JB
JEFFREY BURR
ESTATE PLANNING & PROBATE ATTORNEYS

CLIENT FOCUS

Short Sale vs. Foreclosure

In the wake of the real estate market meltdown, homeowners are often left singed with unexpected tax consequences from a foreclosure or short sale. Here are a few issues you may want to address if you, like many others, are left with a home that is upside down and are trying to determine your best course of action.

Tax Treatment of Foreclosures and Deeds in Lieu of Foreclosure

A distinction exists in the tax treatment of a foreclosure based on the type of promissory note the borrower signed; namely, whether it is "non-recourse" or "recourse" debt. If the debt is "recourse," the debtor is personally liable for the debt above and beyond the fair market value of the real property securing the debt. If the debt is "non-recourse," the debt is only secured by the real property, and the debtor is not personally liable for the deficiency between the principal amount of the mortgage and the fair market value or sales price of the property. In Nevada, most residential mortgages are recourse.

When a foreclosure (or deed in lieu of foreclosure) takes place in the recourse loan context, the debt is satisfied up to the fair market value of the property and is treated as a sale. If the lender forgives the balance of the mortgage, there is cancellation of debt income, which is taxed as ordinary income to the borrower. Hence the borrower is left homeless and may be taxed for the forgiveness of the debt above the fair market value of the house. There are certain exceptions that may apply, and you should consult with your CPA about the specifics of your situation.

When a non-recourse mortgage is foreclosed, the property is treated as being sold for the balance of the mortgage. The balance of the loan above the fair market value of the home is not treated as income to the borrower; thus, the borrower is not taxed on any type of "forgiveness of debt income."

Taxation of Short Sales

In a recourse debt scenario, even if the bank agrees to a short sale of your residence, the debt is not necessarily cancelled out, so any debt not satisfied with the sale proceeds would be taxable as cancellation of debt income similar to the foreclosure situation above, with a few exceptions.

For non-recourse debt, when the seller and buyer require the cancellation of the debt by the lender as a condition of the short sale, the debt cancellation is included in the sale proceeds; therefore, it is not taxable to the seller.

A short sale can be a viable alternative to a foreclosure for debtors with non-recourse debt and who qualify for certain exclusions. Be aware, however, that the lender in most cases has up to 6 years under a short sale to try to recover a deficiency from the borrower, compared to only 6 months in a foreclosure. JB

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fall 2010

UNCERTAINTY ON THE ESTATE TAX FRONT

With the current uncertainty on the estate tax front, some people feel frozen in place in their estate planning. Regardless of the outcome of estate taxes, there are many other issues we want our clients to be aware of which have very little to do with how the estate tax law finally settles out. Following is a list of important factors in your estate planning which may require changes in your existing plan. We recommend you keep this list handy so as life changes, you will know your estate plan must be modified to best deal with changing circumstances.

1 Estate taxes are important, but minimization of taxes should not be the driving factor in any plan.

2 Has your net worth changed significantly since your last meeting with your advisor?

3 Are your documents up to date for changes in your current health status? As clients age, they may want to consider adding a capable family member or friend as a co-trustee. Is everything in place to deal with coming incapacity or known illness?

4 Have your ideas changed with regard to leaving some of your estate for charitable purposes? Have your favored charities changed?

5 Do you have any heirs or potential heirs who have disabilities or handicaps? Are you sure your plan will not negatively impact any benefits they may be receiving? Even a small inheritance can upset a person's benefits.

6 For our clients who have moved out of Nevada, although your trust and Will are valid in any state, we recommend that you have healthcare and financial powers of attorney which comply with the law in your primary state of residence. We have healthcare power of attorney forms for some states; for other states we recommend you contact a local attorney to get the most up-to-date forms.

7 Have marriages or divorces occurred among any beneficiaries or yourself? Many of our divorced clients have not yet removed ex-spouses from their power of attorney designations. Although a divorce automatically voids any bequest under a Will or trust in most cases, it is still important to make sure this is done properly. Also, divorce does not void beneficiary designations of retirement accounts, life insurance and so forth.

8 Does your plan do the best it can to eliminate potential conflicts among heirs? Too often important things, like who inherits family heirlooms, are left to chance, possibly resulting in expensive and divisive family lawsuits.

9 Has a change in the value of your estate negatively affected the prospects for the surviving spouse? Some plans call for the survivor to make distributions of the estate upon the first death. These distribution requirements may have been reasonable when the plan was first drawn up, but we sometimes see cases where the amounts designated to pass upon the death of the first spouse may cause hardship for the surviving spouse.

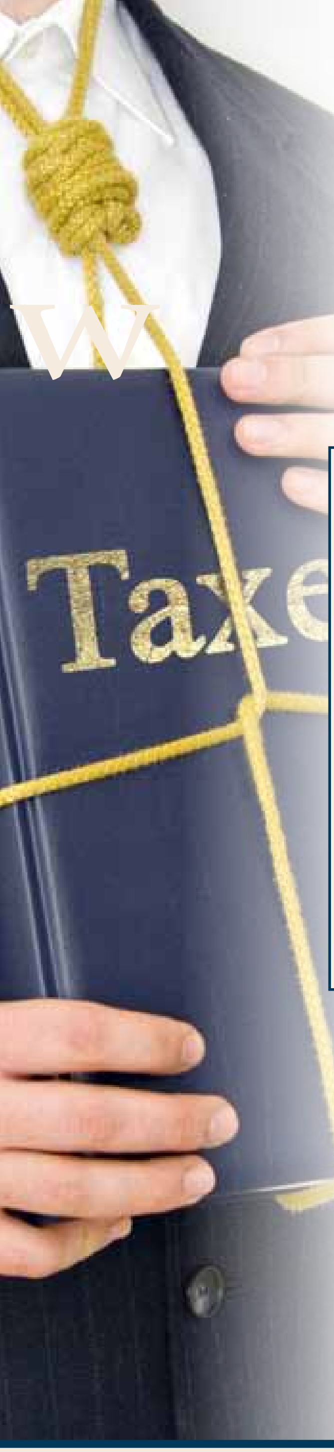
10 We have many clients these days who wish they had taken advantage years ago of our recommendations to set up an asset protection Nevada On-Shore Trust. These trusts may or may not protect you from a lawsuit which is threatened or already in progress, but it is still a good idea to plan for future claims. At least twelve states now have asset protection trust laws, so the concept is consistently gaining more of a following.

11 Have you chosen the correct trustee? Is the son or daughter you have appointed really capable and will he or she be fair, or does the appointment set up a strong potential for conflict? Perhaps an independent trustee, such as a bank or trust company, would be a safer choice. With all the services provided by banks and trust companies in trust administration, we think they are one of the best bargains around.

12 Have you designated the beneficiaries of your retirement accounts properly, e.g., for IRA's, qualified plans, deferred compensation, etc? These assets form a large part of many estates, and it is vital that beneficiary designations be done properly.

13 Are your assets properly assigned to your trust?

Estate planning is not static; it is a dynamic process. Pay attention to changes in family circumstances and contact your advisor to be sure your plan is set up properly to deal with the changes in life which inevitably come to us all.



To File or Not to File: Is it Necessary to File a Federal Estate Tax Return this Year?

We are now eleven months into 2010, and many of the same questions facing estate planners and their clients earlier this year are still unanswered.

Will we see estate tax legislation prior to 2011, preventing a return to a pre-EGTRRA tax regime?

Will that legislation affect the current estate tax environment and provide for the retroactive enactment of an estate tax for 2010?

For estates of those who die in 2010, how is carryover basis applicable?

What federal estate tax form should be filed for persons dying during 2010?

Thus, with these and other unanswered questions still lingering, many tax professionals are left wondering how to deal with the fallout of the one-year repeal of the estate tax. Unfortunately, as far as we can tell, these and many similar questions are no closer to being answered today than they were at the beginning of the year. Additionally, with a pivotal election season on the horizon, it's unlikely we will see any resolution on the estate tax front before November. That being the case, some guidance and hinting towards forthcoming information in the area of estate tax return compliance is available. This can be summarized as follows:

◆ Internal Revenue Code Section 6075, which addresses the time for filing an estate tax return during 2010, states that those required to file estate tax returns are required to do so by the due date of the decedent's final federal income tax return, i.e., April 15, 2011.

◆ The IRS will not be releasing a traditional Form 706 for 2010. Rather, the Service will be providing a new type of return meant to address the carryover basis provisions of the 2010 estate tax law as well as the accompanying allocation of stepped-up basis allowances, i.e., $1.3 million to anyone and an additional $3 million for assets passing to a spouse directly or through a QTIP-like trust. Apparently, the new return will require that within 30 days of its due date, each person receiving property as part of the administration of the trust/estate is to receive the basis information being reported on the return. Additionally, an IRS attorney, Patrick Leahy (not the Senator), publicly stated that it is not necessary to file a Form 706 this year and that forms filed will be returned to the filing party.

The information above is a good start; however, questions remain. Until there is a definitive resolution to the estate tax compliance mystery before us, we recommend following the IRS attorney's request to not file a Form 706 for persons who have died this year. On a related note, if new estate tax legislation is not put in place in the near future, the estate tax regime described as a "55% rate and a $1 million exemption" will be making an encore appearance come 2011. In the event of such an occurrence, enough federal estate tax returns will be filed for deaths taking place in 2011 to more than make up for the dearth of such filings this year. JB

Is Your Business Entity Excluded from the Nevada Business License Fee Requirement?

In October 2009, Nevada passed a law requiring all Nevada entities to obtain a state business license. Currently, the NV Business License Fee is $200. NRS 76.100 codifies the law that mandates all businesses operating in Nevada to obtain a business license from the Secretary of State. However, NRS 76.020 excludes the following from being defined as a "business" and, thus, exempts such businesses from having to pay the fee:

◆ A governmental entity
◆ A nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization pursuant to 26 U.S.C. § 501(c)
◆ A person who operates a business from his or her home and whose net earnings from that business are not more than 66 2/3 percent of the average annual wage, as computed for the preceding calendar year pursuant to chapter 612 of NRS and rounded to the nearest hundred dollars (approximately $18,000 for 2010)
◆ A natural person whose sole business is the rental of four or fewer dwelling units to others
◆ A business whose primary purpose is to create or produce motion pictures
◆ A business organized pursuant to chapter 82 or 84 of NRS (Non-profit Corporations and Corporations Sole)

If you feel your business entity qualifies for one of these exemptions, you may refrain from paying the licensing fee when filing your Annual List of Managers or Members. JB

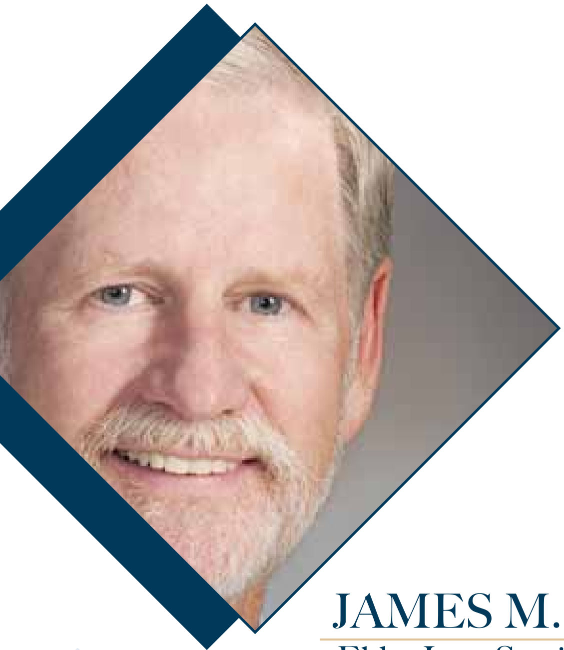
Creating a New Elder Law Division

On June 1, 2010, the Nevada estate planning and probate law firm of Jeffrey Burr, Ltd., and the elder law firm of James M. O'Reilly, LLC, joined together to better serve their clients with an expanded list of services and capabilities. The merger created a new elder law services division within the Jeffrey Burr firm to complement its estate and tax planning practices.

According to Mr. Burr, the firm's founder, the merger is a natural extension for the firm: "The law firm of Jeffrey Burr has a long tradition of assisting families with their tax and estate planning needs. The establishment of an elder law services division within the firm will enable us to offer a more comprehensive spectrum of services to our clients. I have known James O'Reilly for 20 years. I have the greatest professional respect for him and his firm, and am proud to partner with him as we reach this next level."

Mr. O'Reilly adds, "I believe this merger will take this law practice to the forefront of the legal community with our combined abilities to provide extraordinary service in these important and evolving areas of the law."

The firm will continue to be known as the Law Firm of Jeffrey Burr, Ltd. The firm has offices at 2600 Paseo Verde Parkway in Henderson and at 7881 West Charleston Boulevard in Las Vegas.



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