Current Federal Tax Developments

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SECTION: STATE TAX
SOUTH DAKOTA SUPREME COURT RULES ON CHALLENGE TO QUILL, SETTING UP POSSIBILITY FOR U.S. SUPREME COURT TO RECONSIDER QUILL

Citation: State of South Dakota v. Wayfair, SD SC, Case No. 28160, 9/14/17

The most public challenge to *Quill* is now ready to be presented to the U.S. Supreme Court, as the South Dakota Supreme Court in the case of *State of South Dakota v. Wayfair*, SD SC, Case No. 28160 rule South Dakota's tests for when an out of state seller must collect and remit sales tax unconstitutional. The next question is whether the Supreme Court, which does not often show interest in tax cases, will take the opportunity to hear this case when the State of South Dakota files its appeal to the Court.

The State of South Dakota is hoping the Supreme Court believes now is the time to get rid of the physical presence test that was left in place in the *Quill* case. The Supreme Court's opinion in *Quill* gave, at best, lukewarm support for keeping the test in place, doing so largely because that's what had been decided before. The opinion suggested that if there had not been prior case law the Court would not have imposed this test and, as well, left open the door to reconsidering the issue later.

As we have discussed in other articles, this is one of three broad methods being used by states to attempt to increase collections of sales and use taxes by having out of state sellers, especially internet based ones, collect more sales tax. Other states have attempted to claim a very broad definition of "physical presence" to include the use of affiliates sellers in the state and the like (see Massachusetts) to simply "chip away" at the impact of *Quill*, while others have enacted "tattletale" laws that require sellers not to collect and remit the tax, but rather to report names and addresses of buyers in the state.

The latter two options have, to date, fared reasonably well in the federal courts, most significantly when the Tenth Circuit in *Direct Marketing Association v. Brohl* upheld Colorado's tattletale law, a holding the Supreme Court declined to review on appeal. The appellate panel held that because there was no tax collection required, *Quill* was not relevant to a determination of whether a state could impose this requirement on out of state businesses.

But South Dakota is looking to render the need to use those two methods unnecessary by getting the Supreme Court to revisit the entire concept of the physical presence test. The South Dakota Legislature enacted a law (S.B. 106) that clearly violated *Quill* and was meant as a vehicle to get the issue before the Supreme Court again. For that reason, the state is not necessarily upset that it lost at the state level, knowing the goal was to get the Supreme Court to hear the case.

As the South Dakota Supreme Court opinion described South Dakota's law:

> Senate Bill 106 was introduced during the session as: "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S.B. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016). The Act provided that any sellers of "tangible personal property" in South Dakota without a "physical presence in the state . . . shall remit" sales tax according to the same procedures as sellers with "a physical presence[.]" Id. § 1. However, the Act limited this obligation to sellers with "gross

> revenue" from sales in South Dakota of over $100,000 per calendar year or with 200 or more "separate transactions" in the state within the same time frame. Id. §§ 1-2. The Act authorized the State to bring a declaratory judgment action in circuit court against any person believed to meet the Act's criteria "to establish that the obligation to remit sales tax is applicable and valid under state and federal law." Id. § 2. The Act further authorized a motion to dismiss or a motion for summary judgment in the action. Id. It also provided that the filing of the action "operates as an injunction during the pendency of the" suit prohibiting the State from enforcing the Act's obligations. Id. § 3. Other sections of the Act prohibited retroactive application of the obligation to remit sales tax and made the obligation prospective only from the date of dissolution or lifting of an injunction provided for by the Act. Id. §§ 5-6.

The state filed suit shortly after the bill took effect, triggering the legislative injunction against any enforcement but allowing the challenge to move forward.

One of the reasons the state believed the time was ripe to attempt to get the Supreme Court to hear this case related to the *Brohl* case mentioned earlier. Initially the question arose whether the federal courts had the right to hear the challenge to Colorado's law, a question that was finally resolved by the United States Supreme Court. As the South Dakota Supreme Court opinion describes the matter:

> In 2015, the Supreme Court reviewed a Colorado law that instead of imposing the obligation to collect and remit use tax on sellers with no physical presence in that state, imposed the obligation "to notify . . . customers of their use-tax liability and to report" sales information back to the state. *Direct Marketing*, __ U.S. at __, 135 S. Ct. at 1127. The issue before the Supreme Court was whether the United States District Court had jurisdiction under the Tax Injunction Act (28 U.S.C. § 1341) over a suit challenging the new law on Commerce Clause grounds. Justice Kennedy, however, took the opportunity to write a concurrence questioning the advisability of continuing to follow *Bellas Hess* and *Quill* in light of later Commerce Clause jurisprudence and "in view of the dramatic technological and social changes that [have] taken place in our increasingly interconnected economy." *Id.* at __, 135 S. Ct. at 1135 (Kennedy, J., concurring). Despite noting the "startling revenue shortfall in many States" due to Bellas Hess and Quill, Justice Kennedy observed that Direct Marketing did not raise reconsideration of those decisions "in a manner appropriate for the Court to address it." *Id.* Nevertheless, he concluded that *Direct Marketing* provided "the means to note the importance of reconsidering doubtful authority." Id. He invited "[t]he legal system [to] find an appropriate case for [the Supreme] Court to reexamine *Quill* and *Bellas Hess*." *Id.*

The State Supreme Court, in deciding for the out of state sellers, found that the requirements imposed violated the physical presence test of *Quill*. Consider the law was designed to challenge *Quill*, the finding that there was no inherent reason why internet sellers should be treated differently than the mail order seller that was the subject of the *Quill* case is likely one that South Dakota is happy with.

The South Dakota Supreme Court concluded simply that the question of whether *Quill* should be overturned is one that only the U.S. Supreme Court could answer affirmatively. As the opinion states:

> However persuasive the State's arguments on the merits of revisiting the issue, Quill has not been overruled. Quill remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes. We are mindful of the Supreme Court's directive to follow its precedent when it "has direct application in a case" and to leave to that Court "the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp., Inc.,* 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989). Therefore, we affirm.

South Dakota has announced it plans to file with the U.S. Supreme Court by mid-October. The next step after that filing is to wait to see if the Supreme Court decides to hear this case or rather denies the request to hear this case.

SECTION: STATE TAX
MASSACHUSETTS PUBLISHES SALES TAX COLLECTION REGULATION WITH EXPANSIVE VIEW OF PHYSICAL PRESENCE

Citation: Massachusetts Regulation 830 CMR 64H.1.7, 9/22/17

The Boston Tea Party is closely associated with the slogan "no taxation without representation" but the Commonwealth of Massachusetts appears to be just fine with requiring collection of taxes from the represented by those located outside the state who don't get a vote.

The number of states taking aggressive positions to expand the number of out of state entities that must take some action with regard to the state's sales or use taxes continue to expand. Massachusetts has issued regulations with an effective date of September 22, 2017 that require internet vendors who have sales of more than $500,000 into Massachusetts and more than 100 transactions resulting in delivery into Massachusetts to collect and remit sales taxes. [Massachusetts Regulation 830 CMR 64H.1.7]

The regulation begins with the Department's statements regarding why this rule does not run afoul of the Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), especially the physical presence requirement in that ruling. The Department states that virtually every internet seller makes use of some Massachusetts located property, stating:

> *Unlike the mail order vendor at issue in Quill, Internet vendors with a large volume of Massachusetts sales invariably have one or more of the following contacts with the state that function to facilitate or enhance such in-state sales and constitute the requisite in-state physical presence:*
>
> *a. property interests in and/or the use of in-state software (e.g., "apps") and ancillary data (e.g., "cookies") which are distributed to or stored on the computers or other physical communications devices of a vendor's in-state customers, and may enable the vendor's use of such physical devices;*

> *b. contracts and/or other relationships with content distribution networks resulting in the use of in-state servers and other computer hardware and/or the receipt of server or hardware-related in-state services; and/or*
>
> *c. contracts and/or other relationships with online marketplace facilitators and/or delivery companies resulting in in-state services, including, but not limited to, payment processing and order fulfillment, order management, return processing or otherwise assisting with returns and exchanges, the preparation of sales reports or other analytics and consumer access to customer service. [Reg. 830 CMR 64H.1.7(1)(b)]*

The regulation notes that this ruling applies only to internet vendors who otherwise would not be subject to any tax. If an internet vendor is subject to collecting the tax due to other factors then these tests would not apply and collection would be required with the first dollar of sales.

Similarly, if the vendor does not have one of three contacts noted at Reg. 830 CMR 64H.1.7(1)(b) reproduced earlier. The following two examples of vendors that would not be subject to collection of Massachusetts sales tax are found in the regulation (Reg. 830 CMR 64H.1.7(4)):

> *(a) 830 CMR 64H.1.7(3) does not apply if the vendor's only contacts with Massachusetts are that in-state customers may access a site on the vendor's out-of-state computer server. Further, the mere fact that in-state customers may access such site, without more, will not be considered a factor in determining a vendor's tax collection obligation. See ITFA § 1105.*
>
> *(b) A provider of Internet access service or online services (a "provider") is not deemed to be the agent of a vendor for purposes of determining the application of 830 CMR 64H.1.7(3) to such vendor solely as a result of: 1. the display of such vendor's information or content on the provider's out-of-state computer server, or 2. the processing of orders through the provider's out-of-state computer server. See id.*

Since many businesses outsource hosting for websites, the business may have trouble determining whether any servers are located in Massachusetts that may house their data. As a practical matter, it may be difficult to prove an entity isn't subject to this rule if the entity does any sort of outsourcing, since the machines servicing some or all of the company's website could be located anywhere.

An initial "interim period" test applies to determine if an organization must begin collection as of October 1, 2017. As the regulation provides at Reg. 830 CMR 64H.1.7(3)(a) the following test will be applied to determine if collection is required through the end of 2017:

> *(a) For the period beginning October 1, 2017 through December 31, 2017, if during the preceding 12 months, October 1, 2016 to September 30, 2017, it had in excess of $500,000 in Massachusetts sales from transactions completed over the Internet and made sales resulting in a delivery into Massachusetts in 100 or more transactions.*

For periods after December 31, 2017 the testing period will be the preceding calendar year.

Vendors subject to this tax must file a report with Massachusetts by the 20th day of the each month to report sales for the prior month and pay over the tax. Failure to file the return or pay the tax will subject the taxpayer to penalties and interest. [Reg. 830 CMR 64H.1.7(7)]

SECTION: 170
IRS PROVIDES GUIDANCE FOR EMPLOYER SPONSORED LEAVE DONATION PROGRAMS FOR HURRICANE HARVEY AND IRMA RELIEF

Citation: Notice 2017-48, 9/1/17 and Notice 2017-52, 9/14/17

The IRS in Notice 2017-48 and then later in Notice 2017-52 provided guidance on the use of leave-based charitable donation programs that employers can use to provide Hurricane Harvey and/or Hurricane Irma relief. Under such programs, employees give up certain amounts of vacation, sick or personal leave in exchange for which the employer makes a cash donation to a qualified charitable organization for Hurricane Harvey or Irma relief.

Normally such an arrangement would arguably be taxable to the employee, followed by a charitable contribution deduction for the employee or, in the alternative, that the payments are charitable contributions of the employer which would be subject to the appropriate limits on charitable contribution deductions. This notice provides that the IRS will not assert that position for programs that meet the requirements of this notice.

As the original Harvey related notice provides:

> The Internal Revenue Service (the Service) will not assert that cash payments an employer makes to § 170(c) organizations in exchange for vacation, sick, or personal leave that its employees elect to forgo constitute gross income or wages of the employees if the payments are: (1) made to the § 170(c) organizations for the relief of victims of Hurricane Harvey and Tropical Storm Harvey; and (2) paid to the § 170(c) organizations before January 1, 2019.
>
> Similarly, the Service will not assert that the opportunity to make such an election results in constructive receipt of gross income or wages for employees. Electing employees may not claim a charitable contribution deduction under § 170 with respect to the value of forgone leave excluded from compensation and wages.
>
> The Service will not assert that an employer is permitted to deduct these cash payments exclusively under the rules of § 170 rather than the rules of § 162. Cash payments to which this guidance applies need not be included in Box 1, 3 (if applicable), or 5 of the Form W-2.

The later notice provides for the same treatment for programs that are aimed at providing relief for those impacted by Hurricane Irma.

SECTION: 401
IRS ALLOWS RETIREMENT PLANS TO ALLOW THOSE AFFECTED BY HURRICANE HARVEY OR IRMA TO RECEIVE LOANS AND/OR HARDSHIP DISTRIBUTIONS UNDER SIMPLIFIED PROCEDURES

Citation: Announcement 2017-11, 8/31/17, Announcement 2017-13, 9/12/17

In Announcement 2017-11 the IRS has provided special provisions to allow qualified employer retirement plans to make Hurricane Harvey related distributions and/or loans. Following Hurricane Irma, the IRS in Announcement 2017-13 expanded the relief to cover those impacted by Hurricane Irma.

The general relief is described in the notice as follows:

> …[A] qualified employer plan will not be treated as failing to satisfy any requirement under the Code or regulations merely because the plan makes a loan, or a hardship distribution for a need arising from Hurricane Harvey, to an employee or former employee whose principal residence on August 23, 2017, was located in one of the Texas counties identified for individual assistance by the Federal Emergency Management Agency ("FEMA") because of the devastation caused by Hurricane Harvey or whose place of employment was located in one of these counties on that applicable date or whose lineal ascendant or descendant, dependent, or spouse had a principal residence or place of employment in one of these counties on that date.

For Irma the only real change is changing the reference to Irma and moving the beginning date to September 4, 2017.

The counties identified for assistance covered by these announcements can be found at https://www.fema.gov/diasters. The relief will begin on the date each area is named as disaster area on the FEMA website.

The announcement provides for liberal rules on hardship distributions. The distribution amount would be limited to the maximum amount that would be available for a hardship distribution under the Code and regulations. However, the distribution is available to eligible individuals adversely affected by Hurricanes Harvey or Irma who wish to use assets in qualified employer plans to alleviate hardships caused by Hurricanes Harvey or Irma. This means that such a distribution applies to any hardship of the employee, not just the types listed in the regulations. As well, no post-distribution contribution restrictions are required. Normally an employee taking a hardship distribution is prohibited from making contributions for at least 6 months after the distribution, but that rule will not apply for Harvey and Irma related hardship distributions.

The plan administrator can rely upon the representations of the participant about the need for and amount of the Harvey or Irma related hardship distribution unless the administrator has actual knowledge to the contrary.

While the plan must be of a type that would be eligible to offer hardship distributions, the plan language does not need to provide currently for hardship distributions to make them under this relief. So, for instance, a profit sharing or stock bonus plan could make a hardship distribution under this relief regardless of whether it contained hardship distribution language. However, plans prohibited from making hardship distributions by the law cannot make them under this rule—that would include a defined benefit or money purchase pension plan except for assets in such a plan that are in a separate account within the plan containing employee contributions or rollover contributions.

The maximum hardship distribution is limited to the maximum amount that would be allowed under the law if the plan had language allowing for a hardship distribution.

While the language allowing for hardship distributions or loans does not need to be in the plan document currently, the plan must be amended to provide for them no later than the end of the first

plan year beginning after December 31, 2017. A hardship distribution under this relief provision must be made:

- Because a hardship arising from Hurricane Harvey or Irma
- Be made on or after August 23, 2017 (for Harvey) or September 4, 2017 (for Irma) and
- Be made no later than January 31, 2018

Plan loans under this provision must satisfy the requirements of IRC §72(p). Thus, the loans must meet the $50,000 maximum amount rule found at IRC §72(p)(2)(A)(i), taking into account any other plans loans taken out by the participant during the relevant one-year period or, if less, the greater of ½ of the present value of the employee's nonforfeitable accrued benefit or $10,000 per IRC §72(p)(2)(A)(ii).

Special relief is granted for procedural rules as described below:

> In addition, a retirement plan will not be treated as failing to follow procedural requirements for plan loans (in the case of retirement plans other than IRAs) or distributions (in the case of all retirement plans, including IRAs) imposed by the terms of the plan merely because those requirements are disregarded for any period beginning on or after August 23, 2017, and continuing through January 31, 2018, with respect to loans or distributions to individuals described in the first paragraph under "Relief", above, provided the plan administrator (or financial institution in the case of distributions from IRAs) makes a good-faith diligent effort under the circumstances to comply with those requirements. However, as soon as practicable, the plan administrator (or financial institution in the case of IRAs) must make a reasonable attempt to assemble any forgone documentation. For example, if spousal consent is required for a plan loan or distribution and the plan terms require production of a death certificate if the employee claims his or her spouse is deceased, the plan will not be disqualified for failure to operate in accordance with its terms if it makes a loan or distribution to an individual described in the first paragraph under "Relief" in the absence of a death certificate if it is reasonable to believe, under the circumstances, that the spouse is deceased, the loan or distribution is made no later than January 31, 2018, and the plan administrator makes reasonable efforts to obtain the death certificate as soon as practicable.

Note that the taxation of such distributions to the participant is not changed by these rules. As the announcement warns:

> Taxpayers are reminded that in general the normal spousal consent rules continue to apply, and, except to the extent the distribution consists of already-taxed amounts, any distribution made pursuant to the relief provided in this announcement will be includible in gross income and generally subject to the 10-percent additional tax under § 72(t).

Similarly, if the participant takes out a loan, the same rules that lead to a deemed distribution equal to the balance of the loan based on certain uncorrected failures to comply with the loan requirements would also continue to apply.

The announcements each conclude by noting that the Department of Labor that it will not treat any person as violating the provisions of Title I of the Employment Retirement Income Security Act because that person complied with the provisions of either announcement.

SECTION: 2010
IRS ACTED PROPERLY IN ADJUSTING DSUE FROM PRIOR SPOUSE FORM 706

Citation: Estate of Minnie Lynn Sower v. Commissioner, 149 TC No. 11, 9/11/17

When new provisions are added to the IRC, it takes a few years for the first court cases to begin to appear on the issues raised by the new provision. We are now beginning to see the first cases that look at the of the portability rules found in IRC §2010(c), beginning with case of the *Estate of Minnie Lynn Sower v. Commissioner*, 149 TC No. 11.

The portability rules, first added to the law in 2010 and made a permanent part of the law in 2012, are meant to allow a surviving spouse to have the use of any unused exclusion amount from the deceased spouse's estate, so long as the deceased spouse's estate files an election to make that amount available to the surviving spouse. [IRC §2010(c)(4)]

To make the election, the deceased spouse's estate must timely file a Form 706, the estate tax return, to compute the amount of the unused exclusion and to make the election to allow the use of that unused exclusion by the surviving spouse.

In this case Frank Sower died in 2012, leaving Minnie as his surviving spouse. Frank's estate timely filed a Form 706 on which it determined that Frank had no estate tax liability. But there was a problem on the return—the Form 706 showed no taxable gifts but then included over $940,000 of taxable gifts on the worksheet provided to calculate taxable gifts to be reported on the return.

The Form 706 claimed that there existed an unused exclusion of over $1,250,000 available and elected to allow the amount to pass to Minnie to be used on her Form 706 when she passed away. That amount of unused exclusion did not take into account the reduction that should have taken place after accounting for lifetime gifts. Had they been taken into account Frank's estate still would have had no estate tax liability but the unused exclusion amount would have been much lower.

Even though the return contained information that there were gifts that had not been properly considered, the IRS issued an "Initial Letter 627, Estate Closing Document" to Frank's estate. The letter indicated that Frank's return had been accepted as filed and, as the Court noted in the text it cited from the letter, said:

> [The Commissioner] will not reopen or examine this return unless * * * [notified] of changes to the return or there is: (1) evidence of fraud, malfeasance, collusion, concealment or misrepresentation of a material fact; (2) a clearly defined substantial error based upon established Internal Revenue Service position; or (3) a serious administrative error.

Minnie died the following year and timely filed a Form 706. The estate claimed the deceased spouse unused exclusion amount (DSUE) equal to the amount shown on Frank's Form 706. On her return

the same error was committed that did not include the gifts she had made during her lifetime in coming up with her estate tax liability, but the return still showed an estate tax due.

In 2015 the IRS began an examination of Minnie's return and noted the problem with her gifts. The agent also opened an examination of Frank's return and found the same gifting error on that return. The agent adjusted the DSUE from Frank's return downward based solely on the information the agent had from the filing. By the time the adjustments were taken into account, the agent determined that Minnie's estate owed an additional $788,165.

Minnie's estate claimed that the IRS had acted improperly by adjusting the DSUE coming to Minnie's estate from Frank's Form 706. The estate offered several reasons why the IRS should be barred from making this adjustment—but none of them were accepted by the Tax Court.

A major reason the estate faced an uphill fight in arguing the IRS should not able to adjust the DSUE is found in IRC §2010(c)(5)(B) which specifically authorizes the IRS to look at the predeceased spouse's return. That provision reads:

> (B) Examination of prior returns after expiration of period of limitations with respect to deceased spousal unused exclusion amount
>
> Notwithstanding any period of limitation in section 6501, after the time has expired under section 6501 within which a tax may be assessed under chapter 11 or 12 with respect to a deceased spousal unused exclusion amount, the Secretary may examine a return of the deceased spouse to make determinations with respect to such amount for purposes of carrying out this subsection.

That authority was restated in the then applicable Temporary Reg. §20.2010-2(d). The current provisions, which is virtually identical, is found at Reg. §20.2010-2(d) which reads:

> (d)Authority to examine returns of decedent. The IRS may examine returns of a decedent in determining the decedent's DSUE amount, regardless of whether the period of limitations on assessment has expired for that return. See § 20.2010-3(d) for additional rules relating to the IRS's authority to examine returns. See also section 7602 for the IRS's authority, when ascertaining the correctness of any return, to examine any returns that may be relevant or material to such inquiry.

In addition to this specific grant of authority, the Court pointed out that the IRS has broad rights to inquire about information relevant to a return under IRC §7602. The Court noted:

> …[S]ection 7602 gives the Commissioner broad discretion to examine a range of materials to "ascertain[ ] the correctness of any return". Under section 7602(a)(1) Congress gave the Commissioner specific authority "[t]o examine any books, papers, records, or other data which may be relevant or material". Section 7851(a)(6) provides that subtitle F, which includes section 7602, is "applicable with respect to any tax imposed by * * * title [26]". The Internal Revenue Code does not contain any provision exempting estate tax returns from section 7602. As a result, the Commissioner has the power to examine any relevant "books,

> papers, records or * * * data" to determine the correctness of an estate tax return. Sec. 7602(a)(1).

The Court concludes initially:

> Here, the Commissioner properly exercised the power conferred by sections 2010(c)(5)(B) and 7602(a)(1). He examined the return filed by the estate of the predeceased spouse. The Commissioner found that the DSUE had been overstated. He adjusted the amount of the DSUE as authorized by section 2010(c)(5)(B) and the regulations, but he did not determine that there was an estate tax deficiency for the predeceased spouse's estate.

But, the estate countered, the IRS had issued that letter that accepted Frank's return as filed. In the view of the estate that letter amounted to a closing agreement under §7121 that would preclude the IRS from making changes to the DSUE amount flowing from that return.

The Court pointed out that the regulations specifically limit closing agreements to agreements using the prescribed forms Form 866, *Agreement as to Final Determination of Tax Liability*, and Form 906, *Closing Agreement on Final Determination Covering Specific Matters*. The Court did note that the Fifth Circuit, in the case of *Treaty Pines Invs. P'tship v. Commissioner*, 967 F.2d 206, 211 (1992) that a closing agreement could take other forms, but in this case the Court found there was no evidence of the type of continuing negotiations that took place in *Treaty Pines* and thus no evidence of a real agreement between the IRS and Frank's estate.

The Court also found that there was no other reason that letter should serve to prevent the IRS from looking at that return to determine the proper tax on Minnie's return.

The estate argued that this look at Frank's return was an impermissible second examination of Frank's return. IRC §7605(b) provides:

> (b) Restrictions on examination of taxpayer
>
> No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

The Court found that this section did not apply in this case. First, the Court noted that the provisions does not apply when the IRS does not obtain any new information from the taxpayer—in this case the agent never asked for additional information from Frank's estate, since everything he needed as already on the form.

As well, that only offers protection to the examined party (Frank's estate in this case) and cannot be used by other taxpayers.

The estate now attempted to argue that this regulation and law could not apply to gifts before 2010—an argument the Tax Court quickly dismissed. The court noted the effective date was tied to when a decedent died and had no relationship to when the decedent made a gift.

Finally, the estate attempted to argue that looking at Frank's return went against Congressional intent for portability and was an unconstitutional lack of due process since there was no statute of limitations.

The Court pointed that Congress had written a provision to provide for examining the prior deceased spouse's return into the law—and the clear text of the law is the best indicator of Congressional intent.

The Court also rejected the due process claim. The Court notes that the statute for assessing tax on Frank's return still ends as it did before and the IRS was not assessing tax against Frank's estate. The issue was the amount of tax due on Minnie's return, an issue that has the same statute of limitation as it always did under IRC §6501.

SECTION: 7508A
TAX RELATED RELIEF FOR TAXPAYERS AFFECTED BY HURRICANES HARVEY AND IRMA

Citation: IRS News Release IR-2017-135, Texas Comptroller of Public Accounts "Declared Natural Disasters and Emergencies Tax Help", 8/28/17, IRS News Release IR-2017-150, 9/12/17

The IRS and the Texas Comptroller have announced forms of due date and other relief for individuals impacted by Hurricane and Tropical Storm Harvey in Houston and surrounding areas. Federal relief was later provided for victims of Hurricane Irma in Florida and Puerto Rico.

The IRS has announced information related to relief provided under IRC §7508A for performing certain acts in News Release IR-2017-135. IRC §7805A provides that the IRS may authorize a delay of up to one year to allow taxpayers to perform certain acts when the taxpayer is affected by a federally declared disaster or terroristic or military action. Similar relief was extended to taxpayers in Florida and Puerto Rico affected by Hurricane Irma in News Release 2017-150.

The areas eligible for relief can be found on the IRS Disaster Relief web page.

The IRS relief is automatically granted to any taxpayer with an address of record located in the disaster area. Those who live outside the disaster area but whose records are located within the disaster area and relief workers working with a recognized organization need to contact the IRS at 866-562-5227 to discuss relief.

The IRS describes the affected tax deadlines for those affected by Hurricane Harvey:

> The tax relief postpones various tax filing and payment deadlines that occurred starting on Aug. 23, 2017. As a result, affected individuals and businesses will have until Jan. 31, 2018, to file returns and pay any taxes that were originally due during this period. This includes the Sept. 15, 2017 and Jan. 16, 2018 deadlines for making quarterly estimated tax payments. For individual tax filers, it also includes 2016 income tax returns that received a tax-filing extension until Oct. 16, 2017. The IRS noted, however, that because tax payments related to these 2016 returns were originally due on April 18, 2017, those payments are not eligible for this relief.

> A variety of business tax deadlines are also affected including the Oct. 31 deadline for quarterly payroll and excise tax returns. In addition, the IRS is waiving late-deposit penalties for federal payroll and excise tax deposits normally due on or after Aug. 23 and before Sept. 7, if the deposits are made by Sept. 7, 2017. Details on available relief can be found on the disaster relief page on IRS.gov.

The relief for Irma is similar, though the dates are revised to affect the dates that disaster areas were declared for that storm. The same January 31, 2018 deadline is available for filing returns due after September 4, 2017 in Florida and September 5, 2017 in Puerto Rico. The payroll tax deposit date is pushed back to 15 days after the above dates for those affected by Irma.

The news relief also reminds taxpayers that suffered uninsured disaster-related losses may claim elect to claim the losses on their return for the year of loss (2017) or the previous year (2016). See IRC §165(I) and Temporary Reg. §1.165-11T for information on this option. Advisers should point to affected clients that even personal casualty losses may be used in the computation of a federal net operating loss available for carryback (IRC §172(d)(4)(C)).

Similarly, a three year net operating loss carryback period (rather than the standard two year periods) is available for

- Net operating losses arising from a casualty losses of an individual (IRC §172(b)(1)(E)(ii)(I)) and
- Net operating losses of a "small business" attributable to a federally declared disaster (IRC §172(b)(1)(E)(ii)(II).

For this purpose, a "small business" is generally one that has average gross receipts for the prior three years of less than $5,000,000. (IRC §172(b)(1)(E)(iii) ; IRC §448(c))

The Comptroller of the State of Texas has also announced various forms of tax relief available to affected taxpayers related to various state taxes. The information is found in a page containing frequently asked questions on disaster relief on the agency's website.

The page notes that, unlike the IRS relief, affected who cannot timely file taxes with the Comptroller's office will need to contact the agency. The page states:

> Some taxpayers may be unable to file taxes timely due to damage caused by a declared natural disaster. The Comptroller can grant an extension of up to 90 days to file tax returns to a business affected by a declared disaster. An affected business must request the extension. These types of extension requests are handled on a case-by-case basis. For more information or to request a tax filing extension, call the Comptroller's tax assistance line at 800-252-5555.

The page also notes that the Governor of Texas has issued certain proclamations on exemptions for certain sales and other taxes. The FAQ page has information on this relief, which at the time this article was written included certain relief from hotel taxes and sales taxes, as well as relief for out of state businesses performing disaster or emergency related work in Texas.

In the past, such relief has often covered an expanded area in the case of storms such as Harvey, as the storm affects additional areas as it continues to move. Advisers should be sure to continue to monitor developments with the various taxing agencies to see if clients may qualify for some form of relief.