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The Inevitable: **Death and Taxes**

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There is an old English saying, usually attributed to Benjamin Franklin, that "nothing in our lives is certain except death and taxes." As is seen frequently in mass media, many wealthy individuals, politicians and corporations attempt to dodge one of these life certainties. However, if in attempting to avoid one of these certainties, violations are committed, the consequences are severe and will not be pardoned, not even in death.

A recent illustration involves the loss by the Caribbean community of Lowell Hawthorne, founder and CEO of the franchise Golden Krust Caribbean Bakery & Grill (Golden Krust), known for its staple Jamaican style beef patties. Golden Krust is a popular chain that Hawthorne started in 1989, which developed into a national franchise with over 120 restaurants in nine states. In addition, Golden Krust patties are sold by most supermarkets, including Costco, in over 30 states and also served to students in New York City public schools. Lowell documented his company's success in his 2012 publication, "The Baker's Son," and he also appeared in a 2016 episode of CBS' "Undercover Boss." With such great achievement, it was a shock that the 57-year-old Jamaican born entrepreneur was found dead from a self-inflicted gunshot wound. Lowell was allegedly driven by "fears that the Feds were investigating him for evading millions of dollars in taxes."

Tax evasion is a serious crime that can ultimately lead to substantial penalties and incarceration up to five years. In general, the Internal Revenue Code §7201 creates two kinds of tax evasion: the willful attempt to evade or defeat the assessment of a tax and the willful attempt to evade or defeat the payment of a tax. While death may end a criminal case against an individual to a certain extent, death in and of itself does not defeat the payment of the taxes, penalties and interest that the individual may owe, or prevent further prosecution of the individual's business.

As a basic rule, a corporation is treated as a separate entity, taxed unto itself, wherein shareholders and officers are shielded from corporate liabilities. However, there are a number of exceptions to both the IRS and NYS tax laws that will allow the government to assess taxes and commence an action against an individual shareholder, or officer. Specifically, I.R.C. §7343 defines the term "person" to include an officer or employee of a corporation, or a member or employee of a partnership,

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who is under a duty to perform the act in respect of which the violation occurs. Therefore, if a responsible shareholder fails to file a required corporate return, or files with false information, or fails to collect and turn over taxes that were assessed against his business, then there may be personal liability against that individual.

Once an assessment has been made against an individual, his or her estate will still be responsible for addressing and paying this liability. Or even worse, if an assessment is made against an individual who filed a joint return with his or her spouse, the spouse will be jointly and severally liable for any taxes, penalties and interest owed during the years

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that they filed jointly, including additional assessments from ongoing investigations or audits.

When a taxpayer passes away, his executor or an administrator of his estate will now be responsible for negotiating and paying from estate assets any tax liabilities due. Sometimes assets transferred to third parties may be seized by the collection officer. The IRS has a strict collection process for decedent's and estate taxes owed. Once an assessment has been made and the case is assigned to collection, the first thing that a collection agent determines is if there is a joint liability. As mentioned, if there is a joint liability, then the taxing authorities will take collection against the surviving spouse. If the collection case is not dealt with immediately, the surviving spouse may be subject to adverse action such as levies, wage garnishments, driver's license suspension, etc.

An infamous case dealing with this exact issue was that of Carol Ross Joynt, former producer of Larry King on CNN's "Larry King Live" and author of the 2011 memoir "Innocent Spouse." Carol's husband died of pneumonia, leaving behind Nathan's, a popular Georgetown bar. He also left behind $3 million in back taxes, penalties and interest. Although the taxing authorities take a hard position on joint liability, in certain circumstances, a surviving spouse can plead innocence for her husband's tax liability, as was successfully done by Carol through her tax attorneys.

Both the IRS and NYS offer relief of tax, interest and penalties on joint tax returns if the injured spouse can prove that such relief is warranted. The IRS statute offers three types of relief: Innocent Spouse, Separation of Liability and Equitable Relief. Innocent spouse relief completely eliminates the tax liability of a spouse pursuant to provisions of the tax law, its regulations and rules. Separation of liability relief provides for the separation of income and deductions for each of the spouses. Thus, each spouse has his/her own separate tax liability, interest and penalties, and will not be liable for the other's allocation. Equitable relief exists when a taxpayer does not qualify for innocent spouse or separation of liability relief. The intricacies of the statute, regulations and rules are beyond the provisions of this article. However, any matrimonial attorney, tax attorney, or general practitioner should be aware of the existence of these provisions of the tax law, regulations and rules to appropriately advise clients, when joint tax liabilities are involved.

As for tax liabilities that are solely decedent's, the collection case may be assigned to an IRS Revenue Officer (R.O.) to enforce against the estate. Generally, an R.O. cannot commence any collection action against an estate until he has completed all of the required fact finding actions. These regulations impose a duty that the R.O. must research the surrogate's court records, as well as internal and third-party resources. Note, an R.O. has the ability to secure all pertinent probate or administration documents, such as copies of the death certificate, will, letters testamentary, list of assets, any proceedings that outline distribution or litigation of the deceased's assets, list of heirs and their contact information, bonds posted by the fiduciary, accountings, documents related to the businesses owned by the decedent. See IRM/Part5/workingdecedentcases/5.5.3.4. The R.O. also has tools to assist with identifying assets owned by the decedent prior to death and can determine if decedent made any transfers prior to death.

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The goal of an R.O. is to ultimately collect all monies owed to the government, by any means available to him. There are certain federal and state remedies available that will allow an R.O. to force a fiduciary to pay amounts due from the estate assets. A beneficiary may be required to personally pay decedent's tax liability to the extent that he received assets from the decedent's estate. This may be accomplished by the R.O. commencing a transferee action against beneficiaries who received assets. It is important for the Executor or Administrator to determine when a notice of Federal Tax Lien (Lien) has been filed by the IRS against the decedent to properly defend such actions. If a Lien was recorded on a tax assessment made before death, then it attaches to all assets owned by the deceased taxpayer, including any assets that were transferred after the Lien. Therefore, any assets that would automatically pass to an heir will be subject to that Lien, possibly making the beneficiary liable to the government for the value of that asset. In contrast, if the Lien was recorded on a post-death assessment, it does not attach to non-probate property and can only attach to probate assets in the estate.

The death of a loved one is always difficult to deal with, especially if a federal or state investigation targets a surviving spouse, or beneficiary of the estate. It is critical that an executor or administrator of an estate that is facing issues of tax investigations, lawsuits, or the like are fully aware of his or her obligations and exposure of all individuals involved.

A final note: the newly enacted federal tax law need be considered when dealing with tax matters. Collection issues should continue as before the enactment.

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