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Book Review

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Book Reviews

CCH ESTATE PLANNING GUIDE, 1977 Edition. By Sidney Kess and Bertil Westlin. Commerce Clearing House News Bureau, 4025 W. Peterson Ave., Chicago, Ill., 60646. 1977. Pp. 645. \$9.50.

The assault of the Tax Reform Act of 1976 (TRA) on the Internal Revenue Code was the most massive in our tax history, touching the lives of all taxpayers, rich and poor alike. While there were many important changes that affected income tax, the most drastic alterations and innovations occurred in the estate and gift tax area.

For over 35 years, suggestions have been offered for the correlation of estate and gift taxes,¹ and finally, a sluggish Congress has responded. The former separate rate schedules for estate tax and for gift tax (3/4 of estate tax rates) now have been consolidated into a single unified rate schedule, and the former \$30,000 gift and \$60,000 estate exemptions have been replaced by a single unified credit, thereby eliminating most of the advantage of gifting property as a means of reducing the size of the estate at death. This unification substantially removes an estate planning technique that was normally available only to the rich who possessed excess property that they could afford to give away, usually to other family members, so that overall family wealth was not diminished.

Also, for many years the Treasury had been complaining about the loss of revenue resulting from escape from income taxation of appreciation in value of property by virtue of the step-up basis to fair market value at date of death of the owner. This was a gaping loophole, available primarily to the rich, who in order to take advantage of it only had to retain their appreciated property and die. TRA has closed this loophole by substituting a carry-over basis for most inherited property, similar to the carry-over basis that has always been applicable to gift property. Now, except for some minor adjustments, the decedent's basis immediately before death will be carried over

1. Warren, *Correlation of the Gift and Estate Taxes*, 55 HARV. L. REV. 142 (1942).

to the beneficiary, and the appreciation before the decedent's death will be taxable to the beneficiary upon his sale or other disposition of the property. However, a so-called Fresh-Start rule still excludes from income taxation the appreciation in value of the property accruing before January 1, 1977, so that it operates prospectively, and only appreciation after December 31, 1976, is captured.

In order to eliminate the litigation frequently arising over whether an inter-vivos gift was made in contemplation of death, the former rebuttable presumption that a gift within three years of death was made in contemplation of death, and therefore includable in the gross estate, has been replaced by a three year conclusive presumption. Whether such a conclusive presumption is constitutional remains to be seen. A similar two year conclusive presumption was declared unconstitutional in *Heiner v. Donnan*.² The efficacy of this case after some 45 years remains in doubt however.³

As to joint tenancy, one of the most popular forms of tenancy, the old contribution rule has been discarded as between spouses. In cases of joint tenancies created after December 31, 1976, between husband and wife, if a completed gift has been made, only the decedent's one-half interest will be included in the gross estate, regardless of whether any contribution had been made by the surviving spouse.

On top of all this, the TRA has imposed a completely new estate tax on so-called "generation-skipping" trusts in order to remove the tax advantage of creating a trust which made it possible to pay an estate tax only once over several generations. As a result of these and other changes, wills, trusts, title-holdings, and estate planning, both inter-vivos and testamentary, should be subjected to re-examination and rethinking.

Anything that will help relieve the headache caused by the difficulties, complexities, and complications created by the TRA is welcome and the *CCH Estate Planning Guide*, 1977 edition, by Sidney Kess and Bertil Westlin, is better than aspirin. The first thing one should do in examining a new book is to look at the Table of Contents and then at the Index. No matter how useful the information contained between the covers may be, the Table of Contents and the Index are the keys to accessibility

2. 285 U.S. 312 (1932).

3. See, 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 6.26 (1942); Loundes, *Current Constitutional Problems in Federal Taxation*, 4 VAND. L. REV. 469, 488-490 (1951).

of such information and without an adequate key the information may lie fallow. On this score, the Guide's Table of Contents and Index, while not superlative, nevertheless are adequate.

The Guide provides comprehensive coverage of all of the TRA changes and their impact upon estate planning. Part I consists of fifteen chapters and outlines the general principles and techniques. Among other things, it deals with the tools available for estate planning and their appropriate use, such as co-ownership of property, inter-vivos and testamentary gifts, revocable and irrevocable trusts, life insurance, annuities, wills, powers of appointment, and the new liberalized marital deduction for both gifts and estates. Part II, Special Situations, contains nine chapters covering planning for different kinds of taxpayers, for example, executives, professionals, farmers, etc. It also includes a plan for a \$250,000 estate. Part III, Building the Estate, has four chapters covering income-splitting techniques, year-end tax planning, maximizing deductions, and tax shelter investments.

One of the co-authors, Sidney Kess, is that rare hybrid who is not only an attorney but also a CPA. The accountant's fascination with figures is visible in Part IV, Planning Aids, which provides an Appendix, including, among other things, federal individual income tax rates, the unified federal estate and gift tax rates, a table of life expectancies, and a table as to how much one dollar to be paid in the future, from 1 to 25 years, is presently worth, at interest rates ranging from 4 1/2% to 11%. One might want to look immediately at the life expectancy table to determine whether one has enough time left to be able to learn all of the myriad convolutions of the TRA.

An old Chinese proverb proclaims that one picture is worth ten thousand words. The authors have taken heed, and believing that charts, tables and checklists are the equivalent of a picture, have included fifteen exhibits scattered throughout the various chapters. As a sampling, Exhibit 1 is a chart providing a comparison between sole and joint ownership of property; Exhibit 10 is a comparison of basic insurance policies, and Exhibit 15 is a comparison of corporate and noncorporate retirement plans. All of the exhibits are informative and are helpful.

For those who may feel insecure without statistics, the soft

cover Guide contains 645 pages and the price is \$9.50. The price per page amounts to less than a cent and a half, which does not seem unreasonable in an inflationary period. As a bonus, there are three unnumbered blank pages at the end which one may contemplate, if they happen to reflect one's state of mind.

Those attorneys who practice in any of the seven Western community property states or in Louisiana may feel a little slighted with the few pages that are devoted to community property. This may be attributable to the fact that both authors are members of the New York Bar and may not have had extensive experience with community property.⁴ However, community property is basically a local law situation, varying as it does even among the several community property states. An attorney practicing in a community property state should have enough knowledge about the community property laws of his own state to attend to any necessary fill-in.

A few lapses and inadvertent hangovers from prior law appear here and there in the Guide,⁵ but they do not detract measurably from the overall value of the book. However, a word of caution is in order. While the Guide comprehends all of the 1976 TRA changes, it apparently was completed before the enactment on May 23, 1977, of the Tax Reduction and Simplification Act of 1977 (TRASA). None of the changes of the 1977 Act appear to be covered⁶ and the TRASA changes should be kept in mind when reading the book. Fortunately, TRASA, unlike TRA, concerned itself with income tax changes that have no significant impact on estate planning.

The text of the Guide is terse, succinct and direct, without any unnecessary verbiage. As one might suspect, the style is not early Elizabethan and can best be described as CCH Modern.

4. On page 70, with reference to community property, it is stated that: ". . . one-half of the community property will be subject to probate . . ." In California, at least, if community property passes outright to a surviving spouse, probate administration is not required. CAL. PROB. CODE § 202 (West 1977).

5. On page 89, with reference to long-term capital gain, a holding period of six months is mentioned. This was the old requirement. The new holding period is more than nine months for 1977, and more than one year for 1978 and thereafter. I.R.C. § 1222(3); T.R.A. § 1402(a). On page 347, the example deals with an estate containing both separate and community property. The indicated "maximum marital deduction of \$250,000" appears to be in error in that there has been no adjustment downward of the new \$250,000 alternate deduction for community property as is required by I.R.C. § 2056(c)(1)(C).

6. As an example, the Guide at several points, e.g., P.159, refers to the "standard deduction," I.R.C. § 141. TRASA has repealed § 141 and the standard deduction, and has replaced it with a "Zero Bracket Amount" of \$3200 on a joint return and \$2200 on a return of a single person, I.R.C. § 63(d). These amounts have been incorporated in the rate schedules, I.R.C. § 1.

All in all, the Guide contains a great deal of useful information, and the exhibits and appendices provide helpful planning aids. The Guide should be valuable not only to the general practitioner who would like to acquire a knowledge of basic estate planning principles, but also to the practitioner in the estate planning field to update his knowledge in the light of the TRA and to sharpen his skills.

An overview and some detail is provided in the Guide, but because of the large amount of material offered, there has been no opportunity to examine everything in great detail. However, the coverage will be sufficient for most purposes, and for one who finds it necessary to delve further, it may be done with a comfortable foundation. As a result of the TRA, tax planning has now taken on a fourth dimension, and the Guide provides a panoramic sweep of the new horizon. The price is right—buy it, read it, profit from it.

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