



NEW YORK  
CITY BAR

**REPORT OF THE ESTATE AND GIFT TAXATION COMMITTEE  
REGARDING THE NOTICE AND REQUEST FOR COMMENTS  
ON IRS FORM 4422, APPLICATION FOR CERTIFICATE DISCHARGING PROPERTY  
SUBJECT TO ESTATE TAX LIEN**

The New York City Bar Association, through its Estate and Gift Taxation Committee (the “Committee”), respectfully submits this memorandum setting forth the Committee’s comments in response to the notice and request for comments (the “Notice”) issued by the Internal Revenue Service (“IRS”) and Treasury Department on December 29, 2016. The Notice solicited comments concerning Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien.

In September 2016, the IRS revised Form 4422, *Application for Certificate Discharging Property Subject to Estate Tax Lien* (“Form 4422” or the “Application”).

This memorandum is divided into two parts. In the first part, the Committee expresses its concern that Form 4422 does not require certain information which may assist the IRS Advisory Estate Tax Lien Group to efficiently process Applications by eliminating, in certain cases, the need for the IRS to require that the proceeds from the sale of a decedent’s property be held in escrow where there is no need to ensure the payment of the estate tax liability. In the second part, the Committee addresses changes to the instructions to Form 4422 which place additional burdens on the taxpayer and the IRS Advisory Lien Tax Group.

## **BACKGROUND**

Section 6324(a) of the Internal Revenue Code imposes an automatic federal estate tax lien on a decedent’s property that is effective at the moment of death and attaches to all assets of a decedent’s estate. Prior to June 1, 2015, at the close of the estate tax return examination proceedings, the IRS issued the Letter 627, *Estate Tax Closing Document* (“Closing Letter”). The Closing Letter confirmed that the Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return* (“Form 706” or the “estate tax return”), had been accepted by the IRS, either as filed or after an adjustment by the IRS (and agreed to by the estate). The receipt of the Closing Letter generally indicated that the estate tax examination had been closed, in effect releasing the federal estate tax lien<sup>1</sup>. However, the IRS no longer automatically issues Closing Letters to executors or other fiduciaries. Instead, a fiduciary must request a Closing Letter from the IRS no

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<sup>1</sup> Note that the issuance of a Closing Letter does not prevent the IRS from reexamining the estate tax return to determine estate tax liability in certain situations, such as evidence of fraud or misrepresentation of a material fact, clearly-defined, substantial error based upon an established IRS position, or other circumstances.

earlier than four months after filing the estate tax return. In practice, it can take years to receive a Closing Letter from the IRS.<sup>2</sup>

Therefore, if the fiduciary plans to sell estate property (such as real property or cooperative apartments), prior to receipt of a Closing Letter, the fiduciary or other applicant (referred to herein as the “Applicant”) may request that such estate property be discharged from the federal estate tax lien prior to a sale. Section 6324(c) of the Internal Revenue Code provides that “the Secretary may issue a certificate of discharge of any or all of the property subject to any lien imposed by section 6324 if the Secretary finds that the liability secured by such lien has been fully satisfied or provided for.”<sup>3</sup> An Applicant requests the discharge (referred to herein as a “Release of Lien”) by filing Form 4422 with the IRS along with copies of any requested documents, such as the decedent’s Last Will and Testament, Letters Testamentary, Form 706, and the contract for the proposed sale. The instructions to Form 4422 instruct the Applicant to send the Application to the IRS Advisory Estate Tax Lien group for review and processing.

## **PART ONE**

The Committee is concerned that the information in the Application may result in the unnecessary application of the escrow requirement (discussed in greater detail in Part Two of this memorandum) in certain situations, particularly where the value of the gross estate is above the Form 706 filing threshold but is not subject to estate tax.

Form 4422 asks the Applicant to provide information as to any prior estate tax payments made to the IRS. However, the Application does not address the situation where the Applicant wishes to sell estate property early on in the administration and applies for a Release of Lien prior to filing the estate tax return.

The Committee respectfully requests that the IRS change the “Amount of tax paid” line to read “Amount of tax paid/Estimated tax liability,” or some variation thereof. This would permit the examining agent to determine, upon initial review, that the estate is not subject to estate tax, which may facilitate issuance of the Release of Lien by bypassing the escrow process described in Part Two entirely. The Committee respectfully requests that the IRS consider requiring the estate tax return preparer to sign the Application under penalties of perjury for added veracity as to the estimated estate tax liability.

As discussed in greater detail in Part Two of this memorandum, Practitioners have reported significant delays in receiving the Release of Lien because there are only six agents processing Applications from Advisory Estate Tax Lien Group. Further, because Advisory Estate Tax Lien Group is the only division charged with processing the Applications, there is no longer any way to expedite an Application made by an estate that is not subject to estate tax because the value of the

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<sup>2</sup> Alternatively, IRS Notice 2017-12 provides that executors, probate courts, state tax departments and others who in the past relied on a Closing Letter may now rely on an account transcript issued by IRS in place of a Closing Letter if the transcript includes transaction code 421 and the explanation “Closed examination of tax return.” However, practitioners have reported difficulties in the past in obtaining such a transcript. Since banks, title companies, etc. are used to the Closing Letter, many practitioners prefer to receive the Closing Letter in lieu of the account transcript.

<sup>3</sup> Internal Revenue Code §6324(c).

gross estate falls below the federal filing threshold, including situations where the estate plan takes advantage of the marital or charitable deductions from estate tax. Under the prior procedure, the Advisory Estate Tax Group processed applications only with respect to estates with assessed, unpaid balances or estates subject to deferrals under IRC sections 6161 or 6166, which required additional vetting to ensure the payment of the federal estate tax liability. In contrast, the Estate & Gift Tax Exam Group Manager processed applications where the estate was not subject to federal estate tax or the estate tax liability had been paid in full.

Accordingly, the Committee respectfully submits that the IRS could designate that the Estate & Gift Tax Exam Group Manager (or other appropriate division) review and process Applications made by (i) estates not subject to estate tax (including by reason of the charitable or marital deductions) and (ii) estates which have paid estimated tax liability in full. This may help to alleviate some of the burden placed on the IRS Advisory Tax Lien Group in processing these applications.

## **PART TWO**

### **A. Timing**

Item 1 to the Form 4422 instructions requires the Applicant to submit the Application at least 45 days prior to the transaction date for which the Release of Lien is needed. In so doing, the Applicant has presumably allowed sufficient time for review, determination, notification and the furnishing of any applicable documents by the transaction date. Practitioners have expressed concern with respect to timing and have, in some cases, experienced delays in the receipt of the Release of Lien. This places a burden on the Applicant as this could have a significant impact on the ability of an estate to sell estate property. The Release of Lien is, in many cases, required by a title company, managing agent, or cooperative board to close a very lengthy and potentially costly transaction. In addition, often times an estate is selling property to generate badly needed liquidity to pay estate tax or other expenses of administering the estate. Any delay in receiving the Release of Lien can cause ripple effects from falling delinquent on estate expenses to jeopardizing the sale altogether.

Lastly, the inability to secure a release of lien in a timely fashion could cause the sale transaction to be voidable by the buyer, causing the estate to be forced to find another buyer, which in some cases may be extremely difficult, or at a minimum could cause the estate to be forced to list and sell the property for a lower price.

The Committee respectfully suggests that the IRS could consider training additional agents to process the Applications. In addition, the Committee respectfully suggests that the instructions to the Application could be modified to ask that the Applicant submit the Application with greater lead time – perhaps 60 or 90 days, to the extent practicable, so as to manage expectations with respect to processing time. However, this is not ideal, as it may not be practicable or even possible for the Applicant to submit the Application several months prior to a sale of the subject property.

A related concern is the expiration of the Release of Lien, which is conditional. (We understand that an unconditional Release of Lien will only be issued upon receipt of a Closing Letter from the IRS.) In the New York City area, the sale of cooperative apartments is subject to approval by the cooperative board. The review and approval process can be unpredictable and delayed. If

cooperative board approval is delayed, or if the closing is held up for any other reason, such as the ability of the purchaser to obtain financing, the conditional Release of Lien may expire. As such, the estate may incur additional legal fees as well as additional time to facilitate disposition of the property. The Committee respectfully suggests that the conditional Release of Lien be valid for some reasonable period of time, perhaps six months, to allow for any hiccups in the sale process.

### **B. Valuation of Property To Be Discharged from Estate Tax Lien**

The Application asks the Applicant to describe the relationship between the Purchaser/Transferee and the decedent. This information may assist the IRS in ascertaining whether the proposed transaction is between related parties or unrelated parties (i.e., a third-party sale).

Item 3 to the instructions to Form 4422 requests that the Applicant “Attach a description of the property for which you want a certificate of discharge. Show the value of the property and the basis of the valuation. If the property consists of real estate, attach a separate legal description and a preliminary title report for each parcel.” Item 4 to the instructions to Form 4422 requests that the Applicant include a copy of the contract of sale for the proposed transaction.

Practitioners have reported that the IRS agents have at times requested as part of the Application a written, qualified real estate appraisal as to the subject property, or more frequently, a letter from a real estate broker that establishes the basis for the value of the property.

The Committee respectfully submits that in the case of a third-party sale, requiring an Applicant to furnish a separate valuation of the property along with the basis for valuation is superfluous and places an additional burden and expense on the Applicant. The Committee respectfully submits that the fair market value of the property has already been established by the contract of sale which is included with the Application.

Treasury Regulation 20.2031-1 defines fair market value as “The price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.” The Committee respectfully submits that in the case of a third-party sale, there can be no greater indication of fair market value than the value set forth in the contract of sale. Further, requiring the Applicant to obtain a costly appraisal or wait for the real estate broker to research comparable properties and submit a written broker letter places additional cost and time burdens on the Applicant in completing the Application.

Therefore, in the case of a third-party sale, the Committee respectfully submits that the instructions to the Application should not require the Applicant to “Show the value of the property and the basis of the valuation” where the value of the subject property is established by contract of sale (included with the Application).

### **C. Processing by Advisory Estate Tax Lien Group**

Section 6325 of the Internal Revenue Code provides that, “the Secretary may issue a certificate of discharge of any or all of the property subject to any lien imposed by section 6324 if ... such lien has been fully satisfied or provided for.” It is the Committee’s understanding that this

function has been moved over to the collections division. We understand that the IRS Advisory Tax Lien Group requires that the net proceeds of sale be paid over to the IRS or alternatively, that the estate enter into an escrow agreement until the IRS issues a Closing Letter in efforts to ensure that the estate tax lien “has been fully satisfied or provided for.” This requirement effectively restricts access by the estate to the proceeds of sale of estate property.

If no estate tax is payable, there is no liability to be “satisfied or provided for.” The Committee respectfully submits that requiring the proceeds of sale of estate property be held in escrow is unnecessary where there is a full marital or charitable deduction and it is clear that no estate tax is due.

The Committee is concerned that the requirement to hold the proceeds of sale of estate property in escrow could place undue burdens on both the estate and the beneficiaries. The estate and certain beneficiaries, such as a surviving spouse, may suffer significant liquidity problems due to the unavailability of these funds. The estate may lack sufficient funds to pay federal income taxes, state estate and income taxes and administration expenses. In addition, the estate may be obligated to make distributions to beneficiaries before it has sufficient assets to do so. Beneficiaries, such as a surviving spouse, may be relying on the proceeds of sale of estate property for his or her living expenses or to purchase or rent a new home. The process of filing the Application and negotiating the terms of an escrow agreement can be lengthy and time-consuming, and as a result, may add to the expense of estate administration.

The Committee acknowledges that the Advisory Estate Tax Lien Group is now making decisions regarding the necessity of holding proceeds of sale of estate property in escrow on a case by case basis. The Committee respectfully submits that an estate should not be required to hold proceeds of sale of estate property in escrow if an estate does not owe any federal estate tax for the following reasons: (i) no estate tax is estimated to be due because of a marital or charitable deduction; (ii) an estimated estate tax payment of the full amount of tax payable has been made; or (iii) the estate tax return has been filed and the full amount of tax has been paid; and (iv) the IRS has no reason to believe that additional payments of estate tax will be due and payable. Alternatively, if the Advisory Estate Tax Lien Group has reason to believe that additional payments of estate tax may be due, a portion of the proceeds of sale of estate property, commensurate with the amount of tax due, could be required to be placed in escrow.

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