

Nevertheless, the tax savings are not substantial. As a result, when drafting under pick-up tax schemes, estate planners generally use a formula that calculates the credit shelter share based on factors that include the available state death tax credit, provided the use of the credit does not increase or cause the payment of state death taxes.[66]

2. Drafting for Non-pick-up Tax Schemes

In states which may impose state death taxes even if there is no federal estate tax due, the estate of the first spouse to die may choose to take advantage of the maximum state death tax credit, even though this may increase state death taxes paid, because no federal estate tax would be due. In that event, the increase in state death taxes must be compared with the anticipated decrease in federal estate tax at the surviving spouse's death. Based on this analysis, estate planners can determine the appropriate reference to the state death tax credit in the credit shelter share formula.

The result of the analysis depends on the applicable non-pick-up tax scheme. For example, New York imposes a state death tax of $25,500 when the credit shelter share equals $600,000.[67] A credit shelter share of $600,000 allows the estate a maximum state death tax credit of $14,000.[68] A formula for the credit shelter share, that provides that reference to the state death tax credit is to be made only if the credit does not increase or cause the payment of state death taxes,[69] means that the credit could never impact the credit shelter share. If, for example, the maximum credit of $14,000 were used to increase the credit shelter share to $614,000, the state death taxes payable would also increase to $26,340.[70] This would violate the formula's mandate that no increase in the payment of state death taxes should result from using the state tax credit.

A clearly different result is reached if the formula for creating the credit shelter share allows reference to the state death tax credit re-

66. For a case involving such a formula, see Estate of Bennett v. Commissioner, 100 T.C. 42, 50 n.4 (1993).

67. This is determined by calculating the tax under New York death tax rates on $600,000, which is $26,000, and then subtracting the allowable unified credit amount of $500. *See* N.Y. TAX LAWS § 952(a)(6), (b)(3) (McKinney 1992).

68. A credit shelter share of $600,000 means that the taxable estate is $600,000. $600,000 less $60,000 results in an adjusted taxable estate of $540,000. The minimum state death tax credit on this amount equals $10,000 plus 4% of the excess over $440,000, which is $4,000, for a total of $14,000.

69. *See supra* text accompanying note 66.

70. This is determined by calculating the tax on $614,000 under New York death tax rates, which is $26,840, and then subtracting the $500 unified credit allowed under New York law. *See* N.Y. TAX LAW §§ 952(a)(6), (b)(3) (McKinney 1992).

gardless of whether state death taxes are increased. In that event, the credit shelter share is initially increased to $642,425,[71] which results in state death taxes payable of $28,046[72]—$2,546[73] more than if the credit shelter share were $600,000. Payment of state death taxes would ultimately reduce the credit shelter share to $614,379. Unless the surviving spouse is not expected to incur any federal estate or state death taxes at his or her death, shifting an additional $42,425 to the credit shelter share, at a cost of $2,546 in additional state death taxes upon the first spouse's death, will result in an overall death tax savings for the couple.

IV. DEATH TAX PAYMENT STRATEGIES UNDER CURRENT LAW

To successfully implement a plan that minimizes a couple's death taxes requires consideration of post-drafting strategies involving the payment of state death taxes. The state law provisions regarding payment of state death taxes are important for two reasons. First, the timing of state death tax payments may impact the availability of the state death tax credit,[74] and, consequently, it may also impact the timing and

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71. *See supra* note 60 and accompanying text.

72. This is determined by calculating the tax on $642,425 under New York death tax rates, which is $28,546, then subtracting the allowable unified credit amount of $500. *See* N.Y. TAX LAW § 952 (McKinney 1992).

73. *See supra* note 67 and accompanying text.

74. Technical Advice Memorandum (TAM) 89-47-005 highlights the importance of the timing of state death tax payments regarding the state death tax credit. In TAM 89-47-005, the decedent's federal estate tax return was timely filed in July 1987. Tech. Adv. Mem. 89-47-005 (Nov. 24, 1989). Pursuant to the percentage limitations of § 2011(b), the estate's maximum allowable credit for state death taxes was $15,320,000, based on a state death tax payable of $20,140,000. *Id.* The executor deducted the entire $15,320,000 as a credit in computing the federal estate tax due, even though only $4,960,000 had been paid as of the date of the filing of the federal estate tax return. *Id.* The remaining $15,180,000 was to be paid in October 1990 in accordance with a 3-1/2 year extension obtained by the executor. *Id.* Consequently, the state death tax credit claimed on the federal return exceeded the state death tax actually paid by $10,360,000 as of the federal filing date. *Id.*

Relying on the legislative history to § 2011(a) and relevant judicial decisions, the Internal Revenue Service (the Service) determined that the state death tax credit was intended to be effective only as of the date that the state death taxes are paid. *Id.* Specifically, the Service held that the state death tax credit may be properly claimed on the federal estate tax return only if the state death taxes have been actually paid by the later of the filing due date for the federal estate tax return or the first date

amount of federal estate tax payments. Second, to the extent a state provides alternative payment methods, an issue arises as to which method is the most strategic.

A. *State Law Provisions Governing the Payment of Death Taxes*

Payment due dates for death taxes vary considerably among the states. Generally, the original due date is no later than the due date of the federal estate tax return, which is nine months after the decedent's death.[75] In addition, there are substantial differences among the states regarding deferred tax payments.[76] A few states provide no extensions for payment of death taxes.[77] Several states tailor their laws to mirror payment extensions provided by federal law.[78] Other states allow extensions for "reasonable cause" or in cases of "undue hardship".[79]

B. *The Interplay Between the Timing of State Death Tax Payments and the Availability of the State Death Tax Credit*

The Code generally provides that the state death tax credit is limited to state death taxes actually paid and claimed as a credit within four

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prescribed for payment of death taxes under state law, excluding extensions. *Id.* If state death taxes are paid beyond this time, the state death tax credit will be allowed, but is effective only after the date of payment. *Id.*

Therefore, the Service concluded that the state death tax credit was not allowable with respect to the $15,180,000 of state death taxes unpaid as of the filing date of the federal estate tax return. *Id.* Such credit was allowable after the date of the extended payment in October 1990. *Id.* It is worthy of note that when the October 1990 payment is made, the federal estate tax becomes overpaid, but pursuant to § 2011(c), the overpayment is refunded without interest.

A significant undesirable consequence flows from the Service's holding. Because the credit related to the $15,180,000 extended payment was disallowed as of the return filing date, the federal estate tax was in an underpayment situation. Thus, the Service would assess interest on the unpaid estate tax from the filing date until the tax was paid in October 1990.

Despite this adverse result, TAM 89-47-005 produced one major positive result for the estate: the estate tax credit with regard to the $15.18 million October 1990 payment of $15,180,000 was allowable, albeit as of the payment date. Underlying this positive result was that the 3-1/2 year extension payment fell within the federal time frame for claiming the state death tax credit. Had it not, the state death tax credit related to the extended $15,180,000 payment would have been denied.

75. Payment due dates are summarized by state in Exhibits II-IV of this Article.

76. The provisions governing the payment of state death taxes are summarized by state in Exhibits II-IV of this Article.

77. *See* Exhibits II-IV, *infra.*

78. *See* Exhibits II-IV, *infra.*

79. *See* Exhibits II-IV, *infra.*

years of filing the federal estate tax return.[80] This four-year period may be extended only pursuant to the following exceptions: (1) tax court litigation;[81] (2) extended federal estate tax payments;[82] (3) refund claims;[83] (4) remainder or reversionary interests;[84] and (5) the Code's general provision governing credits or refunds.[85]

Therefore, caution must be exercised in utilizing the payment deferral provisions contained in state laws that allow extensions exceeding four years in the absence of one of the federal exceptions. In these cases, state death taxes paid beyond the general four-year period are not eligible for the state death tax credit,[86] which results in an increase in fed-

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80. I.R.C. § 2011(c).

81. If a Tax Court petition is timely filed, the time for claiming the state death tax credit is extended up to 60 days after the decision of the Tax Court becomes final. I.R.C. § 2011(c)(1). Within this 60 day period, a claim for a refund may be filed if the federal estate taxes were paid without fully utilizing the state death tax credit. *See* I.R.C. § 2011(c)(1); Treas. Reg. § 20.2011-1(c) (1958).

82. If an estate obtains an extension of time for payment of the tax shown on the federal return, state death taxes may be paid and state death tax credit may be claimed within the period of the extension. *See* I.R.C. § 2011(c)(2); Treas. Reg. § 20.2011-1(c) (1958).

83. If a timely refund claim is filed, or a timely suit on the claim instituted, the time for claiming the state death tax credit is extended until the later of 60 days after the mailing date of a disallowance notice denying any part of a refund claim or 60 days after a court decision becomes final in a timely instituted suit on a refund claim. *See* I.R.C. § 2011(c)(3) (1986); Treas. Reg. § 20.2011-1(c) (1958).

84. If the decedent's gross estate includes a remainder or reversionary interest, the executor may elect to postpone payment of the federal estate tax attributable to that interest until six months after the precedent interest terminates. I.R.C. § 6163(a). At the end of the six-month period, the Service may extend the time for payment for a reasonable period not exceeding three years. I.R.C. § 6163(a). The state death taxes may be paid and the state death tax credit may be claimed within the six-month postponement period or any Service-approved extension period. *See* I.R.C. § 2015; Treas. Reg. § 2015-1(a) (1958).

85. Section 6511 provides that a credit or refund of any tax may be filed within two years of the tax payment. *See* I.R.C. § 6511. As a result, a state death tax credit is allowed for state death taxes paid within two years after payment of the federal estate tax, even though the four-year general rule limitation period has expired. *See* Rev. Rul. 81-263, 1981-2 C.B. 169; Priv. Ltr. Rul. 80-14-020 (Dec. 27, 1979).

86. Revenue Ruling 86-38 illustrates this principle in the context of installment payments by addressing two distinct situations. *See* Rev. Rul. 86-38, 1986-1 C.B. 296. The first arises when an estate elects to pay both federal estate and state death taxes in installments. *Id.* at 297. In this situation, the Service concluded that the second exception applies and, therefore, the state death tax credit is allowed for state death taxes paid within the federal extension period. *Id.*

In the second situation, the estate elects to pay only its state death taxes in in-

eral estate tax. Thus, a couple would not minimize their death taxes by exercising the payment deference provision.

C. *Strategic Payment of State Death Taxes*

In those states that do not provide death tax payment extensions, the state death tax credit should be available in all cases because all the required payment due dates fall within the four-year limitation rule. Therefore, payment strategies are a moot issue. In those states that allow deferred payments, the appropriate strategy will depend on the underlying facts.

One fact pattern involves a situation in which state death taxes paid can operate as a credit on the federal estate tax return,[87] and federal estate tax is paid in one lump-sum rather than in installments. In these situations, it would be advantageous to pay those state death taxes on or before the filing of the federal estate tax return and offset the credit against the federal estate tax then owed, rather than pay the state death taxes in installments. Installment payments for state death taxes owed would not change the combined state death tax and federal estate tax burden, but the state might impose interest on state death taxes paid in installments.[88]

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stallments which extend beyond four years after the filing of the federal estate tax return. *Id.* at 297-98. On these facts, the Service determined that the state death tax credit was allowed only for state death taxes paid within the normal four-year limitation period because none of the exceptions applied. *Id.* at 298-99.

The reasoning of Revenue Ruling 86-38 would appear to extend to any case in which state death tax payments are deferred for more than four years after the federal estate tax return filing date. *Id.* at 298. Absent one of the exceptions, such payments produce no state death tax credit. *Id.*

See also Estate of Spillar v. Commissioner, 50 T.C.M. (CCH) 1285, 1289-90 (1985).

87. This assumes that the federal estate tax return reflects a tentative estate tax. Otherwise, the state death tax credit is of no value.

88. The following example illustrates this point. Assume these facts: (1) the taxable estate equals $700,000; (2) the total federal estate tax on a taxable estate of $700,000 equals $229,800 which, after employing the unified credit, results in a tax liability of $37,000; (3) the adjusted taxable estate is $640,000 ($700,000 minus $60,000) which, under the table in § 2011(b) yields a maximum state death tax credit of $18,000; (4) the state imposes a pick-up death tax so that the state death tax equals $18,000; and (5) the state allows for payment of the tax in 10 equal installments.

If the entire state death taxes are paid on or before the last date for filing the federal estate tax return, the total tax burden would equal $37,000. This represents $19,000 in federal estate taxes ($37,000 minus the $18,000 state death tax credit) plus $18,000 in state death taxes.

In contrast, if the estate pays the state death taxes in installments, the same amount of total taxes, $37,000, needs to be paid on or before the time prescribed for filing the federal estate tax return. In that event, there is no reduction in the federal

Another fact pattern concerns a situation in which either the state death taxes exceed the available federal state death tax credit, or the taxpayer owes no federal estate tax.[89] In these situations, if state law permits installment payments the amount in excess of the available credit should be paid in installments to the extent desired in light of any imposed interest charges on the unpaid state death tax balance.

A third possible fact pattern relates to a situation in which the federal estate tax is paid in installments. These situations require a complex analysis to determine whether it is economically desirable to pay all state death taxes in installments, including the portion that generates a credit against the federal estate tax. This analysis requires a comparison between the expected rate of return on the amounts needed to make the remaining state death tax installment payments and the federal interest charged against the unpaid portion.[90]

Two other considerations complicate this comparison. First, the federal interest paid is an estate tax deduction.[91] That deduction decreases both the taxable estate and the interest accrued to that point and, thus, also decreases the amount of the remaining installment payments.[92] Second, the non-use of the full state death tax credit on the

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estate taxes owed until the state death taxes are paid. Although the estate would receive a refund of its federal tax paid as state taxes are actually paid in installments, this refund carries with it no interest. *See* I.R.C. § 2011(c). In effect, the estate would pay $1800 annually in state death taxes and receive back $1800 from the federal estate taxes previously paid. Even though the overall tax burden remains at $37,000, the estate may be unnecessarily depleted if the state imposes interest on the unpaid state death tax balance. Although such interest is deductible from the gross estate, the resulting federal estate tax savings is limited to 55% (37% in this example) of the interest paid. *See* Rev. Rul. 81-256, 1981-2 C.B. 183.

89. In large estate situations, no federal estate tax generally results on the death of the first spouse because of the use of a formula credit shelter/marital deduction bequest. *See supra* notes 49-56 and accompanying text.

90. For example, if the estate defers $100,000 in state death taxes over a ten-year period, a comparison needs to be made between the rate of return the $100,000 would earn (or such amount each year which remains after the payment of an installment) during the deferral period and the federal interest incurred as a result of the unpaid state death taxes (had state death taxes been paid in the first year, there would have been a corresponding reduction in federal estate tax liability and, hence, no interest would have been charged on this portion of the reduced federal estate tax liability).

91. *See, e.g.*, Rev. Rul. 80-250, 1980-2 C.B. 278.

92. *Id.* As a result, a 10% interest charge on the deferred portion of the federal estate tax liability does not cost the estate 10% times the amount of the deferred federal estate tax; rather, it costs the estate 10% times such deferred tax minus the

initial federal estate tax return may affect the maximum available state death tax credit. As interest accrues on the portion of the federal estate tax that could have otherwise been shielded by the immediate payment of the state death taxes, the taxable estate is reduced. In states that impose a non-pick-up death tax which exceeds the maximum state death tax credit initially calculated, the effect is to further reduce the maximum available state death tax credit.[93]

Although these variables are complex and interrelated, one rule of thumb is that deferral of the payment of state death taxes makes sense from an economic standpoint if there is no interest owed on the unpaid state death tax balance and if the deferred amounts can be invested in a vehicle that will experience a reasonable rate of return. If a state imposes interest on any unpaid death tax balance paid in installments, then without the aid of a computer program, it is difficult to compare the economic benefits of deferral versus lump-sum payments of state death taxes.[94]

V. REPLACING THE STATE DEATH TAX CREDIT WITH A STATE DEATH TAX DEDUCTION: DOES THE CHANGE REPRESENT SOUND POLICY?

A. *Impetus for Change*

Congress must confront a delicate political issue: reduction of the enormous federal budget deficit.[95] The deficit has been the source of considerable attention and debate because of its perceived negative impact on the United States' relative economic strength.[96] To address

deferred tax times the highest marginal estate tax rate to which the estate is subject, which is the estate tax saved by the deduction generated.

93. This reduction should not be a factor in states that have a pick-up death tax because even though the maximum available state death tax credit is reduced due to the decrease in the taxable estate (and thus the adjusted taxable estate), the amount then paid to the state should correspondingly be reduced.

94. At a basic level, after decreasing the interest payments by the tax savings generated by the reduction in the taxable estate, it is still useful to compare the true rate of interest charged on the combined state and federal extended payments with the rate of return for the property used to make the deferred payments. In addition, a pragmatic approach may involve choosing the payment method which facilitates overall estate administration and decreases the costs associated with filing multiple state death tax returns and a federal estate tax return or filing for or preserving state death tax refunds.

95. According to the Congressional Budget Office (CBO), the federal budget deficit for fiscal 1993 was $255 billion. James Risen, *Clinton Budget Kills 115 Programs, Slashes Others*, L.A. TIMES, Feb. 5, 1994, at A1. Despite recent efforts to cut the deficit, the CBO predicts a shortfall of $171 billion for fiscal 1995. *Id.*

96. *See, e.g.*, Ann R. Dowd, *CEOs Speak Out on Clintonomics*, FORTUNE, Dec. 14,

this concern, Congress is continuously searching for new revenue sources because it must increase federal reserves.

One obvious source of additional revenue would be an increase in the federal income tax. In recent years, however, Congress has avoided legislation that would result in an overall increase in federal income tax revenues.[97] Instead, Congress has relied, and will likely continue to rely, increasingly on excise taxes for its revenue needs.[98]

The federal estate tax, which is an excise tax, may appeal to Congress as a source of additional revenues because it affects only a fraction of the taxpayers impacted by the federal income tax.[99] As a result, a federal estate tax increase would be less likely to raise public criticism and debate than would a federal income tax increase.

Congress may be even more receptive to such an increase if it could be implemented without directly increasing the federal estate tax base or the federal estate tax rates.[100] One indirect and relatively subtle approach would be to replace the state death tax credit with a state death tax deduction. In the short term, a deduction would enhance federal revenue through increased federal estate tax receipts.[101] More importantly, this enhancement could be accomplished in a manner that would invoke little, if any, public attention.

1992, at 69; Jeffrey E. Garten, *The 100-Day Economic Agenda*, FOREIGN AFF., Dec. 1992, at 16; Warren Rudman, *The Federal Budget Deficit*, VITAL SPEECHES OF THE DAY, Apr. 15, 1992, at 386; *The Policy Conundrum from Hell*, THE ECONOMIST, Jan. 11, 1992, at 23.

97. In fact, federal income taxes as a percentage of average family income declined from 12.3% in 1980 to 10.9% in 1990. *See* Sylvia Nasar, *Tax Burden is No Lighter After Efforts of 80's*, N.Y. TIMES, Oct. 1, 1992, at D1.

98. Excise taxes accounted for 3% of 1992 federal budget receipts. *See* WILLIAM H. HOFFMAN ET AL., WEST'S FEDERAL TAXATION: INDIVIDUAL INCOME TAXES 1-4 (1993). As a percentage of family income, excise taxes increased from 0.9% in 1980 to 1.1% in 1990. *See* Nasar, *supra* note 97, at D1.

99. Because of the changes embodied in the Economic Recovery Tax Act of 1981, the number of estates subject to the federal estate tax is approximately 1/3 of 1%. *See* R. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 17 (1989-90 ed.).

100. *See* John M. Janiga, *The Corporate Alternative Minimum Tax: A Critique and Exploration of Alternatives*, 20 LOY. U. CHI. L.J. 21, 35-36 (1988). Direct approaches to raising taxes tend not to be politically expedient. *Id.* at 36. As a result, Congress will often use an indirect approach to accomplish the same means. *Id.* It has been argued, for example, that the corporate alternative minimum tax "was added mainly to provide Congress with a politically palatable and feasible way to curb tax avoidance. Simply put, the corporate minimum tax system allows Congress to indirectly tax that which it is not willing to tax directly." *Id.* at 35-36.

101. *See supra* notes 9-10 and accompanying text; *see also Chapter*, *supra* note 16.

B. *Implications*

Although subtle in nature, a shift from a state death tax credit to a state death tax deduction would have substantial costs to society which would outweigh the minimal increase in federal revenue. First, the shift would force state legislatures to amend their state death tax laws.[102] Moreover, from the perspective of both practitioners and their clients, replacement of the current state death tax credit would lead to chaos in the estate planning field.[103]

1. State Legislative Response

Currently, all states draft their death tax laws to incorporate the state death tax credit.[104] If the credit were replaced with a deduction, states would be required to amend their state death tax laws to eliminate all references to the credit.[105] Importantly, the amendment process would entail substantial delay and administrative costs. For example, consider the death tax laws that states would need to substitute in place of their current laws that reference the state death tax credit. Furthermore, most states, like the federal government, are in dire need of revenue. With the elimination of the state death tax credit, states would have little pressure, other than pressure exerted politically, to limit the amount of their death taxes. Therefore, state legislatures would have an incentive to establish death tax laws which increase state death tax revenues. This objective will cause substantial debate, thereby adding delay, costs, and uncertainty to the amendment process.

Moreover, as with any new state legislation, there will be interpretation problems. The current state death tax credit is unambiguous and efficient in operation. For example, an estate under a pick-up tax scheme pays an estate tax equal to the maximum available credit on the federal tax return with no need for further inquiry. In contrast, new state death tax legislation may introduce some of the complexities inherent in the federal estate tax system, such as deductions for administrative costs, split interest charitable giving, and marital gifts. If this occurs, states will incur substantial enforcement costs because state regulators would need to be educated on these issues to ensure compli-

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102. *See infra* notes 104-05 and accompanying text.
103. *See infra* notes 110-21 and accompanying text.
104. *See supra* notes 32-35 and accompanying text.
105. It is difficult to project how state legislatures would modify their state death tax laws to account for the elimination of the state death tax credit. Even with the credit, there are some differences in taxing schemes among the states. Without the credit, it would be reasonable to assume that even greater variety would exist.

ance. In addition, the complexity of enforcement proceedings would arise, resulting in additional costs to taxpayers and the states.

The substantial repercussions of changing the current system are not justified from a policy standpoint. First, the state death tax credit has been part of the federal tax law for over sixty years[106] and has operated as an effective and efficient means of revenue sharing between the federal government and the states. The current structure is one of the few sensible and easily applied standards in the Code. The initial justifications for the credit, including the elimination of forum shopping, are still defensible. Moreover, in the short term, only minimal additional revenue would be raised,[107] and depending on the state responses, revenue could actually decrease over the longer term.[108]

There is also a fairness issue involved. Relying on the state death tax credit's continued existence, state legislatures have expended considerable efforts amending their state death tax laws to account for the state death tax credit.[109] Congress' attempts to raise additional federal revenues should not result in burdensome and costly legislative changes in every state.

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106. *See supra* note 11 and accompanying text.

107. For example, assume that states were to impose death taxes at the same rate as the maximum rate allowed by the state death tax credit and that state death taxes were treated as a deduction for federal estate tax purposes. The federal revenue raised would be, at most, an additional 63% (100% less the minimum federal estate tax rate of 37%) of the amount of the state death taxes paid. Furthermore, the amount of state death taxes paid (based on the state death tax credit) is, for larger estates, only a fraction of the federal estate tax paid. For example, for a taxable estate of $3,000,000, the federal estate tax payable in 1993 after considering the unified credit ($192,800) and the state death tax credit ($182,000) was $916,000. I.R.C. § 2001(c)(2)(D). If the state death tax credit had instead been a deduction, the federal estate tax payable after considering the unified credit would have been $1,001,540, resulting in additional federal revenue of only $85,540.

108. Consider the following scenario. For a taxable estate of $2,100,000, the state tax credit equals $106,800. *See supra* note 30. Accordingly, this means a reduction in federal estate tax of $106,800. If a state imposes its own inheritance tax on a taxable estate of $2,100,000 at an average rate of 11% or more, then the deduction will reduce the federal estate tax by more than $106,800, as follows. At an average tax rate of 11%, the state death tax would equal $231,000. If the state death taxes paid are a deduction, the taxable estate would be reduced to $1,869,000. The federal tax payable on this amount, before consideration of the unified credit would be $721,850. In contrast, with a taxable estate of $2.1 million and a state death tax credit of $106,800, the federal estate tax payable, before consideration of the unified credit, would be $723,000.

109. *See* Estate of Fasken v. Fasken, 19 Cal. 3d 412, 419 n.9 (1977).

2. Estate Planning Impact

Replacing the state death tax credit with a deduction would also cause havoc in the estate planning field. The change would have at least three substantial negative effects. First, all current estate planning documents that contain credit shelter/marital deduction formulae that reference the state death tax credit would require review, and many would require revision.[110] Second, estate planners would need to constantly examine the benefits of forum shopping.[111] Third, estate planners would have to develop new death tax payment strategies.[112]

a. *Revision to estate planning documents*

Currently, estate planning documents for married couples have been drafted to carefully consider the effects of the state death tax credit and current state death tax laws through appropriate credit shelter/marital deduction formulae.[113] If the state death tax deduction supplants the state death tax credit, many of these formulae would no longer apply.[114] Accordingly, many estate planning documents would require revision to account for such a change.[115] Such revisions have at least two serious practical implications. First, if the credit is eliminated, many married couples may not understand the significance of this change and the resultant need to revise their estate planning documents. Estate planners, therefore, would have to shoulder the costly and time-consuming burden of contacting couples and advising them on this matter. In some cases, contact may be difficult or impossible, such as when a couple moves out-of-state without leaving a forwarding address or phone number.[116] Second, revisions will require additional costs and time by both the estate planner and the couple.

In essence, the shift would result in deadweight cost to the estate planner and the client. These costs will clearly outweigh the minuscule increase in federal revenues associated with replacing the state death tax credit with a state death tax deduction.

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110. *See infra* notes 113-14 and accompanying text.

111. *See infra* notes 117-20 and accompanying text.

112. *See infra* notes 120-21 and accompanying text.

113. *See supra* notes 49-73 and accompanying text.

114. *See, e.g., supra* notes 67-73 and accompanying text.

115. The problem may be exacerbated to the extent that a couple changes their state of residence. If the new state of residence employs a death tax scheme different from the old state of residence, the couple's estate planning documents may require revision.

116. It is interesting to speculate as to what the estate planner's exposure to liability should be in this area. For example, should the estate planner be liable for failure to contact the client in all cases, regardless of the facts?

b. Forum shopping

One of the original purposes of the state death tax credit was to eliminate a state's incentive to attract residents by having little or no state death taxes.[117] If the credit is replaced with a deduction, the incentive may resurface. As a result, certain states might be tempted to lower their death taxes when modifying their laws to account for the elimination of the credit. Conversely, states that have a substantial amount of retirement-age citizens, such as Florida, Arizona, and California, may be encouraged to increase their state death taxes in an effort to increase state revenues.

Because state death tax laws will, in any event, be diverse, couples will be tempted to engage in "forum shopping,"[118] particularly in retirement, because of favorable death tax laws. Any law that inadvertently results in forum shopping is adverse to the overall goodwill of society because the federal government placing states in direct competition with one another is contrary to sound public policy and should be avoided.

c. Death tax payment strategies

In the current environment, estate planners are generally in a position to establish appropriate death tax payment strategies after they determine whether the state of residence imposes a pick-up or non-pick-up tax scheme. Furthermore, these strategies do not have to be modified even if the couple changes their state of residence, as long as the new and old state have the same type of tax scheme.[119]

If the state death tax credit is eliminated and replaced with a state death tax deduction, planning for death tax payments will become virtually impossible. There will likely be no uniformity in state death tax schemes.[120] As a result, a couple changing their state of residence would have to modify their death tax payment strategy.

117. *See supra* note 11.

118. Forum shopping is the concept of choosing to apply a state law that best suits the individual. In this instance, it refers to choosing a state of residence.

119. For example, if a couple moves from a pick-up tax state, such as Illinois, to another pick-up tax state, such as Florida, no change in payment strategies is required.

120. *See supra* notes 31-45, 104-05 and accompanying text.

Further, unlike the certainty of a credit, the value of a deduction varies depending on the estate's marginal federal estate tax rate.[121] Also, a deduction will likely result in more overall taxes being paid. Accordingly, a couple's overall estate tax exposure will likely increase and their need to ensure liquidity to pay estate taxes at their deaths will also increase. The liquidity issue, often discussed in the context of estate taxes, is difficult to plan. Forcing clients to face another liquidity issue is not justified and will further exacerbate an already difficult planning process.

VI. CONCLUSION

In its search for additional revenue, Congress should avoid replacing the state death tax credit with a state death tax deduction. Such a change, although seemingly subtle in nature, would have dramatic consequences.

Prior to expeditious decision-making, Congress should focus on the true impact of any proposed change. The cost to states in modifying their existing estate tax laws, the cost to clients in changing their estate plans, and the resulting attendant confusion and inefficiency vastly outweigh the minimal, if any, increased revenue that would result from the change.

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121. *See supra* note 9.

Exhibit I: I. R. C. § 2011(b)

Amount of credit.—The credit allowed by this section shall not exceed the appropriate amount stated in the following table:

If the adjusted taxable estate is:	The maximum tax credit shall be:
Not over $90,000	8/10ths of 1% of the amount by which the adjusted taxable estate exceeds $40,000.
Over $90,000 but not over $140,000	$400 plus 1.6% of the excess over $90,000.
Over $140,000 but not over $240,000	$1,200 plus 2.4% of the excess over $140,000.
Over $240,000 but not over $440,000	$3,600 plus 3.2% of the excess over $240,000.
Over $440,000 but not over $640,000	$10,000 plus 4% of the excess over $440,000.
Over $640,000 but not over $840,000	$18,000 plus 4.8% of the excess over $640,000.
Over $840,000 but not over $1,040,000	$27,600 plus 5.6% of the excess over $840,000.
Over $1,040,000 but not over $1,540,000	$38,800 plus 6.4% of the excess over $1,040,000.
Over $1,540,000 but not over $2,040,000	$70,800 plus 7.2% of the excess over $1,540,000.
Over $2,040,000 but not over $2,540,000	$106,800 plus 8% of the excess over $2,040,000.
Over $2,540,000 but not over $3,040,000	$146,800 plus 8.8% of the excess over $2,540,000.
Over $3,040,000 but not over $3,540,000	$190,800 plus 9.6% of the excess over $3,040,000.
Over $3,540,000 but not over $4,040,000	$238,800 plus 10.4% of the excess over $3,540,000.
Over $4,040,000 but not over $5,040,000	$290,800 plus 11.2% of the excess over $4,040,000.
Over $5,040,000 but not over $6,040,000	$402,800 plus 12% of the excess over $5,040,000.
Over $6,040,000 but not over $7,040,000	$522,800 plus 12.8% of the excess over $6,040,000.
Over $7,040,000 but not over $8,040,000	$650,800 plus 13.6% of the excess over $7,040,000.
Over $8,040,000 but not over $9,040,000	$786,800 plus 14.4% of the excess over $8,040,000.
Over $9,040,000 but not over $10,040,000	$930,800 plus 15.2% of the excess over $9,040,000.
Over $10,040,000	$1,082,800 plus 16% of the excess over $10,040,000.

Note: Exhibits II - IV are intended to summarize the payment provisions for state death taxes in all 50 states and the District of Columbia as of February 1, 1993. To keep the exhibits to a reasonable length, only selected aspects of the various payment provisions are included. Reference should be made to the specific statutes for additional detail.

Exhibit II: States Imposing Pick-Up Estate Tax

State	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
Alabama	9 months after death	Not to exceed 10 years	Undue Hardship	Federal rate established pursuant to § 6621
Alaska	15 months after death	Single extension not to exceed 5 years; aggregate of extensions not to exceed 5 years	Undue Hardship	12% per annum
Arizona	No later than federal estate tax return filing date	Permitted; no statutory limit on extension period	Good cause shown	In the same manner and at the same times as prescribed by § 6621
		At same time and same number of installments as federal estate tax	Election made to pay federal estate tax under section 6166 and Arizona estate tax exceeds $50,000	
Arkansas	9 months after death	Single extension not to exceed 18 months; aggregate extensions not to exceed 5 years	Undue hardship	10% per annum
		At same time and same number of installments as federal estate tax	Election made to pay federal estate tax under section 6166	4% per annum on "4% portion" (as defined in § 6601(j)(2)); 10% per annum on any excess
California	At death, but first becomes delinquent 9 months thereafter	None provided by statute	Not applicable	12% per annum on payments made beyond delinquency date
Colorado	No later than federal estate tax return due date, including extensions	In accord with extension or installment election for payment of federal estate tax	Extension obtained or installment election made for payment of federal estate tax	Prime rate (as reported by Wall Street Journal) plus 3% on tax not paid within 9 months of death

Exhibit II: States Imposing Pick-Up Estate Tax

State	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
District of Columbia	No later than: (1) 10 months after death, or (2) 30 days after end of federal estate tax return filing date extension	None provided by statute	Not applicable	1.5% per month on tax not paid within 10 months of death
Florida	Within same period provided for federal estate tax payment	Single extension not to exceed 1 year; aggregate of extensions not to exceed 10 years	Within 30 days of receipt, must file copy of approved federal extension notice	1% per month
Georgia	No later than federal estate tax return due date, including extensions	None provided by statute	Not applicable	1% per month if tax paid after federal estate tax return due date, excluding extensions
Hawaii	No later than federal estate tax return due date, including extensions	In accord with extension for payment of federal estate tax	Extension obtained for payment of federal estate tax	2/3 of 1% per month on tax paid beyond federal estate tax return due date, excluding extensions
Idaho	No later than federal estate tax return due date, including extensions	Not to exceed 14 years	Good cause shown	12% per annum on tax paid by due date, excluding extensions
Illinois	On the due date for the federal estate tax, including extensions	In accord with extension or installment election for payment of federal estate tax (based on ratio of Illinois property giving rise to the extension or installment to total Illinois property)	Extension obtained or installment election made for payment of federal estate tax	6% per annum on tax permitted to be deferred or paid in installments; otherwise, 10% per annum if paid beyond federal estate tax due date, excluding extensions
Maine	9 months after death	Single extension not to exceed 1 year; aggregate of extensions not to exceed 10 years	Not specified by statute	Established by rule not to exceed highest conventional interest charged for commercial unsecured loans by Maine banks on first business day of October preceding the calendar year

Exhibit II: States Imposing Pick-Up Estate Tax

State	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
Minnesota	9 months after death	In accord with extension or installment election for payment of federal estate tax	Extension obtained or installment election made for payment of federal estate tax	Average predominant prime rate quoted by commercial banks to large businesses as determined by Board of Governors of Federal Reserve System
Missouri	No later than federal estate tax return filing date, excluding extensions	Permitted; no statutory limit on extension period	Not specified by statute	Established by rule equal to average predominant prime rate quoted by commercial banks to large businesses, not to exceed 12% per annum
		In accord with extension or installment election for payment of federal estate tax (based on ratio of Missouri property giving rise to the extension or installment to total Missouri property)	Must file copy of extension obtained or installment election made for payment of federal estate tax	
Nevada	At death, but first becomes delinquent 9 months thereafter	Installments proportionate to any permitted under federal law	Installment election made for payment of federal estate tax	No higher than rate provided by federal law in similar circumstances
New Mexico	No later than federal estate tax return filing date, including extensions	None provided by statute	Not applicable	1.25% per months on tax paid after due date
North Dakota	At death, but first delinquent 15 months thereafter	None provided by statute	Not applicable	1% per month on tax not paid within 15 months of death
Oregon	At time federal estate tax is payable	Not to exceed 10 years	Application	5/6 of 1% per month
Rhode Island	9 months after death	Not to exceed 4 years	Undue hardship	Predominant prime rate quoted by commercial banks to large businesses as determined by Federal Reserve Board of Governors, plus 2%, not to exceed 21% per annum

Exhibit II: States Imposing Pick-Up Estate Tax

State	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
South Carolina	9 months after death	Single extension not to exceed 1 year; aggregate of extensions not to exceed 5 years	Not specified by statute for single extension; otherwise, undue hardship	Underpayment rate prescribed by the Internal Revenue Code
Texas	9 months after death	May be granted if federal estate tax due date extended	Good cause shown	10% per annum
Utah	No later than federal estate tax return due date	Not to exceed 5 years	Good cause shown	12% per annum
Vermont	15 months after death or due date of federal estate tax return, including extensions, whichever is later	For reasonable period, not to exceed 5 years	Undue Hardship	None
		Permitted; no statutory limit on extension	Good cause shown	Average predominate prime rate quoted by commercial banks to large businesses as determined by Federal Reserve Board of Governors
Virginia	No later than federal estate tax return due date, including extensions	In accord with extension or installment election for payment of federal estate tax	Must file copy of extension obtained or installment election made for payment of federal estate tax	Federal rate established pursuant to § 6621 on tax paid beyond federal estate tax due date, excluding extensions
Washington	No later than federal estate tax return due date, excluding extensions	In accord with extension or installment election for payment of federal estate tax	Extension obtained or installment election made for payment of federal estate tax	12% per annum
West Virginia	At death, but first becomes delinquent 9 months thereafter	Single extension not to exceed 1 year; aggregate of extensions not to exceed 10 years	Undue hardship and extension granted for payment of federal estate tax	12% per annum on tax paid after delinquency date
Wyoming	At same time federal estate tax is payable	In accord with extension(s) for payment of federal estate tax	Extension(s) granted for payment of federal estate tax	None

Exhibit III: States Imposing Inheritance Tax and Additional Estate Tax

State: Type of Tax	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
Connecticut: Inheritance	9 months after death	Permitted; no statutory limit on extension period	Cause shown	11.25% per annum until expiration of extension; 15% thereafter
Additional Estate	Same	Same	Same	May or may not be imposed. If charged, 15% per annum.
Delaware: Inheritance	9 months after death	Reasonable period of time	Written request	1% per month
Additional Estate	Same	None provided by statute	Not applicable	1% per month if tax not paid within 9 months of death
Indiana: Inheritance	18 months after death	None provided by statute	Not applicable	10% per annum on delinquent tax; 6% per annum if delinquency due to unavoidable delay
Additional Estate	Same	Same	Not applicable	6% per annum on delinquent tax
Iowa: Inheritance	9 months after death	Not to exceed 10 years	Avoid hardship	Average prime rate charged by banks on short-term loans as determined by Federal Reserve Board of Governors
Additional Estate	Same	None provided by statute	Not applicable	No interest specified even on delinquent payments
Kansas: Inheritance and Additional Estate	9 months after death	None provided by statute	Not applicable	1.5% per month

Exhibit III: States Imposing Inheritance Tax and Additional Estate Tax

State: Type of Tax	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
Kentucky: Inheritance and Additional Estate	At death, but first becomes delinquent 18 months thereafter	Not to exceed 10 equal annual installments	Net tax due from beneficiary's distributive share exceeds $5,000	Adjusted prime rate charged by banks on tax paid in installments; in other cases, 8% per annum if due to unavoidable cause; otherwise 10% per annum
		Not to exceed 5 equal annual installments	Distributive share of specified beneficiary consists of "closely held business"	
Louisiana: Inheritance	At death, but first becomes delinquent 9 months thereafter	Permitted; no statutory limit on extension period	Reasonable cause	None
Additional Estate	Prior to filing federal estate tax return or 9 months after death, whichever comes first	Not to exceed 15 months	Filing of federal estate tax return required	.5% per month for 3 months after delinquency date; 1% per month thereafter
		Same terms as installment election for payment of federal estate tax	Installment election made for payment of federal estate tax	Same rate charged on federal installment payments
Maryland: Inheritance Additional Estate	Date determined by Register of Wills	Not to exceed 5 years	Payment of tax on due date would require sale of "small business"	Not specifically stated, but may be built into the "alternative payment schedule"
	9 months after death	Permitted; no statutory limit on extension period	Application	Same

Exhibit III: States Imposing Inheritance Tax and Additional Estate Tax

State: Type of Tax	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
Michigan: Inheritance and Additional Estate	9 months after death	Permitted; no statutory limit on extension period	Extension request	.75% per month
Montana: Inheritance	At date of death	Not to exceed 11 equal annual installments	Value of interest in "closely held business" exceeds 35% of adjusted gross estate	4% per annum
Additional Estate	Same	Permitted; no statutory limit on extension period	Cause shown	6% per annum if due to unavoidable cause; otherwise 10% per annum
Nebraska: Inheritance and Additional Estate	12 months after death	None provided by statute	Not applicable	14% per annum
New Hampshire: Inheritance	12 months after death	Permitted; no statutory limit on extension period	Application certified by probate court	1.25% per month
Additional Estate	At the same time or times at which the federal estate tax is payable	Same	Not applicable	Same
New Jersey: Inheritance	At death, but first becomes delinquent 8 months thereafter	None provided by statute	Not applicable	6% per annum on tax paid after delinquency date if delay due to unavoidable cause; otherwise 10% per annum
Additional Estate	At death, but first becomes delinquent 18 months thereafter	Permitted; no statutory limit on extension period	Cause shown	May or may not be imposed. If charged, 6% per annum.

Exhibit III: States Imposing Inheritance Tax and Additional Estate Tax

State: Type of Tax	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
North Carolina: Inheritance and Additional Estate	At death, but first becomes delinquent 9 months thereafter	Permitted; no statutory limit on extension period	Reasonable cause shown	Rate established by Secretary of Revenue not less than 5% per annum and not to exceed 16% per annum
Pennsylvania: Inheritance	At death, but first becomes delinquent 18 months thereafter	Permitted; no statutory limit on extension period	Reasonable cause	Rate of net income produced by property if delay due to unavoidable cause; otherwise rate established by Secretary of Treasury under provision of Internal Revenue Code
		20 consecutive quarterly installments on tax due on transfer of "small business interest"	Election filed with return	
Additional Estate		None provided by statute	Not applicable	Rate established by Secretary of Treasury under provision of Internal Revenue Code
South Dakota: Inheritance and Additional Estate	As soon as amount determined under state law, but first becomes delinquent 1 year after death	None provided by statute	Not applicable	1.5% per month on tax paid after delinquency date
Tennessee: Inheritance	9 months after death	Permitted; no statutory limit on extension period	Undue hardship	Not to exceed highest rate allowable under state law on short-term business loans
Additional Estate	At same time or times at which the federal estate tax is payable	None provided by statute	Not applicable	Rate determined pursuant to formula
Wisconsin: Inheritance and Additional Estate	At date of death	Not to exceed 15 years	Election	12% per annum

Exhibit IV: States Imposing Estate Tax and Additional Estate Tax

State	Payment Due Date	Payment Deferral	Basis for Deferral	Interest on Deferred Payment(s)
Massachusetts: Estate and Additional Estate	Date fixed by Commissioner of Revenue	Not to exceed 6 months	Extension request	Not specifically stated, but may be built into extension terms
		Not to exceed 3 years	Undue hardship	
Mississippi: Estate and Additional Estate	9 months after death	Not to exceed 6 months in any one extension from return due date or expiration of previous extension	Undue hardship	.5% per month
New York: Estate and Additional Estate	At death, but first becomes delinquent 6 months thereafter	Not to exceed 4 years	Total tax imposed exceeds 5% of net estate; otherwise, undue hardship	If not paid by delinquency date, but before 9 months after death, rate varies from .5% if paid in seventh month to 1.5% , if paid in ninth month; payments after 9 months carry interest at rate set by Commissioner of Finance and Taxation not less than 6% per annum
		In accord with extension for payment of federal estate tax under § 6166	Extension obtained for payment of federal estate tax	
Ohio: Estate	9 months after death	Single extension not to exceed 1 year; aggregate of extensions not to exceed 14 years	Undue hardship	Federal short-term rate plus 3%
Additional Estate	Same	Same	Same	Same, except no interest accrues until 60 days after final determination of federal estate tax liability
Oklahoma: Estate and Additional Estate	9 months after death	Permitted; no statutory limit on extension period	Extension request	1.25% per month unless abated by district court to 1/2 of 1.25% per month