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FEDERAL ESTATE AND GIFT TAXATION

Tenth Edition



Boris I. Bittker
Elias Clark
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WEST

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■ ■ ■

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PREFACE

This book is the tenth edition of a work designed to introduce students to the federal estate, gift, and generation-skipping transfer taxes. Over the years these taxes have undergone numerous changes at the hands of Congress, the courts, and the Internal Revenue Service, rendering many traditional estate planning devices either obsolete or in need of substantial restructuring. Such changes have routinely furnished the occasion for revising casebooks in the field (not to mention countless wills and trusts). Undoubtedly the most striking development in recent years is the enactment in 2001 of legislation calling for repeal of the estate tax—but not until 2010, and then only for a temporary one-year period. In the event, the scheduled repeal was averted at the eleventh hour by fresh legislation which reinstated the estate tax, albeit with an opt-out provision for estates of decedents dying in 2010. While the prospect of permanent estate tax repeal has receded, the skirmishing over rates and exemptions is far from over, and the taxation of inherited wealth is likely to remain the subject of heated controversy for years to come. In the meantime, students, instructors, and practicing attorneys will continue to pay close attention to the existing tax system while remaining alert to the possibility of further statutory changes.

Although the current edition of this book includes revised text and notes in a number of key sections, the basic philosophy of the book is unchanged. Our objective is to provide a book that is complete and up-to-date in coverage, giving equal time to the claims of both the taxpayer and the Internal Revenue Service, while avoiding the temptation of becoming so encyclopedic as to render the book unmanageable in a two-or three-hour course.

Chapter 1 provides an overview of the federal wealth transfer taxes, including their origins, the policy objectives they seek to serve, the method by which they are computed, and the interplay between the marital deduction and the unified credit. Students are also invited to consider the interaction of the transfer taxes with each other, with the income tax, and with state law. Chapters 2 through 4 explore the concept of a taxable transfer for gift and estate tax purposes. Although the gift and estate taxes share a single rate schedule and a unified credit, the two taxes are not fully integrated in that the gift tax receives preferential treatment in several regards and continues to serve mainly as a backstop to the estate tax. Chapter 2 focuses on the application of the gift tax to lifetime transfers (including trusts with retained interests and powers), while Chapters 3 and 4 examine the impact of the estate tax on various property arrangements. The competing claims of the estate and gift taxes are considered in connection with specific situations, including trusts, joint-and-survivor tenancies, employee benefit plans, life insurance, and property subject to powers of appointment. Chapter 5 examines the estate tax deductions and credits, and Chapter 6 presents a bird's-eye

view of the tax on generation-skipping transfers. Chapter 7 provides a survey of issues arising with respect to the valuation of property, including special rules concerning transfers of interests in family-owned businesses. Finally, Chapter 8 deals with federal estate and gift tax procedure as well as apportionment of the federal estate tax among those interested in the gross estate.

As noted in Chapter 1, the reach of the federal wealth transfer taxes is limited to a very small group of well-to-do taxpayers; only one out of a hundred decedents will incur any estate tax liability. This does not mean, however, that the study of these taxes is without vocational importance. As attorneys throughout the country will attest, the volume of legal practice in the field remains substantial. Critics may wring their hands in dismay, but the truth remains that this body of law, dealing as it does with an infinite variety of property arrangements, has become a forbidding thicket of complex statutes, regulations, and rulings. As long as this state of affairs continues, the services of informed lawyers will be needed by people planning the disposition of their property.

The subject may lay further claim for attention in its power to stimulate and challenge the student even if he or she never makes vocational use of it. The interplay of legislative, administrative, and judicial action; the attempt to steer a course true to the statute's purpose through the ever-changing and involuted channels cut by reluctant taxpayers; the search for a better tax program—these offer limitless opportunities to the student and instructor alike.

Although the materials in the book can readily be adapted for use in a course on estate planning, that is not our primary orientation. With a few notable exceptions, the writing on estate planning betrays a willingness to sacrifice everything else to a dramatic showing of tax savings, though to be sure there is usually a warning that an estate plan cannot be valued solely by the number of dollars that is diverted from the Treasury to the heirs.

A different approach to the study of these taxes may be simply stated. The federal wealth transfer taxes serve an important social policy. Practicing attorneys, unless they happen to be on a public payroll, can hardly help but regard these levies as burdens to be avoided, if it is legally possible to do so. But students have the time and the independence to reflect on the appropriate status of these taxes in our public policy and on the extent to which they succeed in fulfilling their mission. If such reflection is possible later on, when the problems of clients press on them, so much the better. In any event, they will be better citizens, and probably better lawyers as well, if they have looked at these taxes at least once from the perspective of legislators charged with formulating a tax program.

In editing the cases, rulings, and other materials that follow, we have freely omitted footnotes and renumbered those that were left. Editorial footnotes are marked as such, and parallel citations have been omitted. In general, citations to the Internal Revenue Code refer to current section numbers. In the preparation of this casebook, liberal use has been made of the text and notes in volume 5 of Bittker & Lokken, *Federal Taxation of Income*,

Estates, and Gifts (2d ed. 1993), where most issues can be pursued in more detail.

We owe an immense debt of gratitude to our senior co-author, Boris Bittker, late Sterling Professor of Law, Emeritus, of Yale University, who passed away on September 8, 2005. Although he did not participate in the preparation of the current edition, this book bears the indelible imprint of his formidable intellect and felicitous writing style. As a colleague and collaborator, he set an exemplary standard of professional integrity and personal generosity. We are also indebted to the many students who served as research and editorial assistants in the preparation of the several editions of this book and to countless other students who have knowingly or unknowingly aided and abetted our education. Finally, we express our appreciation to Pam Siege Chandler, Roxanne Birkel, and West Group for their invaluable assistance in bringing this book to publication.

ELIAS CLARK

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April 2011

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