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On June 13, 2019, DeEtte L. Loeffler, a partner at Miller Monson, will be speaking at the *Estate Administration Boot Camp* presented by NBI (National Business Institute). Her topics will include final and fiduciary income tax returns, portability of tax exemptions, and estate, gift and GST tax planning. The event runs June 12 and 13 at the Hampton Inn, Downtown San Diego. For more details, please visit <https://nbi-sems.com>.

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SELLING A BUSINESS REQUIRES PLANNING

By DeEtte L. Loeffler, J.D.,
LL.M., Taxation

Selling your business requires more than just finding a buyer and negotiating a purchase price. If you are considering selling in the next year or so, we recommend you take some practical steps now to prepare yourself, and the business, for the event. This article is not about positioning the business to maximize value - there are many articles on the internet and experts available to help you with doing so. This article is about the kinds of things that can make, or break, the deal once you have found a buyer and agreed upon a price.

Potential Deal Breakers

1. Issues with the Lease. If you lease the space in which your business operates, you should first review the lease to determine if it

allows you to transfer the space or to sublet it to another person. A friendly lessor may be willing to amend the lease (usually for a price) if the buyer is acceptable to them.

The lease might require you (the tenant) to guarantee the rent payments of the new tenant through the end of the current lease term. If this is required, you can ask the lessor if it will waive this requirement for the right new tenant. A waiver is unlikely, however, so you should plan to factor this issue into your arrangement with the buyer. One option is to secure the obligation against the business assets or against other assets owned by the buyer (like a residence). If the proposed buyer does not have experience in business, or the type of business being sold is volatile (such as food service), securing this obligation is even more important. In some cases, you may have to decide between running the risk the proposed buyer will not pay rent and you may have to do so, or looking for a different buyer with better assets or credit.

2. Intellectual Property. If your business owns intellectual property that it created, like a website, logo, marketing materials, a book, software, or something similar, you should ask an intellectual property attorney to review it. You may need to secure copyright or trademark protections to ensure you can transfer title to these assets. Buyers may balk at paying for, or even taking responsibility for, such property if there is a chance another person or company may have rights to it. If your business has intellectual property that it rents or bought from a third party, you should determine if this property is transferable. If it is not transferable, the sale agreement should specifically identify this property as not being transferred.

3. Review Your Contracts. If you have contracts with vendors and suppliers, you should review those contracts to determine if they are transferable. If such contracts need renewal before the sale, you may want to renegotiate them now so that they do not become an issue during the sale process.

4. Employees and Independent Contractors. You should review your agreements with current employees and independent contractors. Recent changes to state law regarding independent contractors may affect these relationships. Many persons who were formerly classified as independent contractors may have potential claims against the business that could become an issue in the sale. If you do not have written employee and contractor agreements in place, you should seek them as these will need to be shared with the buyer. You may also want to put into place agreements to keep key employees in the business in the event of a sale. Finally, if you have personnel issues, such as a hostile work environment or business culture, you may want to deal with them now to avoid deterring a potential buyer. Updating your employee manual might be helpful if the business is to be sold intact. Seeking advice from an experienced employment attorney is highly recommended.

5. Conduct an Internal Audit of Your Books. We recommend you also have an independent person review your business books and records to confirm they are complete and up-to-date. Your business CPA is often a good choice for completing this review since he or she is already familiar with the business. If you are selling the entire business, and not just the assets, the buyer will want to review these records; if the buyer finds errors, it may lose confidence in other information you have provided about the business. Cleaning up your financial statements is particularly important as this information will be looked at not only by the buyer but also by the bank from which it intends to borrow. You should also verify all required state and local tax returns have been filed and all taxes paid (if any) by the business. Your business attorney can help you to bring the business records, including ownership documents like stock or membership certificates, up-to-date.

6. Permits and Licenses. If your business requires permits and licenses, you should review these to confirm they are current. You may require a business license, a seller's permit, etc. Some of these licenses and permits might not be transferable (like the seller's permit) and you will want to know this so you do not agree in the sale agreement to provide these to the buyer. If your employees are required to have permits and licenses (like a food handler's permit, cosmetology license, notary, or the like) that need to be renewed periodically, you should confirm these are current and determine when they need to be renewed to avoid having to seek renewals in the middle of the sale transaction.

7. Valuation. Once you have addressed these issues, you should seek opinions regarding the value of your business. Working with a valuation professional is highly recommended, although a business broker may be able to give you a ballpark value based on his or her understanding of the type of business and its location. This valuation can help you to determine if you are able to sell the business at

this time, need to work longer before you can afford to retire, or need to build up the value before seeking a buyer. This will avoid the expense of starting the sale process and then being unable to complete it. We strongly recommend you not share this value with prospective buyers and instead allow the buyer to propose a price to you. A business broker may also be able to generate interest in the business and create competition for the business that will push the value higher than the appraised value.

8. Taxes. The sale will likely trigger some taxes for the seller. This is often overlooked or incorrectly understood in the sale process, which can lead to significant costs down the road. We strongly recommend you know how each type of asset you are selling will be taxed upon sale (the character) and make a plan to include a schedule in the sale agreement which shows how the purchase price was allocated to the assets. Failure to agree in writing in the sale agreement could result in the buyer reporting the transaction to the IRS very differently than you report it, which could lead to a tax audit and dispute with the IRS and/or the buyer. Different categories of assets are taxed differently. For example, the sale of inventory results in ordinary income to the seller, which is taxed at the highest tax rate, while the sale of goodwill is taxable to the seller as capital gains at a much lower tax rate. So long as the sale agreement allocates the purchase price in a reasonable manner, the IRS should not dispute that allocation. Your tax attorney or CPA is an excellent resource to help you with this process. We recommend you look at this issue before you set a sale price.

9. Non-Disclosure Agreement. You should not disclose any private information about your business to a potential buyer (or broker) without first obtaining a confidentiality agreement to prevent them from disclosing or using this information. Your business attorney or business broker should be able to provide you with such an agreement.

10. Determine What You Can Afford. Before you sell, you need to determine what you want, or can afford to do, for the buyer. Some buyers will ask a seller to take back a promissory note for some of the purchase price. Before you agree, you need to carefully review the buyer's ability to repay you should the business fail after the sale. Unsecured debt may be uncollectable, and an overleveraged buyer may be unable to pay its obligations when due. You do not want to be in the position of an unsecured, or under-secured, creditor. A buyer who balks at providing this information, or at securing the debt, may mean you will not get paid in full if you complete the sale.

Planning ahead to understand your business and address the issues discussed above can prevent the unnecessary expenses of a "false start" and clear away any potential road bumps in the sale process. Seeking the assistance of professionals like your CPA, your attorney and others will increase the chances of a successful and smooth sale process. If you are considering selling your business, we would be happy to discuss this process with you at your convenience.

**PROBATE AND GUARDIANSHIP
COMPLICATIONS COULD HAVE BEEN
AVOIDED** (pay your attorney now or pay
more later...)

By Julie K. Allen, Paralegal

A \$5,000 (or less) estate plan could have avoided probate, guardianships for two high school age children, accountings and receipt tracking, bond payments, continuing court jurisdiction until one year after reaching majority, *and the associated attorneys' fees!*

Our firm has a client who was divorced with two minor children when her ex-husband suddenly and unexpectedly died. He had no Will or trust in place. The children were ages 17 and 14 at the time of their father's passing, and the sole

heirs of his estate under California intestate laws.

You might think this situation does not present a real problem. The mother, our client, is the natural legal guardian of her children, so a simple probate awarding the assets to the mother on behalf of the children should suffice. Unfortunately, this was not the case.

First, probate proceedings are not simple. They involve attorneys' fees, filing fees, publication and other costs, and time to process. In this case, by operation of law, the decedent's mother would normally have been appointed by the court to administer her son's estate. However, the decedent's mother was over 80 years old, suffered some health issues, and lived out of state. Therefore, the first step was to explain the situation to her and obtain her declination to serve as administrator of her son's estate in a California Probate Court.

Once she declined to serve, the minors' mother petitioned the probate court to be appointed as administrator of her former husband's estate. The court required the mother to post a bond in the amount of the personal property (cash and vehicles), and limited her administration powers such that she could not sell or encumber the two real properties included in the estate without prior court approval.

Before she could act on behalf of the children to receive distributions from the estate, the mother was required to file a separate action in Probate Court to establish guardianships for the minor children. This resulted in additional attorneys' fees, filing fees, costs, and another bond had to be posted. It also required that notice of the guardianship proceeding be sent to the living relatives of the father, including a copy of the Petition for Guardianship which explained that the minors were the sole heirs to their father's estate.

This opened the door to inquiries from the decedent's siblings regarding the minors' inheritance. The siblings exerted pressure on

the minors to share their father's wealth with his family. The teenagers received messages such as, "Don't you think you should share some with your grandma?" The attorney representing the guardian also had to field numerous calls from the decedent's family – their position, of course, was that they deserved a share too.

There was also additional time and expense caused by having to perform two Inventory and Appraisals by two different Probate Referees: one for the probate proceeding and one for the guardianship proceeding.

In addition, one of the minors turned age 18 after the Petition for Final Distribution of the father's estate had been filed with the court, but before the final hearing on the Petition could be heard. This required a complete revision of the Petition to request the court to distribute the share of the 18 year old directly to her, and not to her Guardian. Further, even though the minor had reached age 18, the Guardian would not be relieved by the court until the minor attained age 19.

The probate proceeding finally came to an end with a court order to distribute the assets to the adult beneficiary and to the Guardian for the minor. However, the guardianship for the remaining minor will continue (with *detailed* annual accountings to the court) for several years until she reaches the age of majority.

The guardianship accounting also was complicated by the fact that the older child received assets from the probate estate directly, but the younger child had her share distributed to her guardian. Since the probate estate included real properties, rental income and expenses needed to be split and assets prorated. The accounting for income and expenses for the older child covered a portion of the year while the accounting for the younger child covered the entire period (with supporting schedules and explanations for each). Prorating the income and expenses between the two children was a time-consuming (expensive) process.

We recommend you make sure your estate plans are in place and up-to-date and we encourage you to share this information with your friends and colleagues who have minor children. Probate is an expensive process already without the added expense of a guardianship. Feel free to contact our office if you would like our assistance in updating your estate plan.



FEDERAL TAX UPDATE

By Katie Lepore, CPA, J.D.,
LL.M., Taxation

Reduced Penalties for Under-withholding.

The IRS released Notice 2019-25, which supersedes Notice 2019-11, to expand the waiver of penalties for underpayment so long as taxpayers paid at least 80% of their tax due on their 2018 return. Notice 2019-11 had set this limit at 85%.

Bills Affecting Estate Tax. On January 23, 2019, Senator John Thune (R-SD), introduced S. 215, *Death Tax Repeal Act of 2019*, which would repeal the federal estate and generation skipping transfer (GST) taxes. The bill would retain the gift tax with an inflation-adjusted \$10 million exemption and a 35% marginal tax rate applicable to transfers over \$500,000. Gifts under \$500,000 would be subject to graduated rates. Additionally, Senator Tom Cotton (R-AR) introduced S. 176, the *Estate Tax Reduction Act*, on January 17, 2019, which would reduce the estate, gift, and GST tax rates to a flat 20%, applicable to transfers after December 31, 2019. Also in the Senate, on January 31, 2019, Senator Bernie Sanders (I-VT) introduced S. 309, the *For the 99.8 Percent Act*, which is detailed more fully below. All three bills are currently with the Senate Finance Committee.

Other similar bills to repeal the estate tax were introduced in the House of Representatives this

year, including H.R. 222, the *Death Tax Repeal Act of 2019*, introduced by Representative Mac Thornberry (R-TX); H.R. 25, the *Fair Tax Act*, introduced by Representative Rob Woodall (R-GA); H.R. 218, the *Death Tax Repeal Act*, introduced by Representative Jason Smith (R-MO); and H.R. 521, the *Permanently Repeal the Estate Tax Act of 2019*, introduced by Representative Robert Latta (R-OH). Each of the House bills have been referred to the Ways and Means Committee.

Democratic Presidential Candidates Estate Tax Plans.

Democratic Presidential hopeful Senator Elizabeth Warren (D-MA) unveiled her tax plan to institute an “Ultra-Millionaire Tax” to be levied on the richest 0.1% of Americans. The tax would be levied at a rate of 2.0% annually on those with a net worth between \$50 million and \$1 billion. Taxpayers with a net worth above \$1 billion would be subject to an additional 1.0% “Billionaire Surtax.” Additionally, any taxpayers subject to this tax who renounce their U.S. citizenship would incur a 40% “exit tax” on their net worth above \$50 million. If adopted, the plan would significantly increase work for appraisers since the tax would be based on the current value of assets annually.

Another Presidential hopeful, Senator Bernie Sanders (I-VT), introduced S. 309 on January 31, 2019 called the *For the 99.8 Percent Act*. Among other things, the bill would create a multi-tiered structure for taxing large estates. The transfer tax rate for estates, gifts, and transfers of \$3.5-10 million would be 45%, for transfers from \$10-50 million would be 50%, from \$50 million to \$1 billion would be 55%, and for transfers of more than \$1 billion the rate would be 77%. The bill is co-sponsored by Democratic Presidential hopeful, Kristin Gillibrand (D-NY). Senator Sanders estimates the new tax would collect \$2.2 trillion from the top 0.2% of taxpayers, but would be collected over a period of years since it is imposed on gifts and at death.¹

¹ <https://www.sanders.senate.gov/download/estate-tax-one-pager?inline=file>

Bipartisan Tax Extenders Bill Released.

Senate Finance Committee Chairman Chuck Grassley (R-IA) and Ranking Member Ron Wyden (D-OR) introduced on February 28, 2019 S. 617, the *Tax Extender and Disaster Relief Act of 2019*, which would retroactively extend tax provisions that expired at the end of 2017 and 2018. It also would provide disaster relief to taxpayers affected by major disasters that occurred in 2018. The provisions would be extended through 2019 at their current rates and levels. Most of the items included in the bill are credits related to renewable energy and fuel reduction, but the bill also includes other items such as exclusion from gross income of discharge of qualified principal residence indebtedness, treatment of mortgage insurance premiums as qualified residence interest, deduction of qualified tuition and related expenses, and the temporary reduction in medical expense deduction floor from 10% to 7.5%.

Regulations Regarding CFCs. On March 4, 2019, the IRS released proposed regulations ([REG-104464-18](#)) relating to the application of the Tax Cuts and Jobs Act for shareholders of a controlled foreign corporation (“CFC”). The regulations generally try to equalize tax effects between individual, trust, and estate CFC shareholders against corporate CFC shareholders, the latter of which enjoy a new, lower 21% tax rate. Individual taxpayers may now make an election under Internal Revenue Code Section 962 to help reduce tax burdens.

Relief for Partnerships with Negative Tax Basis. On March 7, 2019, the IRS released Notice 2019-20 allowing for penalty relief for partnerships who fail to report partners’ negative tax basis capital account under Sections 6722 and 6698 of the Internal Revenue Code. The Notice waives penalties for partnerships which, in tax year 2018 only, fail to timely report a partner’s negative tax basis capital account on the Schedule K-1 in Item L or line 20 using code AH. Partnerships will be required to file a schedule showing such negative capital accounts at a later date, but the IRS waived

penalties for those which cannot timely comply by the 2018 filing date.

Medical Device and Health Insurer Tax Legislation. On February 27, 2019, Representatives Ami Bera (D-CA), Josh Gottheimer (D-NJ), Jackie Walorski (R-IN), and Kenny Marchant (R-TX) introduced H.R. 1398, the *Health Insurance Tax Relief Act*. The bill would delay the Affordable Care Act’s (ACA) tax on health insurers, stating that the tax would cost insurers \$16 billion in 2020 and cause premiums to increase by more than \$470 per family in 2020. In the Senate, Senator Martin Heinrich (D-NM) introduced S. 684 to repeal the so-called “Cadillac Tax” on high-end health insurance provided by employers. Additionally, Representatives Ron Kind (D-WI) and Jackie Walorski (R-IN) delayed introduction of a bill to repeal the 2.3% excise medical device tax while they gathered additional bipartisan co-sponsors. Without legislation, the excise tax will go back into effect on January 1, 2020 after its current two-year suspension. A similar bill, S. 692, was introduced in the Senate on March 7, 2019 by Senators Pat Toomey (R-PA) and several cosponsors including Amy Klobuchar (D-MN), who has announced her candidacy for President.

White House Releases 2020 Budget. On March 11, the White House released its fiscal year 2020 federal budget. The budget contains a proposed repeal of tax credits for energy efficient assets, including the plug-in electric drive motor vehicle credit, the energy investment tax credit, and the credit for residential energy efficient property. Additionally, the budget calls for removal of the exclusion of utility conservation subsidies and repealing accelerated depreciation for renewable energy property. The budget also proposes a budget for the IRS of \$11.5 billion, an increase from its current \$11.3 billion. Specifically, \$290 million is proposed to be used to help the IRS modernize its outdated technology.

Renominations to Fill Federal Tax Court Vacancies. On February 6, 2019, President Trump renominated Mark Van Dyke Holmes,

Courtney Dunbar Jones, Travis Greaves, and Emin Toro to serve 15-year terms as judges at the United States Tax Court. Each person was previously nominated in 2018, but the Senate was unable to confirm their appointments prior to the 2018 session ending. There are currently three vacancies on the Court and Mark Van Dyke Holmes is serving as a senior Tax Court Judge while awaiting confirmation. Also, President Trump renominated Michael Desmond on January 16, 2019 to serve as Chief Counsel of the IRS and he was confirmed in late February 2019. Similarly, Michael Desmond was nominated on March 2, 2018 for the position, but the Senate was unable to confirm him before the close of the 2018 session.

Ways and Means Committee Outlines Priorities. On January 24, 2019, at a House Ways and Means Committee organizational meeting, Chair Richard Neal (D-MA) indicated the top priorities for the Committee this session would be: strengthening retirement security; lowering health care costs (including prescription drug prices); ensuring the tax system benefits the middle-income taxpayer and small businesses; improving the country's infrastructure; and addressing various problems with the *Tax Cuts and Jobs Act*. Mr. Neal also indicated he has a strong friendship with Ranking Minority Member Kevin Brady (R-TX) and hopes to pass legislation mostly on a bipartisan basis.



STATE TAX NEWS
By Katie Lepore, CPA, J.D., LL.M., Taxation

Bill Could Bring Back California Estate, Gift and GST Taxes. Senator Scott Weiner (D-San Francisco) introduced S.B. 378 to reinstitute gift, estate, and generation skipping transfer taxes in California, which were repealed and banned by

ballot measure in 1982. If the bill is passed, California will vote in November 2020 whether to allow the state to levy an estate tax of 40% at death on assets worth more than \$3.5 million (\$7 million for married couples). These values would not be adjusted for inflation. Senator Weiner estimates the tax would raise \$500 million to \$1 billion a year, to be paid to a new Children's Wealth and Opportunity Building Fund to address income inequality and help low-income children build savings accounts.² The law would be effective for transfers taking place after December 31, 2020 and would allow a credit for any federal gift, generation skipping, or estate taxes paid.

Proposed Property Tax Ballot Measures. At least two measures may appear on the November 2020 ballot relating to California property taxes. Senator Jerry Hill (D-San Francisco) is proposing Constitutional Amendment 3 (SCA 3), which could affect the application of the parent-child property tax reassessment exclusion for inherited properties. Under his proposal, heirs would be required to move into an inherited residential property within one year to qualify for the exemption from property tax reassessment. This amendment requires a two-thirds majority vote by both houses of the state Legislature in order for the measure to be placed on the ballot in 2020.

Another ballot measure is already qualified for November 2020 and would create a "split roll" for property taxes where commercial and industrial properties would no longer be protected from reassessment under Proposition 13 but residential properties would still enjoy its protections. Proposition 13 sets state property taxes at 1.0% of the purchase price and caps annual increases at the lower of 2.0% or the rate of inflation. Under the ballot measure, commercial and industrial properties would be reassessed at fair market value annually, but there would be exceptions for small businesses and agricultural land.

² <https://www.sfchronicle.com/politics/amp/Californians-would-vote-on-raising-estate-taxes-13715633.php>

Additional States of Emergency Announced.

The California Department of Tax and Fee Administration (CDTFA) has added the Winter Storm of February 2019 to the list of state of emergencies for which CDTFA relief is available. The impacted counties are: Calaveras, El Dorado, Humboldt, Los Angeles, Marin, Mendocino, Modoc, Mono, Monterey, Orange, Riverside, San Bernardino, San Diego, San Mateo, Santa Barbara, Santa Clara, Shasta, Tehama, Trinity, Ventura, and Yolo. The CDFTA may issue leniency in the form of an extension of tax return due dates or relief of penalties and interest.

State Sponsored Tax Seminars. The CDTFA announced it will begin sponsoring small business tax seminars to be held periodically throughout the state. There are varying topics for the seminars and representatives from the different tax agencies in California including the CDTFA, the Employment Development Department (EDD), the Franchise Tax Board (FTB), and the Governor's Office of Business and Economic Development (GO-Biz) will be in attendance. Additionally, representatives from the IRS may also attend. A list of upcoming seminar topics and locations can be found on the CDTFA's website at: <https://www.cdtfa.ca.gov/seminar/>.

CDTFA Interest Rates for 2019. The CDTFA announced the interest rates applicable for the second half of 2019, beginning July 1, for underpayments of tax and amounts past due. The interest rate will increase to 9.0% from its current 7.0% for underpayments and amounts past due and the rate for overpayments will remain at its current 2.0%. These rates are applicable to taxes and fees administered by the CDTFA, including sales and use tax and other excise taxes.

Remember, individual tax returns are due April 15!

PLEASE TAKE NOTE:

Our firm recently installed a new email server. If you experience issues with getting your email through to us, please call our office at 619-239-7777.

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AREAS OF PRACTICE

ESTATE PLANNING & ADMINISTRATION

WILLS & TRUSTS
ESTATE & GIFT TAX PLANNING
INSURANCE TRUSTS
FAMILY LIMITED PARTNERSHIPS
GENERATION SKIPPING/DYNASTY TRUSTS
ESTATE/GIFT TAX DISCOUNT PLANNING
CHARITABLE GIFT PLANNING
PROBATE & TRUST ADMINISTRATION
ESTATE & GIFT TAX RETURNS
PRE-MARITAL AGREEMENTS

VALUATION SERVICES

BUSINESS APPRAISAL SERVICES/DISCOUNT OPINIONS
VALUATIONS FOR ESTATE AND GIFT TAX PURPOSES

TAXATION

IRS RULING REQUESTS
TAX REPRESENTATION

TAX PLANNING

BUSINESSES & INDIVIDUALS
REAL PROPERTY TRANSACTIONS
BUSINESS ACQUISITIONS/SALES
EMPLOYEE COMPENSATION

BUSINESS & CORPORATE LAW

BUSINESS MERGERS, ACQUISITIONS, & SALES
CORPORATIONS, PARTNERSHIPS
LIMITED LIABILITY COMPANIES
EMPLOYMENT MATTERS
ASSET PROTECTION

REAL ESTATE

SALES & LEASES; FINANCING
SHARED EQUITY AGREEMENTS
CO-OWNERSHIP ARRANGEMENTS

LITIGATION

ERISA LITIGATION
FIDUCIARY LITIGATION
PROBATE & TRUST LITIGATION
WILL CONTESTS
REAL PROPERTY MATTERS
BUSINESS & COMMERCIAL DISPUTES

EMPLOYEE BENEFITS & ERISA

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