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Post-mortem Estate Planning, or the Maryland Executor's Eight Tax Returns

G. Van Velsor Wolf

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POST-MORTEM ESTATE PLANNING, OR THE MARYLAND EXECUTOR'S EIGHT TAX RETURNS†

By G. VAN VELSOR WOLF*

In Maryland the executor (or administrator) of a decedent's estate normally has eight returns or reports which he must file relating to the tax responsibilities of the estate itself. This list includes the "inventory,"¹ which is technically not a tax return but amounts, in effect, to one of the more important tax reports since it is the basis of several tax calculations.

The preparation of these various documents requires of the executor a careful analysis not only of the obligations of the estate, but also of the charges against, and the expenses of, the administration. If this is done with a thorough understanding of the applicable income, estate, and inheritance tax principles involved, the net result will often produce a very substantial monetary savings to the members of the decedent's family.

WITHIN TWO MONTHS

The executor's first responsibility, tax-wise, comes two months after his qualification as executor. He must give

* Of the Baltimore City Bar; A.B. Yale University, 1930; LL.B., Harvard Law School, 1933.

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¹ Actually there are two inventories which must be filed in the usual case, namely, the inventory of the personal or probate estate, and the inventory of the real property which does not pass through the executor's hands but as to which he must account tax-wise.

notice to the Commissioner of Internal Revenue that there is an estate, and that he is the executor. If the decedent was a citizen or resident of the United States, and if his estate appears to exceed \$60,000, a "preliminary report" must be filed. If, on the other hand, the decedent was neither a citizen nor a resident of the United States, then the responsibility to file such a report exists if his assets in the United States exceed \$2,000 in the aggregate.² Although the report need not be filed until two months after the qualification of the executor or administrator, if no one qualifies as such within two months of the date of the decedent's death, a report must be filed within this period by "every person in actual or constructive possession of any property of the decedent at or after the time of the decedent's death."³

It makes no difference whether the expected exemptions or deductions of the estate are great or small; the responsibility exists to file such a return if the gross estate itself, without consideration of exemptions or deductions, may exceed \$60,000 or \$2,000, as the case may be, as valued "at the date of death." If there is any question, the return should be filed to be on the safe side.

The return of a resident and domiciliary of the United States should be filed with the District Director of Internal Revenue in the District in which the decedent died domiciled. In other cases it is not quite so clear.⁴ However, it should be filed in some proper manner since failure to do so can subject the executor personally to a civil penalty of up to \$500,⁵ and possibly even to a severe criminal penalty.⁶

WITHIN THREE MONTHS

Within three months of the date of the granting of his letters, the executor must make two returns to the State of

² Internal Revenue Code of 1954 (herein referred to as I.R.C.) secs. 6036 and 6071; Regs. § 20.6036-1 and § 20.6071-1; Form 704 for the estates of citizens or residents of the United States, and Form 705 for nonresidents not citizens.

³ Reg. § 20.6036-1 (b).

⁴ Reg. § 20.6091-1 provides that if the decedent was a "resident" then the notice must be filed where the decedent had his "domicile." If a nonresident, whether or not a citizen, the notice must be filed with the Director of International Operations in Washington or with such other office as the Commissioner may designate. If the decedent was a resident, but was domiciled outside any revenue district, perhaps the notice should be filed both in the district of residence and in Washington to be on the safe side.

⁵ I.R.C. sec. 7269.

⁶ I.R.C. sec. 7203. There does not seem to be any penalty which could be imposed on the decedent's estate for a delinquency or failure on the part of the executor to file, in spite of the implication in the "Instructions" on the form.

Maryland. First, he must file a report with the Register of Wills listing (1) the property, if any, in which the decedent had an interest as joint tenant at the time of his death; and (2) all transfers of "a material part" of his property given away by the decedent within two years prior to his death.⁷ In considering the latter part of this report, relating to gifts in contemplation of death, it should be noted that the Maryland law is the same as that which formerly applied for Federal tax purposes, namely, that if the gift was made within two years of death there is a presumption that it was made in contemplation of death, and if the gift was made earlier than two years prior to death it can still be held to have been made in contemplation of death if that fact is proved.⁸ This report, like the Federal preliminary report, is primarily only a general notice, having no tax or other estate obligation based on its specific figures. It usually contains only good guesses of assets and the values thereof. Nevertheless, it must be filed on time or the executor will be subject to having his administration revoked.⁹

The executor's second responsibility within this three month interval is the filing of inventories of the decedent's entire estate, both real and personal, with the Register of Wills.¹⁰ By this time the executor must have obtained appraisals on all of the decedent's property, with certain minor exceptions.¹¹ If this is not done his letters may be revoked,¹² and he could be attached personally, with a fine of \$30 assessed against him.¹³ Incidentally, the executor must also file an inventory of money and a list of debts,¹⁴ but these are, in practice, usually combined with the personal inventory.

With the filing of these inventories the first opportunity is presented for what is known as post-mortem estate planning, that is, the arranging or the handling of the

⁷ 7 MD. CODE (1957) Art. 81, § 155.

⁸ 7 MD. CODE (1957) Art. 81, § 151.

⁹ 7 MD. CODE (1957) Art. 81, § 165.

¹⁰ 8 MD. CODE (1957) Art. 93, § 239 and §§ 251, 253. Note that the same appraisers "shall" be appointed to value the real estate as were appointed for the personal estate.

¹¹ Not included, and therefore exempt from the Maryland taxes on inheritance and executors' commissions are "heirlooms and the ornaments and jewels of a widow proper to her station, and the clothing of the family," 8 MD. CODE (1957) Art. 93, § 244. In addition, § 241 exempts "wearing apparel," and § 242 exempts provisions laid up for consumption by the family.

¹² 8 MD. CODE (1957) Art. 93, § 239 and § 253.

¹³ 8 MD. CODE (1957) Art. 93, § 234 and § 253.

¹⁴ 8 MD. CODE (1957) Art. 93, § 245.

decendent's estate during administration in ways that will most benefit the decedent's surviving spouse, his children, and any other beneficiaries of the estate. One of the chief purposes of this planning is to reduce the tax burdens of all concerned. And it is the necessity of having to value all of the assets in the inventories which provides this first opportunity.

The valuation of such things as stocks and bonds quoted on national exchanges is nearly automatic. However, it is not infrequent to find fine jewelry, or a good painting, or perhaps real estate, in a decedent's estate. Before filing an inventory and committing all hands to the value thereof, it is important to stop and consider to what use any such property is to be put.

If a diamond ring, is it to be kept by the beneficiary, or will it be sold? Will the decedent's home, or some other piece of real estate, be used by the beneficiary, or be put up for sale? If either is to be kept, it might be better to use a figure on the low side of the reasonable valuation spread of such asset, since the inheritance tax¹⁵ would then be lower, as well as the Federal estate tax. On the other hand, if such property is to be sold, it might be more satisfactory to use a figure on the high side, so that the capital gain tax, which might in the end prove to be a greater burden than the inheritance and estate taxes combined, could be kept at as low a figure as possible.

The beneficiary of a painting might wish to keep it, or he might prefer to donate it to an art gallery. If it is to be kept, the lower valuation would be preferable. If, on the other hand, it is ultimately to be given to a charitable institution, the donor will undoubtedly wish to obtain as high an income tax deduction therefor as possible. Thus, for him at least, it would be preferable to have a high valuation recorded in the inventory.

Consider also the matter of depreciation on business real estate or equipment. The higher the valuation for inventory and estate tax purposes the higher the basis for depreciation. Very often the income tax benefit from these annual deductions is greater than the benefit that would be taken on the lower inventory and estate tax valuation.

Of course, valuations cannot be placed at high or low figures arbitrarily. But who knows the precise value of a diamond ring, or of an old master, or of a piece of real estate? Where there is no exact measure of worth there

¹⁵ A widow's diamond ring would presumably not be subject to the inheritance tax, see *supra*, n. 11.

is necessarily a substantial area of latitude, of which good use can be made in careful post-mortem estate planning. And this is important, for when an income tax return is being audited the Federal Internal Revenue Agent will almost invariably check Orphans' Court records, as well as estate and gift tax returns. If the properly supporting figure does not appear on the inventory in the Orphans' Court appraisal, the tax benefit which the beneficiary had expected to obtain can well be seriously prejudiced.

WITHIN SIX MONTHS

Six months after the date of the decedent's death an income tax return is due to the State of Maryland. This is the time to report the decedent's income during his last taxable year prior to the date of his death.¹⁶ Whether or not the decedent himself was on a cash or accrual basis, for this return his income is accrued to the date of death, and all deductions are similarly accrued.¹⁷ However, there is an interesting conflict here in two separate provisions of the Maryland income tax law.

At one place, as indicated above,¹⁸ it is stated that "the net income for the taxable period in which falls the date of" the decedent's death shall include "amounts accrued up to the date of his death." At another place it is stated that there shall be excluded from taxable income any amount "received by an executor . . . during the period of administration . . . which is subject to estate, inheritance or succession taxes payable to the State of Maryland."¹⁹ So, what happens to a dividend which is declared to stockholders as of a record date prior to decedent's death, but is not actually payable until after his death? It is an accrued amount which should, therefore, be included in the decedent's last return. However, it must also be included in the administration account; and an inheritance tax will be payable thereon. This writer has been advised by the Maryland taxing authorities that the conflict has been resolved in favor of the inheritance tax. If the accrued income is subject to that tax on distribution, it will not be required to be included as taxable income in the final return of the decedent.

Incidentally, an important thing to remember in connection with the filing of this Maryland income tax return

¹⁶ 7 MD. CODE (1957) Art. 81, § 305.

¹⁷ 7 MD. CODE (1957) Art. 81, § 284(b).

¹⁸ *Ibid.*

¹⁹ 7 MD. CODE (1957) Art. 81, § 280(i).

is that the personal exemptions and dependency credits, to which the decedent would have been entitled had he survived, must be prorated to the date of death. Thus, if the decedent was on a calendar year basis and died on June 30, the executor would only be entitled to take one-half of the personal exemption, one-half of the over sixty-five additional exemption, and one-half of the dependency credit for providing for his needy aunt.²⁰

AT USUAL INCOME TAX TIME

The executor's fifth tax responsibility is the Federal income tax return, in which must be reported, for Federal purposes, the income received by the decedent during his last taxable year prior to his death. It is filed at the same time that the decedent would have filed it had he survived.²¹ There is no acceleration of the time requirement because of his death during the taxable year, and there is no proration of exemptions to the date of decedent's death as there is for the Maryland return. If the decedent was on the calendar year basis, the return would be filed on the 15th day of April in the year following the year of his death, even though this could amount to a delay of more than fifteen months. In addition, there is no responsibility on the executor for the making of payments of estimated tax after the decedent's death, although if the decedent had filed a joint estimated return with his wife, she will be personally liable for the payment of the remaining instalments unless she files an amended declaration setting forth her separate estimated tax.²²

Usually of considerable benefit in the way of tax savings is the fact that this return can be filed as a joint return with the surviving spouse unless she remarries during the taxable year.²³ Thus, in the return for the year in which the decedent's death occurs, the income received by him during the taxable year prior to his death, together with income received by the spouse during the entire year

²⁰ 7 MD. CODE (1957) Art. 81, § 236(c). Of interest here is the fact that the Maryland Comptroller, in a departmental memorandum (3/1/60), has ruled that for administration purposes a deceased spouse will be considered a deceased "dependent," if she had no taxable income in the taxable year. Thus, no matter when a spouse (without taxable income) dies, the surviving spouse (the taxpayer) can take a full exemption on his or her return, without proration. This is the converse of the situation discussed in the text, namely, the death of the taxpayer rather than the dependent.

²¹ Reg. § 1.6072-1 (b).

²² Reg. § 1.6015 (b)-1 (c) (2).

²³ I.R.C. sec. 6013 (a) (2).

(including the period after the decedent's death until the close of the accounting year), can be reported together on a joint return for the two.

This return is signed by the surviving spouse and by the executor on behalf of the decedent. If no personal representative has been appointed for the decedent's estate by the time the surviving spouse must file a return on her own behalf, she can file a joint return with respect to both herself and the decedent. However, a personal representative subsequently appointed can disaffirm such act on behalf of the estate within one year after the last day for filing the return of the surviving spouse.²⁴

Only the income that would actually have been reported by the decedent had his normal tax accounting period ended on the date of his death, together with the deductions for expenses on the same basis, are included as the decedent's income for this period prior to death. That is, there is no bunching of his income because of death. If the decedent was on a cash basis, only the income actually received by him prior to death and the expenses incurred by him and paid (with one exception) are reported on this return.

The income to which the decedent had become entitled prior to death, but to which he had not become entitled to be paid prior to his death, is no longer to be considered as his income prior to death. Such income is given special treatment under the Federal tax law and is known as "income in respect of a decedent." It must be valued and included for estate tax purposes. It must also be reported for income tax purposes. However, a credit is allowed against this income, the credit being based upon the estate tax to which such income was subjected when included in the taxable estate of the decedent.²⁵

As indicated above, there is one place where income deductions can be taken on the last return of the decedent even though payments had not been made prior to his death. Medical expenses incurred by the decedent during his last taxable year, provided they are paid out of the estate within one year after his death, may be taken either as an income tax deduction on his last return or as an estate tax deduction, but not as both.²⁶ It is up to the executor, in considering not only taxes but also the relative interests of the affected life tenant and remainder-

²⁴ I.R.C. sec. 6013 (a) (3).

²⁵ I.R.C. sec. 691 (c).

²⁶ I.R.C. sec. 213 (d).

men, to determine whether or not it would be better to take such medical deductions as an income tax benefit rather than as an estate tax benefit.

In making these calculations it is important to remember that if the decedent had not attained the age of sixty-five years at the time of his death, then only the medical expenses in excess of 3% of his adjusted gross income will be deductible. Thus, although the higher income tax rates might indicate the taking of the deduction for income tax purposes, nevertheless the 3% rule could substantially reduce the amount actually available. Also, the use of medical expenses as an itemized deduction will eliminate the availability of the optional standard deduction, and perhaps, with all things considered, it might be preferable to take the optional standard deduction on the income tax return and leave the medical expenses to the estate tax return.

One procedural fact should be noticed here. In order to take such an income tax deduction it is necessary that there be filed with the Commissioner of Internal Revenue a statement and waiver in writing to the effect that the deduction has not been taken on the estate tax return and will not be. Once the statement and waiver are filed no change can be made. Yet it is often difficult to make any final decision on the subject by the time the income tax return must be filed. It is therefore suggested that the income tax deduction be taken, but that no waiver be filed at that time. Then, on audit, when the Agent requires that the statement and waiver be filed in order to permit the deduction, the decision can be made more intelligently.

FROM FOUR TO FIFTEEN MONTHS

The tax report in which there is, perhaps, the greatest comparative opportunity for tax money saving is the Federal income tax return for the estate (the executor does not ever file an income tax return to the State of Maryland for income which becomes payable during the period of administration).²⁷ This Federal return must be filed annually, beginning some time within 15 months of the date of death (plus a few days if death occurred early in the month), but the executor has complete latitude within that period as to the actual date. He is not bound by the decedent's accounting period. Although the dece-

²⁷ 7 MD. CODE (1957) Art. 81, § 280 (1).

dent may have been on a calendar year basis, the executor can switch the estate to a fiscal year basis, ending on the last day of any month within one year of the date of death that he may feel most opportune. His only responsibility is that if he does use a fiscal period he must keep a set of books on the basis of such accounting period. They do not have to be elaborate, but they must show that the executor is in fact carrying his account on a fiscal year basis.

As an example of what benefit this can be, take the case of a decedent who dies on May 15. A considerable amount of income may be received during the next two and one-half months which actually accrued to the decedent prior to his death. It may be non-recurrent, and it may actually represent a very substantial part of the aggregate income which will eventually be received by the estate during the entire period of administration. Under the circumstances the executor might well file for the estate on the basis of a fiscal accounting period ending July 31, thereby placing this heavy income for the two and one-half months in the first accounting period by itself. If it should equal the amount of income which is received during the subsequent twelve month period, the tax rate would be held as low as possible on the entire income during the administration. At the same time, if there is no need to make any distribution until after the fifteen month period, when the estate might be closed, no beneficiary would have to pay any tax on any of the income during the entire period, since there would have been no distribution of anything that could be attributed to income until after the close of the second fiscal year. As there is no proration of exemptions, the estate would get the full \$600 exemption during the short fiscal period just as if it had been a full year. If the decedent was engaged in several businesses, each business could have its own separate fiscal year.

Incidentally, the executor does not have to pay the Federal tax on the income of the decedent's estate all at once. He is entitled to make the payments over four equal instalments, the first being due on the date for the income tax return, with each of the other three following at three-month intervals.²⁸

However, the most important estate planning facet in this post-mortem area is the choice between the estate or the income tax deduction that is available insofar as administration expenses and casualty and theft losses are con-

²⁸ I.R.C. sec. 6152 (a) (2) and (b) (1).

cerned. For example, executors' commissions and attorneys' fees are administration expenses. Yet they can be taken as deductions either on the estate tax return or on the return reporting the income of the estate. This is true of all administration expenses, although not of funeral expenses.

Thus, it is important for the executor to determine whether it would be more beneficial to take these deductions on one return rather than on the other. Actually, if his calculations of comparative tax effects so indicate, he can take part on each. But, if any are used as an income tax deduction the same statement and waiver considered above would have to be filed. However, this latter problem could be handled in the same way, by taking the deduction on the income tax return and holding up on the statement and waiver until audit, when the final decision can be made.

It is interesting to note that there are a couple of rules of thumb which illustrate, in the normal case, when to take and when not to take these deductions for income tax purposes. For instance, in a situation where there is no marital deduction, where the estate does not exceed \$100,000 and where there is adequate taxable income, it would always be preferable to take these items as income tax deductions, since the lowest income tax rate is 20% and the estate tax rate does not attain the 20% rate until the taxable estate exceeds \$100,000. In larger estates, with no marital deduction, the reverse might be true.

More dramatic is the situation where the marital deduction is to be included in the determination. Here, if either of the usual marital deduction formula clauses (or something else which permits the maximum marital deduction to be taken) were used, it would still be more beneficial tax-wise in the normal situation to take such deductions on the income tax return, rather than on the estate tax return, even though the estate assets are valued as high as \$1,250,000! This is because the top-bracket gross estate tax at that level amounts to 39%. And, since only one-half of any deduction on the estate tax return would enjoy any tax benefit under these circumstances,²⁹ the ef-

²⁹ Each deduction reduces the adjusted gross estate. But, if the maximum marital deduction is taken (through the application of a formula) then, as the adjusted gross estate is reduced, one-half of each available deduction that comes off is automatically applied to the marital deduction portion (one-half of the adjusted gross estate, which is already exempt), and only the other one-half of such additional deduction will have any tax reduction effect.

fective estate tax rate on a \$1,250,000 estate would obviously not amount to as much as 20%, the lowest income tax bracket.³⁰

As indicated, these conclusions depend upon the assumption that there is taxable income in the estate against which deductions can be taken. On the other hand, even if an estate has substantially more than \$1,250,000 in principal, its income is probably so great that no matter how much principal there is, it would always be more beneficial — where the marital deduction is a factor — to take such deductions for income tax rather than for estate tax purposes.

But, if this is done, some thought should be given to making appropriate adjustments. If administration expenses, or casualty or theft losses, are paid out of the estate, and yet are taken as an income tax deduction, the benefit to the income legatee and the prejudice to the corpus remainderman can be very substantial. The payments would be made out of the principal, so the remainderman will ultimately receive that much less than he would have otherwise. At the same time the estate tax will be higher, without the benefit of these deductions, thereby causing an even greater loss to the remainderman; and, by the same token, those entitled to the income will be receiving a greater net amount than would normally be the case. With the deductions being allowed for income tax purposes (although not paid from the income), the tax on the income would be thereby reduced and the net spendable balance would be greater.

The obvious unfairness of this situation has been recognized in the few states where the problem has been presented.³¹ In these cases the courts have required the income beneficiary, or any others benefiting from this election, to reimburse the principal of the estate to the extent that the estate taxes are increased by this maneuver. The balance of the benefit, which represents the reason why the deductions are taken for income tax purposes rather than for estate tax purposes, may be retained by the in-

³⁰ Actually, in this example, the effective estate tax rate is only 19%. The Maryland inheritance tax of 1% is allowable as a credit against the Federal tax. Since it is payable anyway the Federal tax itself thus really only amounts to 38%. Where the remaindermen are collaterals (7½% inheritance tax), the area in which the effective estate tax rate is still under 20% may be much higher.

³¹ In *re Bixby's Estate*, 140 Cal. App. 2d 236, 295 P. 2d 68, 75 (1956); In *re Levy's Estate*, 167 N.Y.S. 2d 16, 18 (1957); In *re Warms' Estate*, 140 N.Y.S. 2d 169 (1955).

come beneficiary. Therefore, some specific provision should be made in the will to avoid any contention in this area.³²

Would treating these expenses as income tax deductions have the effect of increasing the surviving spouse's maximum allowable marital deduction? This deduction is limited by the statute to one-half of the "adjusted gross estate" which, in turn, is defined as the gross estate less the deductions "allowed by" sections 2053 and 2054.³³ These are the sections which permit the very deductions for estate taxes that we are considering taking on the income tax return. So, if the administration expenses are not taken as a deduction in the estate tax return, is the adjusted gross estate thereby increased, and is a maximum marital deduction legacy to the surviving spouse thereby automatically increased in an amount equal to one-half of this difference?

The Treasury seems to have said "yes" to this proposition on at least two occasions — and very clearly "yes".³⁴ It has held that the words "allowed by" should be construed to mean "actually claimed" as estate tax deductions, and thus, by taking them as income tax deductions the wife's marital gift is increased — and the overall tax burdens further decreased to the extent of this additional tax free gift. And one would think that would be the end of the case. But, in view of the Treasury's position and the opinion of the Tax Court in a recent decision, there seems to have been thrown some doubt on this conclusion.³⁵

³² The following is a suggested will provision to resolve, at least in part, these possible areas of contention:

"My executors, in their sole and absolute discretion, shall have full power and authority, as well as the direct responsibility, to make such decisions during the administration of my estate as they may deem necessary, appropriate, or desirable in connection with the determination of (a) whether any alternate valuation date or dates shall be used for estate and/or inheritance tax purposes, (b) which of the assets constituting my residuary estate shall be allocated to the marital deduction gift to my wife, and (c) whether any deductions available for estate tax purposes shall be used instead as income tax deductions either on the last return filed on my behalf individually, or on any of the returns filed in respect of income reported by my estate. All such decisions shall be final and binding on all persons interested therein, and my executors shall have the power, but shall be under no duty, obligation, or requirement whatsoever, to make any adjustments among the interests of the various persons entitled to share in my residuary estate because any such decision may increase or reduce the amount of such interest."

³³ I.R.C. sec. 2056 (c) (1) and (2) (A).

³⁴ Rev. Rul. 55-225, 1955-1 Cum. Bull. 460; Rev. Rul. 55-643, 1955-2 Cum. Bull. 386.

³⁵ Estate of Roney, 33 T.C. 801 (1960); Estate of Luehrmann, 33 T.C. 277 (1959).

Therefore, until the apparent confusion on this point has been cleared up, allowance should be made in the will to permit the executor to so increase these tax savings.³⁶ The point is that if the surviving spouse has an interest only in the marital trust, and the remainder of the estate is left for the benefit of her step-children, or other inimical interests, there could indeed be a very severe difference of opinion as to how these deductions should be handled. The legatees of the residue might well object to increasing the wife's share at their expense.

AT THE EXPIRATION OF FIFTEEN MONTHS

The last two returns to be made by the executor, namely, the Federal estate tax return and the Maryland estate tax return, must be submitted to the proper authorities within fifteen months of the date of the decedent's death;³⁷ but the executor has some more good post-mortem estate planning tax opportunities in their preparation.

Taking first the Federal estate tax return, the executor can elect whether to have the estate valued (1) as of the date of death, or (2) as of the date of disposition or one year after the date of death, whichever is earlier. That is, it is up to him to decide whether it would be more beneficial to take lower values because property will be kept, or obtain higher values in order to reduce the capital gain taxes in the event of sale. However, the election is only available when the value of the estate at the moment of the decedent's death exceeds \$60,000. Also, the election must be made within the time for filing the return; and thereafter no change will be permitted.³⁸

If the decedent owned at the time of his death an interest in one or more closely held businesses, there are two things which the executor should keep in mind, and perhaps take advantage of. The first is the privilege to sell to such a corporation its own stock without running any risk of having the proceeds considered as a dividend distribution. This rule provides that if the stock of any corporation represents more than 35% of the decedent's gross estate, or more than 50% of his taxable estate, the

³⁶ See suggested draft, *supra*, n. 32.

³⁷ Extensions of time for filing a Federal estate tax return will not be granted for more than six months in the aggregate under any circumstances, unless the executor is abroad. I.R.C. sec. 6081 (a). And failure to file on time, without reasonable cause, will subject the estate to a penalty of from 5 to 25%. I.R.C. sec. 6651.

³⁸ Reg. § 20.2032-1 (b).

corporation can redeem an amount of the stock equal in value to the sum of the estate and inheritance taxes paid by the estate plus the funeral and allowable administration expenses, without any income tax consequences.³⁹ The same privilege is available if two or more corporations are involved, and if the decedent owned at least 75% in value of the outstanding stock of each of the corporations whose stock is added together to satisfy the 35 or 50% requirements.

The executor also has the right to pay at least a portion of the estate tax in instalments over a period of from two to ten years, with only a 4% interest charge.⁴⁰ The "closely held business" to which this option applies is that which represents the same 35 or 50% of the estate, but either the decedent must have been one of no more than ten stockholders, or at least 20% of the voting stock must have been included in determining his gross estate. If more than one corporation is involved then the decedent must have owned more than 50% of the total value of each. However, if this privilege is to be availed of, the statutory provision should be carefully studied as there are some quite technical limitations and restrictions on the continuation or termination of the payments.

Another significant post-mortem estate planning opportunity arises from the preparation of the Federal estate tax return based, as it must be, on the administration account. It is then that the executor must allocate the various distributable assets between the marital share and the residue of the estate.

In this connection it should be stated that the estate tax is only paid upon the assets constituting the residuary share.⁴¹ And since these assets will not be taxable again in the surviving spouse's estate (if placed in an appropriate trust), it will make little difference how much larger the value of that share may become during the balance of the spouse's lifetime. On the other hand, the marital deduction share, not having been taxed at the time of the decedent's death, will be taxed at the time of the surviving spouse's death to the extent of the assets constituting the same at the time of her death.

³⁹ I.R.C. sec. 303.

⁴⁰ I.R.C. secs. 6166 and 6601 (b).

⁴¹ And only the assets constituting the residuary share should be liable therefor. If the marital share must contribute thereto, the allowable marital deduction will be thereby decreased. I.R.C. sec. 2056 (b)(4). Thus, the draftsman should specifically provide in the will that Federal estate taxes are to be paid only from the balance of the estate after providing for the maximum exempt share to the surviving spouse.

Thus, if the estate is composed of two types of assets, one a good income producing asset whose market value varies little over the years, and the other an asset of considerable dynamic growth, it would normally be better to allocate the non-growing assets to the marital deduction share for taxation at a later period and to place the dynamic growing asset into the residuary share.⁴² Then, when the decedent's spouse dies, and these growth assets have indeed appreciated greatly in value, this appreciation will not be taxed.

The executor's eighth report⁴³ is the Maryland estate tax return, likewise filed at the end of fifteen months. It simply picks up the difference between the amount of allowable credit for State taxes under the Federal estate tax and the actual amount paid for Maryland inheritance tax purposes.⁴⁴

In addition, there are two other points to remember as this fifteen month period draws to a close. First of all, it is the last chance for a reappraisal of the estate assets for Maryland tax purposes. Thus, if the estate has gone down considerably in value, and it is desired to have the inheritance taxes reduced, a reappraisal can be authorized at anytime up until the expiration of the fifteen month period. The inheritance tax will then be charged on the value as reappraised, rather than on the original appraisal.⁴⁵ Secondly, the Maryland inheritance taxes must be paid prior to the expiration of fifteen months from the date of qualification of the executor. If this is not done the mandatory provisions of the Code are that the executor shall forfeit his commissions.⁴⁶

In connection with the Maryland inheritance tax responsibilities of the executor, it should be remembered that the duty is imposed upon every executor or other person "making distribution of any property passing sub-

⁴² It must be remembered, however, that in order to qualify a gift for the marital deduction the surviving spouse must be entitled to receive the income or "beneficial enjoyment" of such property, or its equivalent, during her lifetime. Thus, care must be exercised to make sure that if unproductive (non-income producing) property, other than a home, can be allocated to the marital deduction share, the wife has an effective right to have such property made productive, or be converted. Reg. § 20.2056 (b)-5 (f) (4) and (5).

⁴³ Actually there will probably be at least one more Federal fiduciary income tax return, but it would follow along in the usual way one year after the filing of the first income tax return for the estate, previously discussed.

⁴⁴ 5 MD. CODE (1957) Art. 62A, § 2.

⁴⁵ 7 MD. CODE (1957) Art. 81, § 153.

⁴⁶ 7 MD. CODE (1957) Art. 81, § 154. See also § 165 as to revocation of administration.

ject to" Maryland inheritance taxes to collect from each beneficiary the amount of such tax owed by him.⁴⁷ The executor can deduct it first from what he is distributing,⁴⁸ or he can sell the property to pay the tax.⁴⁹ But apparently this liability does not extend to jointly owned property, joint bank accounts, "payable on death" Government bonds, or the like.

It should be noted that the time for collecting and paying the tax on real estate is less than for the personalty — thirteen months. If a beneficiary does not pay up by the date designated by the statute, the executor must sell.⁵⁰

THEREAFTER

After all of the executor's responsibilities have been satisfied in the filing of the eight tax reports hereinabove discussed, the question remains as to when the estate should be distributed. Here, again, this is very often exclusively a matter of tax planning.

As far as the State of Maryland is concerned, we know that the State income tax on unearned income is 5%. We also know that there is no Maryland income tax as far as the estate is concerned, and that any income received by the estate is simply taxable under the inheritance tax provisions.⁵¹ Thus, if the beneficiaries of the income under the will can escape the income tax and be subject only to the direct inheritance tax thereon, that is, if they are either parent, spouse, or descendants, their tax burden on such income will only be at the rate of 1%, thereby saving 4% as long as the estate is held open.⁵² Of course, the reverse is true where the beneficiaries are collaterals. Here the tax burden would be heavier the longer the estate is held open, since the collateral inheritance tax of 7½% would be payable instead of the income tax at the lesser 5%.

Calculations should also be made as to the Federal income tax. If the estate is ultimately to be held for the benefit of the spouse alone, with her to receive all the income, it would normally be more beneficial tax-wise to have the estate file its own return on the estate income, and have the spouse file a separate return on whatever

⁴⁷ 7 MD. CODE (1957) Art. 81, § 152; and § 156 as to real estate.

⁴⁸ *Aged People's Home v. Hospital*, 170 Md. 128, 183 A. 247 (1936).

⁴⁹ 7 MD. CODE (1957) Art. 81, § 153.

⁵⁰ 7 MD. CODE (1957) Art. 81, § 158.

⁵¹ 7 MD. CODE (1957) Art. 81, § 280 (i).

⁵² This may not be applicable to beneficiaries who are non-residents of Maryland. In some states this income would be taxable as such to them when received, regardless of the Maryland inheritance tax payment.

other income she may have in addition. In this way a split tax arrangement is obtained, dividing the tax into two paying entities, with lower tax brackets as to each. This assumes, of course, that the income from the estate is to be accumulated, and not paid out to the wife during the taxable year. On the other hand, if there are to be several beneficiaries of the estate income, all of whom are in low income tax brackets, it might be preferable to terminate the estate as promptly as possible so that they would have this income split among them for a lower aggregate tax cost; although the same result could be accomplished, with the estate remaining undistributed, by simply paying out the income to these beneficiaries during the taxable year.

In either event, the important thing to remember is that the aggregate burden of the income tax can usually be reduced by splitting income among estate and beneficiaries. Thus, it is a good idea before the close of each taxable year to see whether such a benefit can be obtained by making at least some distribution from the estate to minimize this aggregate tax burden.

Finally, in this area, there is the question of what property to transfer, and what to hold, where the legatees are clamoring for at least some sort of a partial distribution of the estate, or where the executor has completed the administration but feels that he should nevertheless retain an adequate sum to cover any possible additional income or estate tax deficiencies which might subsequently be assessed on audit. For example, if there are in the estate tax-exempt municipal bonds (of the State of Maryland, any county, etc., or instrumentality thereof), national bank stocks, the stock of any bank incorporated in Maryland, or a Maryland utility stock such as the Baltimore Gas and Electric Company, all of which produce income that is wholly exempt from Maryland income tax in the hands of a Maryland resident, it would probably be preferable in the normal case to include these assets among those to be distributed. In this way the tax exemptions would not be wasted by keeping these securities in the estate where no income tax would be payable anyway, but would be made available to the distributees who would be in a position to use and enjoy them.⁵³

⁵³ This tax benefit would also be applicable to the distribution, rather than the holding, by the executor of obligations of the United States. However, in most cases when he is simply holding back a sum to protect him in the event of a later assessed income or estate tax deficiency, the executor would normally invest, nevertheless, in U.S. Treasury Bills in order to have the money earning, safely, some income in the meantime, regardless of the tax aspects.

TAX TRAPS

In discussing post-mortem estate tax planning it is necessary to give some attention to possible tax traps. Perhaps the first thing to remember is that the holding period for assets in the estate begins with the decedent's death. If there are to be sales made during the period of the administration, the profits therefrom will be taxable at ordinary income tax rates rather than as capital gains unless, at the time of sale, six months have expired since the death of the decedent.

Another, and very serious, tax trap relates to principal payments to legatees during administration. It is quite possible for the executor to make what he thinks are principal payments to beneficiaries, only to find later that these payments are subject to income taxes in the hands of the beneficiaries, at ordinary rates and to their full extent.

Under existing law a beneficiary of an estate must pay an income tax on all amounts (with two special exceptions) received by him which, under the will, must be distributed currently or which are in fact properly paid or credited during the taxable year.⁵⁴ And, to be taxable, these payments do not necessarily have to be paid from income. As long as the estate had distributable net income, and a distribution is made, the recipient has taxable net income even though the payment is made from corpus. The two special exceptions to the foregoing rule are a gift or bequest of a specific sum of money and a gift or bequest of specific property, which in either case is paid or credited in not more than three instalments.⁵⁵

An illustration of this problem would be a will in which it is provided that everything is to go to A and B equally. Assume that the estate has \$10,000 of distributable net income, that during the taxable year the executor distributes 500 shares of XYZ stock to each of the residuary legatees from the corpus of the estate, retaining all the cash income to pay bills, and that the stock had a value of \$10 a share on the date of distribution. Although a corpus payment, the tax law would consider the stock distributions as payments of \$5,000 of income to each of the beneficiaries, since there was that much distributable net income, and since payments in that amount had been made to legatees named in the will.

⁵⁴ I.R.C. sec. 662.

⁵⁵ I.R.C. sec. 663 (a) (1).

Suppose, instead, that the executor had divided the decedent's furniture, jewelry and household effects between A and B in equal shares. These distributions would likewise be taxable to A and B at ordinary income tax rates since they were not specifically bequeathed.⁵⁶ Thus, it is important to provide separately in a will for the distribution of tangible personal property, so that the beneficiaries can take immediate possession without running any risk of income tax liability. For the same reason it is often a good idea to provide in a will for a pecuniary legacy to the surviving spouse, in addition to the marital deduction formula interest. She can then receive this amount of cash during the administration without having to pay any income tax thereon.

A third trap to avoid is in the payment of pecuniary legacies in kind. If John Smith is left a legacy of \$10,000 and the executor pays it by transferring to him XYZ stock having a value of \$10,000 at the time of transfer, the executor would have a capital gain or loss problem to consider. This is true because he has satisfied an obligation of the estate in a fixed amount by the use of property having a cost basis to the executor probably quite different from its value when used to satisfy the pecuniary legacy.

This particular trap becomes even more important where there is a formula clause marital deduction provided in the will. Thus, if the testator leaves to his surviving spouse an amount equal to one-half of his adjusted gross estate — a pecuniary legacy — the payment thereof through the transfer of various assets constituting the decedent's estate at the time of death presents to the executor a series of capital gain and loss calculations.⁵⁷ It seems to be the generally accepted opinion, however, that this problem can be completely eliminated if there is a provision in the will stating that for all purposes the values of the various items of property constituting the decedent's estate shall always be those finally accepted for Federal estate tax purposes, and that all divisions and distributions of the estate shall be made on that basis. With such a provision it would then be unnecessary to use the somewhat unpopular "fractional part of the residue" formula clause, which provides for the wife's gift as a complicated fraction or percentage of the value of the residuary estate.⁵⁸

⁵⁶ Reg. § 1.663 (a)-1 (c) (1) (1).

⁵⁷ Rev. Rul. 60-89, 1960-10 Cum. Bull. 18.

⁵⁸ A drafting suggestion as to how to provide for this might be as follows:

"If my wife survives me there shall be paid over to her a portion of my residuary estate equal in value to (a) one-half of the value

MORAL RESPONSIBILITY AND/OR PERSONAL LIABILITY

The responsibility of the executor to protect fully the estate and beneficiaries in the various areas of post-mortem estate planning discussed above has not yet been tested to any substantial degree in the courts. But if an executor is going to accept the appointment — and the sometimes substantial fees involved — it is quite possible that he will be expected to handle his job with the special competence demanded of a professional in any other field; and if he is not fully alert to the various possibilities, he may well be surcharged for his negligence, or lack of knowledge.

There are also two other questions in this field which should be discussed, namely: (1) What is the executor's responsibility to investigate the extent to which the decedent may have negligently or intentionally, even though innocently, understated or failed to report past income or gift tax liability, including gifts in contemplation of death? (2) Should an estate tax be paid on assets discovered, or learned of, by the executor long after the estate tax return has been filed, audited and approved, and the estate has been closed?

These are serious questions for, if there are assets on which the law requires the payment of a tax, and one is not paid, the Government will hold the executor to account therefor personally. If, on the other hand, the executor pays where he need not, such as waiving the defense of the statute of limitations where applicable, he may be surcharged, personally, with any loss thereby suffered by the beneficiaries.⁵⁹ Thus, the problem is not really a moral issue as far as the executor is concerned. He is normally motivated entirely by the question of his personal liability to one side or the other.

The Internal Revenue Code states that the "tax imposed by this chapter shall be paid by the executor."⁶⁰ But it is

of my adjusted gross estate as that term is defined under the Federal estate tax laws applicable to my estate, less (b) the value of all interests in property which pass or have passed to my wife under other provisions of this will or otherwise than under this will, but only to the extent that such interests are included in determining the value of my gross estate for Federal estate tax purposes and qualify as a marital deduction thereunder.

In all matters relating to the administration of my estate the values of the several assets constituting my residuary estate, including the valuations of any assets which may be distributed by my executors in satisfaction of the foregoing gift, shall be those finally determined for Federal estate tax purposes. I direct that in establishing this gift there shall not be allocated thereto any assets which would not qualify for said marital deduction."

⁵⁹ See *infra*, n. 74.

⁶⁰ I.R.C. sec. 2002.

improbable that this provision was intended to impose any personal liability on him. In its context it presumably means that the payment shall be made from the estate by the executor in his fiduciary capacity.

Actually, the only place that any personal liability of an executor appears to be mentioned in applicable federal legislation is in a Revised Statute adopted more than a century and a half ago. This law was originally designed primarily to protect the Treasury from distributions in certain insolvency situations, before there was a national bankruptcy law.⁶¹ Thus, it is not surprising that there are still substantially divergent views as to its application to an executor's personal responsibility under the modern estate tax law. But it seems to be all that the Commissioner needs in most cases.

This ancient Revised Statute provides, in substance, that taxes (including income, gift, and estate) due the United States shall have priority over all other debts of, or claims against, the estate, with minor exceptions, and that any executor who pays a debt or distributes the estate without first satisfying all such taxes, shall be held personally accountable, to the extent of such payment.

Recognizing, then, that the executor has a personal, as well as a fiduciary, liability, the next question is, How far must he go as a detective or super-sleuth in searching out and disclosing his decedent's frailties, or worse, for the purpose of protecting himself against personal liability for unpaid taxes? Although by no means thoroughly settled as a rule, it might be said generally that liability will not be imposed under the statute unless the executor was "chargeable with knowledge" of the existence of the particular unpaid tax obligation. That is, although he must bear the burden of proof, an executor will not be liable if he can show that he had "no notice which would put a reasonably prudent man upon inquiry." But there would be "enough" to sustain his personal liability if he were "in possession of such facts as that a faithful and fair discharge of his duty would put him on inquiry."⁶²

On the other hand, there is no reason for him to assume that the decedent was not thoroughly and completely honest. An executor certainly should not have to observe every past act of the deceased with suspicion. But, if he knows of a failure to report or pay a tax, or if the facts

⁶¹ R.S. § 3467, 31 U.S.C.A. (1954) § 192, which is read *in pari materia* with R.S. § 3466, 31 U.S.C.A. (1954) § 191.

⁶² Irving Trust Co., 36 B.T.A. 146 (1937). The Commissioner has acquiesced in this decision.

which have come to his attention pretty clearly indicate an omission somewhere, he must pursue the matter until reasonably satisfied.

Take, as an example, the oft-repeated situation where a prospective testator, in discussing his estate plans with an attorney or trust officer, will quite innocently relate facts clearly showing that he has failed to report taxable income in a transaction where he should have; or that he has placed a great deal of personal property in joint names without filing a gift tax return; or that he has transferred property to a trust, retaining in himself no right to receive income or principal, and on which he has paid a gift tax, but where he has not added the income of the trust to his own for income tax purposes since he had not realized that in retaining certain powers over the administration of the trust the annual income was taxable to him.⁶³

Of course, neither the attorney nor the trust officer would participate in any further current revision of his estate unless he brings his tax reporting picture up to date. But suppose the man dies and these same persons are his executors. Do they now have to make good these omissions? In such a case it would seem clear that they, as executors, would have to disclose the facts and pay on behalf of the estate whatever taxes, interest, and penalties there were which were not barred by lapse of time.

However, it must be remembered that the executor was selected because the decedent felt he would exert every effort to protect the estate, even against the ravages of the taxing statutes if necessary. So, perhaps the best thing for the executor to do would be to disclose what is known, inquire into what is evident or apparently obvious, resolve reasonable doubts in favor of the estate where nothing more than an undocumented suspicion exists, and seek what protections the law provides. The following procedure is suggested.

(1) *Protection from liability for current obligations.*

(a) The executor's first act should probably be to give written notice to the District Director of his appointment, enclosing therewith a certified copy of his letters.⁶⁴ He will thereafter be treated as standing in the place of the decedent; and if the Commissioner has any deficiencies he wants to assert, or other problems he wants to discuss, notice will

⁶³ See I.R.C. secs. 671 through 675, inclusive.

⁶⁴ I.R.C. sec. 6903, Reg. § 301.6903-1 (b).

go straight to the executor, and neither the estate nor the executor will be prejudiced because of any failure of proper communication.

(b) He should then request a prompt assessment by the Commissioner of all past income and gift tax liabilities of the decedent.⁶⁵ In this way he will be apprised of any errors which are in the returns which could cause him trouble later, and the Commissioner has to give him an answer within the time allotted therefor. After the expiration of 18 months from the receipt by the District Director of such a request, if no assessment shall have been made, limitations will have run in favor of the estate. But, it should be remembered that such protection is not afforded when no return has been filed, or when the return was false or fraudulent with intent to evade tax. Also, for such a request to be effective, it must be sent to the District Director in a separate envelope, without any other document being included therein.⁶⁶

(c) The executor's next step would be to make as thorough an investigation as the circumstances seem to indicate with regard to those activities of the decedent which might have involved him in unreported tax liability. Thus, the executor should review carefully the decedent's last three income tax returns to see if they disclose any indications of unpaid taxes. Although this would not take care of fraud, or the decedent's liability for having failed to file any return at all in a prior year, in the normal case it should be sufficient to satisfy the requirement of reasonable diligence. He should inquire of the surviving spouse and children about joint bank accounts, life insurance, jointly held property, and particularly gifts of any sort, so that he will be able to report accurately the decedent's taxable estate, as well as learn of possible unpaid gift tax liabilities. He should then inquire of the bank where the decedent kept his account, as well as of the members of the family, about the existence of any trusts that the decedent may have created, and whether or not the decedent retained any right to income or principal, so that past income or gift tax liabilities in this area could be provided for without incurring additional penalties. The executor should also review all documents under which the decedent's income tax returns indicate that he had an interest as a life beneficiary, or the like, to see if there was also a taxable power of appointment.

⁶⁵ I.R.C. sec. 6501 (d).

⁶⁶ Reg. § 301.6501(d)-1 (b).

(d) Next, as he files income or other tax returns on behalf of the estate, the executor should request prompt assessments thereof, as he did for the decedent's returns discussed above. It should be remembered, however, that although such a request will relieve the estate of any further liability after the shortened time limit, any possible liability of the executor for such deficiency is not affected thereby; it will continue for the full period as discussed below.

(e) When he has filed the estate tax return the executor should request of the Commissioner a determination of the amount of the estate tax, and a discharge from personal liability therefor.⁶⁷ And here the converse is true, namely, that although such a request will not reduce the time within which a deficiency assessment can be made against the estate, it will release the executor of any personal liability after the expiration of one year. It should also be noted here that although a request for early audit and discharge from estate tax liability, which can only be made in respect of the estate tax and not for either income or gift taxes, can be made before the estate tax return is actually filed, the one year period will not expire until one year after the receipt of the application, or the filing of the return, whichever is later; whereas the request for a prompt assessment of income or gift tax liability, which cannot be made in respect of estate tax liability, can only be made after the actual filing of the return in question.

(f) Unless the testator has otherwise directed in the will, the executor should collect whatever contributions there are to the Federal estate tax actually paid by him which should be made by life insurance beneficiaries and remaindermen of trusts over which the testator had a "general" power of appointment, as provided under the Federal statutes.⁶⁸ He should also collect the contributions to such tax for which provision is made under the Maryland statute.⁶⁹

(g) Since an assessment could still be made against the executor personally for the decedent's unpaid income or gift taxes, and against the estate for unpaid estate taxes, the executor should retain, undistributed, a portion of the estate to satisfy any reasonably possible deficiencies which may be assessed in the future. And, the remaining ques-

⁶⁷ I.R.C. sec. 2204; Reg. § 20.2204-1.

⁶⁸ I.R.C. secs. 2206 and 2207.

⁶⁹ 7 Md. CODE (1957) Art. 81, § 162.

tion would then be, How long should this reserve be held before it is distributed to the residuary legatees? The answer would normally be — until the estate tax and all other returns have been accepted in writing⁷⁰ or all claimed deficiencies have been negotiated and paid as assessed, or upon the expiration of three years from the date for the filing of the estate tax return, whichever is later. The general rule is that limitations will run on any tax after the expiration of three years from the time for filing the return, or after the date of filing if filed late,⁷¹ unless items are omitted (and no reference is made thereto) which in the aggregate would exceed 25% of the gross amount reported in the return,⁷² and then the time would not expire for six years thereafter.

(2) *Later discovery of estate assets.*

Now, suppose that all of the foregoing problems have been settled, and that the estate has been audited and closed, when months or years later the executor first learns of some assets which belong in the estate but which were theretofore completely unknown to him. There would be three possible sources to which the Government would look for payment. And it would depend upon the circumstances as to which, if any, of the three would have any liability therefor.

(a) The estate, through the executor as its fiduciary, would be the first place to look. But if three years have expired since the filing of the return,⁷³ and if the newly discovered assets do not exceed in value 25% of the gross estate stated in the return, as discussed above, it would be too late for the Government to proceed against the estate. And here, again, the lack of any moral issue becomes apparent. Since the statute of limitations has run, and since the beneficiaries are entitled to its protection, it is submitted that if the executor makes a "voluntary" payment of tax to the Government he may well subject himself to personal liability to the beneficiaries. Perhaps these assets should have been included in the return, and

⁷⁰ The District Director will acknowledge in writing when he has reviewed and accepted a return as filed.

⁷¹ I.R.C. sec. 6501(a) and (b); unless, of course, there is no return or it is false, *id.* (c).

⁷² I.R.C. sec. 6501(e)(1) and (2). And this extension of time for assessment would probably supersede the 18 month limitation under a prompt assessment. *Id.* (d).

⁷³ Which means the last day permitted for filing, if filed early, I.R.C. sec. 6501(b)(1).

as such they should have been subjected to the tax. But as they were not, it would appear that the executor has no authority now to waive the protection of the statute of limitations. If he does so he might well be proceeding at considerable risk.⁷⁴

(b) The personal liability of the executor for the tax would still be governed solely by the Revised Statute discussed above,⁷⁵ and the procedure for collection would be similar to that which would be employed against the estate.⁷⁶ The period for assessment against him, however, could be somewhat longer before limitations would be available to bar the claim since, in respect of a fiduciary, the assessment can be made at any time not later than the date for collection from the estate or "not later than 1 year after the liability arises," whichever is later.⁷⁷ As liability under the Revised Statute does not arise until the executor has made a distribution of the estate without paying a tax that is due, it is true that if limitations have run as far as the estate is concerned he should be subject to no personal liability⁷⁸ if he proceeds to make distribution of the new assets. But, if he distributes before limitations have run, his liability will continue for another year. And, note also that, if an assessment has been made against the estate within the period of limitations, the collection thereof may be commenced at any time within the next six years.⁷⁹ Thus, if an assessment is made in time and the executor distributes in the sixth year thereafter, his personal liability could extend for a period of nearly ten years.

(c) The third source for the payment of the tax would be the beneficiary to whom distribution has been made,

⁷⁴ It is true that 8 Md. CODE (1957) Art. 93, § 106 provides that it "shall not be considered the duty" of an executor to avail himself "of the act of limitations" if he deems a claim just. Thus, he can in such cases waive the statute of limitations without personal liability. But there is considerable doubt as to whether § 106 would apply to a claim of the United States. It is quite possible that the "act of limitations" mentioned in § 106 has reference only to the statutory limitations contained in Article 57 of 5 Md. CODE (1957) which, in turn, have no application to claims of the United States, since "the United States is not bound by state statutes of limitation." *United States v. Summerlin*, 310 U.S. 414 (1939); *United States v. Thompson*, 98 U.S. 486 (1879); *United States v. Schaefer*, 33 F. Supp. 547 (Md. 1940). As the Maryland statutes probably have no effect on the enforcement of Federal claims, it might be presumed that a reference therein to "the act of limitations" would not contemplate the inclusion of any matter relating to Federal claims; and so an executor, perhaps, cannot waive any defense to a Federal tax claim and hope for protection under § 106 of Art. 93.

⁷⁵ See *supra*, n. 61.

⁷⁶ I.R.C. sec. 6901(a) (1) (B).

⁷⁷ I.R.C. sec. 6901(c) (3).

⁷⁸ As to criminal liability see the discussion in text, *infra*, n. 83.

⁷⁹ I.R.C. sec. 6502 (a).

or his transferee. The period of limitations here would run as to the beneficiary one year after it does as to the estate, with one more year for his transferee.⁸⁰

Incidentally, and not to be forgotten if tax liability is assessed in any of these situations, is the fact that the tax should be paid only on the value of the assets on the valuation date.⁸¹ Thus, if the estate only had a claim to assets, either vested or contingent, which, as of the date of valuation, still had to be judicially determined, this factor should be taken into account.⁸²

This leaves for determination the following three situations: where the executor learns of the existence of the assets before the three year limitation period has run for the estate, but after he has obtained his personal release from liability on the basis of his application for determination within 1 year; where he has no release and learns of the assets before the expiration of the three year period, but then does not distribute the new assets until after the statute has run both against the estate and himself; and where he first learns of the assets after limitations have run in favor of the estate and himself, but if he distributes promptly the legatees would still be subject to transferee liability.

To disclose such assets in any of those situations might sound like a voluntary act, for which he would have no authority without the consent of competent legatees. But that is probably not true. One or more of the criminal provisions of the Code relating to attempts to evade or defeat a tax, failure to pay over a tax, and failure to file a return or supply information⁸³ might well be applicable to the first two, if not all three, of those situations, and the resulting penalties up to a \$10,000 fine and one year in prison for the executor, present a consideration to be conjured with.

Finally, as for the collection of the tax itself, it is provided that, with certain exceptions irrelevant to this discussion, the estate tax remains a lien on the decedent's

⁸⁰ I.R.C. sec. 6901(c) (1) and (2). It is probable that a beneficiary would be an "initial transferee," since the definition of transferee in paragraph (h) apparently does not include an executor, although it includes persons who hold or receive a part of the taxable estate outside the operation of the will. There is no definition of the term "transferor"; but it apparently includes an executor in his fiduciary, and not his personal, capacity.

⁸¹ I.R.C. sec. 2001 imposes the tax as determined under sec. 2051, which bases its calculation on the value of the gross estate, which in turn is defined in secs. 2031 and 2032 as the value of the estate at the time of death, or on the alternate valuation date, if elected.

⁸² *Duffield v. United States*, 136 F. Supp. 944 (E.D. Pa. 1955).

⁸³ I.R.C. secs. 7201, 7202, and 7203.

gross estate for 10 years;⁸⁴ although the District Director can give a release from this lien for any part of the estate, if he is satisfied that what is retained has a value of at least double the amount of the unpaid tax.⁸⁵ Also, any person holding or receiving property includable in the taxable estate, but not includable in the probate estate, can be held personally liable for the tax,⁸⁶ and will be treated as a transferee for the purpose of determining when limitations will run.⁸⁷

In summary, then, it might be said that the executor has a responsibility to the decedent to keep the tax burden as low as possible. He also has a responsibility to the Federal and State governments to see that all proper taxes are paid. But there is also a third consideration — himself. To the extent that he errs in either of the first two, he may have to answer with his own personal assets.

CONCLUSION

The inescapable moral, if one can properly be drawn from the above, is that the job of executor is no sinecure. In anything but the simplest of estates it is difficult, tricky — and risky. For these serious responsibilities, which have been brought on in recent years more by the high tax rates than anything else, a professional is needed, a trained specialist in the field, be he a lawyer or trust officer, or perhaps both.

It is submitted that the time-honored custom of appointing a member of the family, or a friend, as a gesture of confidence or gratitude, could bring substantial evaporation in gross asset value through unknowing handling of the tax and administration problems, as well as unsuspected personal liability and loss for the executor himself. Skill should be the order of the day, not sentimentality. The executors' fees are no gift. If the right executor is selected they are well, albeit hard, earned.

⁸⁴ I.R.C. sec. 6324 (a) (1)

⁸⁵ I.R.C. sec. 6325 (b) (1) ; Reg. § 301.6325-1(b).

⁸⁶ I.R.C. sec. 6324 (a) (2).

⁸⁷ I.R.C. sec. 6901 (h).