



Ganz Wolkenbreit & Friedman LLP

ATTORNEYS AT LAW

One Columbia Circle, Albany, New York 12203 ph: 518-869-9500
230 Park Avenue, Suite 1000, New York, NY 10169 ph: 212-984-1070

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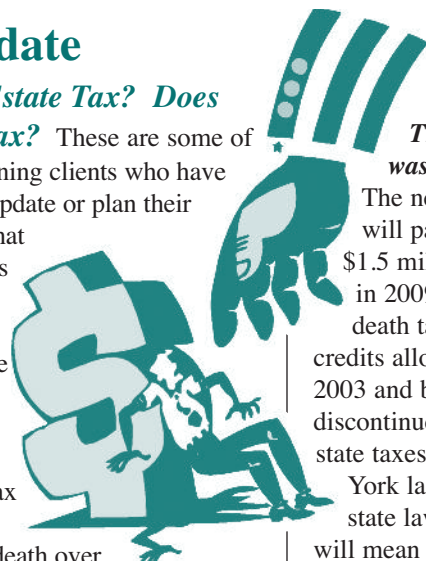
Estate Planning Update

What is the deal with the Estate Tax? Does New York still have an estate tax?

These are some of the questions we hear from estate planning clients who have done their homework in preparing to update or plan their estates, but who are confused about what they have ready in the regular press. As we have reported in previous issues of this newsletter, the current political situation has left the future of the estate tax up in the air. The Estate tax is a transfer tax imposed on the right to be allowed to transfer property to others after death. On the federal level, the tax is imposed on the value of all property which passes as a result of a person's death over which the decedent had a certain amount of control. This includes not only property owned in the decedent's name but also the value of retirement accounts, the face value of life insurance policies, the value of all or a part of jointly owned property, and the value of certain legal powers which the decedent had over property owned by others. The total value of all these assets is called the gross taxable estate.

The tax however is paid on the net taxable estate. To calculate that we are allowed to deduct certain items such as the expenses involved in administering the estate, funeral and other death-related expenses and the debts of the decedent. Property passing to a surviving spouse who is a US citizen is also fully deductible, regardless of amount. Finally, we are also entitled to a credit against estate taxes in an amount which currently would be equal to another one million dollar deduction. The balance is then subject to tax at a graduated rate beginning at 18% and going up to 49%. The tax is paid by the estate before any money passes to heirs.

In 1997, New York substantially revised its estate tax (effective 1/31/2000) to create what is commonly called the "SOP" or "sponge" tax. New York law recognizes the same unlimited marital deduction and the same \$1 million tax exemption and imposes a tax on the balance based on the table of State Death Tax credits allowed on the Federal return (as of July 22, 1988). In simplest terms, New York imposed a tax in the amount of the tax credit allowed on the Federal return, thereby absorbing (or sopping up) an amount of



money which in the alternative would have gone to Washington.

This brings us to 2001 when a new set of tax "cuts" was passed by Congress and signed by the executive.

The new law raises the dollar amount of property which will pass free of federal estate tax from one million to \$1.5 million in 2004, \$2 million in 2006, and \$3.5 million in 2009. The new federal law also changed the way State death taxes are to be treated on the federal tax return. The credits allowed in 2001 was reduced by 25% in 2002, 50% in 2003 and by 75% in 2004. In 2005, the credit will be discontinued altogether and replaced by a deduction for state taxes. Because New York taxes are governed by New York law and not Federal tax law, unless there is a new state law passed before 2005, the change in Federal law will mean that the State tax will now increase. New York law continues to recognize only the one million dollar exempt amount. In addition, the State tax will still be calculated based on the State Death Tax credit tables which were in effect on July 22, 1998. Effectively, this will mean that for New York State Estate tax purposes, the tax of the estate of a decedent who dies in 2005 will be calculated based on a one million dollar exemption and at the rate of what the credit would have been in 2001. However, in 2005 there will be no credit allowed (that is nothing to absorb) on the federal return, so instead of simply shifting money from the federal government to the state, the state tax (continued on page 2)

NEWS OF THE FIRM



We are pleased to announce that **Howard W. Roth** has become "of counsel" to our firm. Mr Roth has practiced law in Albany for more than 40 years, with an emphasis in the areas of real estate, estate planning and taxation. He holds degrees from Cornell University, Albany Law School, and New York University. He has shared office space with our firm for more than two years. This new affiliation will allow us to assist him in serving his clients and will provide us with a high level of expertise and experience in his practice areas. He also has a new secretary, Anna Dwyer. ■

Our New York City office has moved up Park Avenue to the historic Helmsley Building. The new address is 230 Park Avenue, Suite 1000, New York, New York 10169. The phone and fax numbers remain the same. ■

Estate Planning Update *(continued)*

will have to be paid from estate assets without any (or with only a partial) contribution from the Federal government. Effectively Congress, not the New York Legislature, has raised state taxes.

This situation can be avoided by a change in New York law, but in a year in which the State is starved for revenue, such a change seems somewhat unlikely. We will have to stay tuned to the tax debate both in Albany and in Washington for the next chapter.

Real Estate Rulings

The state of the economy and the terrorist attacks are the basis of some recent real estate cases. Each of these cases instructs us how to be a more intelligent participant in the real estate field, whether as

borrower, landlord or tenant. The first case is quite relevant in these times of low interest rates. Many of us are selling homes or refinancing existing mortgages. If you sell your home or refinance your existing mortgage with a new lender, you will need to obtain a payoff statement from your existing lender and, when the lender receives the entire balance due on the mortgage, the lender should send you a satisfaction of mortgage. Real Property Law §274-a provides that under most circumstances, the lender is not allowed to impose a charge for providing the payoff letter. Notwithstanding the statute, when Thomas Dougherty asked North Fork Bank for a pay off statement, the Bank sent a satisfaction statement which stated the outstanding principal and interest. The Bank also charged Mr. Dougherty a \$5.00 "facsimile fee", a \$25.00 "quote fee", and a \$100.00 "satisfaction fee". Mr. Dougherty paid the fees and subsequently sued North Fork Bank. The case went to the Appellate Division, which held that the quote fee and the facsimile fee were unlawful, but the Bank was entitled to charge the \$100.00 satisfaction fee, which was its attorneys' fee for the preparation of the satisfaction.

The horrible events of September 11, 2001 have given rise to numerous cases. In *Gutowski v. Louie*, the New York County Supreme Court was faced with the question of whether or not there was a binding contract for the sale of a condominium unit. Mr. and Mrs. Louie had submitted a signed contract to buy Mr. Gutowski's condominium in Lower Manhattan. The Louie's attorney mailed the signed contracts to Mr. Gutowski's attorney on August 29, 2001 with a cover letter that asked the attorney to hold the check in escrow until

the Louie's attorney was in receipt of two fully executed contracts of sale. On September 10, 2001, Mr. Gutowski signed the Contracts of Sale at his attorney's office. That day, his attorney mailed the contracts to the Louie's attorney by leaving the envelope with an employee of Federal Express.

On the next day, September 11, 2001, the World Trade Center was attacked. Mr. and Mrs. Louie immediately decided that they did not wish to purchase the condominium in Lower Manhattan. On September 11, 2001, before their attorney received the fully signed contracts, they sent a letter by Federal Express and facsimile to Mr. Gutowski's attorney rescinding the offer to buy the condominium. While the trial court did not decide whether or not there was a binding contract, it did hold that, under the terms of the document itself, both the execution and delivery of the contract was required before it became effective. Further, the Louie's attorney's cover letter indicated that the Louies did not consider the contract to be binding until and unless their

attorney received the fully executed contract. Before that receipt occurred, Mr. Louie wrote a letter rescinding their offer. The court said it was a trial issue, whether the Louie's attorney's letter was intended to mean that there would be no binding contract between the parties until and unless the attorney had received the contract. One might think that the contract became binding as soon as Mr. Gutowski signed the contract, thereby making it a fully executed contract. In some cases, that may be the case. Here, because the contract referred to delivery, and because the attorney's cover letter also seemed to hinge on receipt of the contract, the court required more than the mere existence of a fully executed contract.



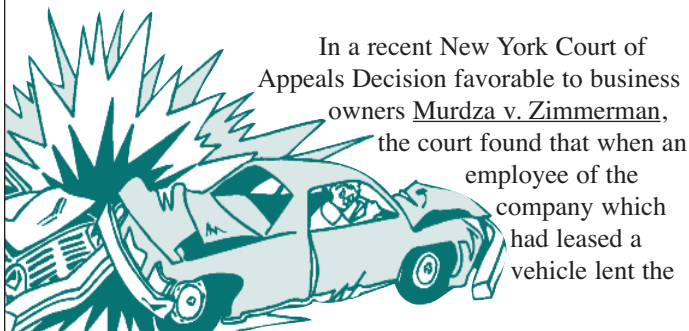
Security concerns in downtown office buildings are another outgrowth of the September 11, 2001 attacks. In *League of Arab States v. 4 Third Avenue Leasehold, LLC*, the landlord and tenant were involved in a lawsuit over additional costs for security after September 11, 2001. The League of Arab States, the tenant, notified its landlord that it had received bomb threats and death threats after September 11, 2001. The landlord took measures to increase security and then sought to bill the tenant. The court reviewed the lease and determined that nothing in the lease allowed the landlord to pass on the cost of additional security expenses. The landlord also argued that the tenant had created a nuisance and was therefore in default of its lease. The landlord claimed that the mere presence of the Arab League poses a safety risk, given the number of individuals and groups that wish to seek vengeance against Arabs and/or Muslim groups. The court summarily rejected that argument. The tenant had not engaged in any conduct other than its lawful possession of the leased premises. Accordingly, the tenant had not created a nuisance and the landlord's case was dismissed.

The final case concerns landowner's liability. Sheila Notkin attended a wedding at the Gristina Vineyards. The bridal couple had rented the vineyards for the occasion of their wedding ceremony. Ms. Notkin apparently tripped as she went onto the dance floor, which was placed on grass. She claimed that the landowner had breached its duty of reasonable care by negligently allowing high grass and inadequate lighting on its premises to conceal the raised edge of the dance floor over which she tripped. The Gristina Vineyard had agreed to provide the location for the wedding ceremony, and the wine and wine pouring services. All other party services and equipment were the responsibility of the bridal couple. The couple had contracted with a rental service to provide and install all of the party equipment including the tent, which was erected on the main lawn and the dance floor which was set up under the tent. That company also arranged for the tent lighting.

There was no claim that the landlord actually knew of the condition that caused the accident. Instead, Ms. Notkin claimed that the landlord should have known. The court held that a landlord may be liable for injuries caused by a defective condition upon the leased premises, if the landlord retained sufficient control of the premises that it should have known about the condition. Here, the court was satisfied that the land owner did not retain sufficient control of the tent area and dance floor. It had not selected nor installed the dance floor, so no constructive notice could be assumed. The lesson of this case is that the landowner who rents out property to be used by third parties should try to anticipate what those third parties will do and make clear what is and is not within the landowner's area of responsibility ■

Court Relieves Employer of Liability in Leased Car Accident

As a matter of social policy, New York Law holds the "owner" of a vehicle strictly liable for the negligence of a driver (Vehicle & Traffic Law §388). This has recently received a lot of headline attention because of the exposure it creates from financial services companies which theoretically "own" vehicles under lease financing arrangements. Another aspect of this issue is that the lessee is also considered a "owner" of the vehicle and, therefore, another potential defendant in a motor vehicle accident case.



vehicle to her boyfriend who was then involved in an accident, the injured party could **not** proceed against the employer.

Critical to the court's determination that liability would not attach to the employer was the fact that the employer had an *employee handbook* which explicitly prohibited employees who were driving vehicles owned or leased by the employer from allowing anyone else to operate such motor vehicles. The court found that this explicit restriction "while simultaneously restricting its liability as an owner under the Vehicle & Traffic Law §388, encourages careful selection of operators - - the curative policy underpinning of this section." The court found that this was sufficient to rebut the presumption of liability under the statute and free the employer from liability.

Therefore, employers should review their employee handbook to make sure that they have a provision so restricting the use of company vehicles to company employees, regardless of whether the vehicles are owned outright or leased. ■

What We're Up To

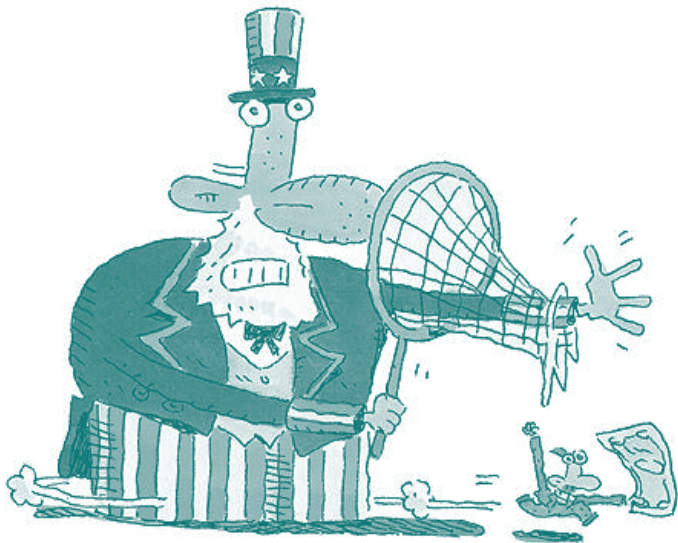


Jed Wolkenbreit is currently working with physician groups both in New York and Albany to establish private hospital-affiliated practice groups. ■

Dave Seigfeld is working with Jed in assisting our physician clients in meeting the challenges of becoming HIPAA compliant. He is also involved in some not-for-profit corporate governance issues. ■

Rob Ganz recently argued 2 appeals in the federal court of appeals for the region; one involving a faulty real estate appraisal and the other concerning the squeeze-out of a minority shareholder. ■

Rick Friedman won a case in a state appellate court relating to insurance commissions owed to our client. He was also involved, on a creditor's behalf, in a bankruptcy proceeding under Chapter 13 to force the wife of the debtor to reveal her income so that the court could better determine the appropriateness of a repayment plan. ■



The Taxation of Business Activities Beyond New York's Borders

As states struggle to generate sufficient revenue to reduce their record deficits, they are becoming more aggressive in the enforcement of their tax laws. One approach some states are taking is to attempt to ensure that all entities conducting business in their state are paying the appropriate business taxes. For example, the state of New Jersey, Department of Treasury, through the use of State troopers, has begun to pull over or check at weigh stations, out-of-state commercial trucks to determine if their owners have failed to register to do business in the state or failed to file appropriate tax returns. If the business has failed to do either or both, the truck is impounded with all its cargo until such time as the appropriate tax for **all** prior years is paid. Accordingly, it is important for every business selling goods outside the State to ensure that it is compliant with the laws of the state in which they are doing business recognizing that each state's tax laws and business registration requirements are different.

There are two issues that need to be determined: (i) whether the activities conducted in another state constitutes "doing business" in that state, thereby requiring **registration**, and (ii) whether the activities in that state go beyond the mere solicitation of business, requiring the **payment of a tax** based upon net income generated in that state.

In general, Federal law **prohibits** a state from imposing a net income tax on the income derived within a state by any business from *interstate commerce* if the only business activities within that state are: (i) the **solicitation** of orders by such business in such state for sales of goods, (ii) the orders are sent outside the state for approval, and (iii) if approved are filled by shipment or delivery from a point outside the state. To the extent business activities go beyond mere solicitation, the state can impose a tax based upon the net income derived in that state.

The following activities have been deemed to go beyond the mere solicitation of business, allowing a state to impose such a tax:

1. maintaining, owning, leasing or renting any office in that state;
2. having any employees or sales people who reside and solicit sales in the state;
3. operating any manufacturing, training or warehouse facility in the state;
4. obtaining a telephone listing in the state;
5. maintaining a bank account in the state;
6. evaluating or reviewing the inventory of any customer in the state;
7. directing how the company's products should be displayed or prepared for customers in the state; and
- 8 retrieving spoiled or damaged products.

It should be noted that states can impose a tax unrelated to income and can require a company to register in the state if it is "doing business" in that state. For example, Federal Law allows a company to deliver their product into another state without the concern that the state can impose a tax on the net income. However, a company that uses its own vehicles to ship product into another state or has salespeople in that state soliciting sales could be "doing business" in that state, requiring it to register. Each business should analyze its out of state activities and the particular laws of the state in which it engages in such activities in order to properly determine how to be compliant with that state's laws. Registration usually involves filing a simple form with the department regulating the businesses, appointing a domestic registered agent upon whom legal process may be served, and thereafter paying an annual flat "fee" (\$250 to \$750) per year for the continued registration status.

Currently, the best way to avoid another state from imposing a tax on a company's business activities would be for the company to limit its activities in that state to mere solicitation and to deliver products by common carrier.

With the growing Internet market, states have been discussing methods of unifying the business income taxes they impose, to insure that all business are paying the appropriate taxes for the business conducted in each state, without resorting to the type of subjective analysis discussed above. While this may increase a business's tax liability, it may also provide a more definitive method to ensure compliance. The passage of any uniform Internet sales tax is a political process which has a long way to go before it is accomplished. ■



DISCLAIMER Actual resolution of legal issues depends upon many factors, including variations of facts and the application of such facts to state and federal statutory and common law. This Newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this Newsletter.