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## Gain in Marketable Securities Should Be Taxed at Death

To the Editor:

Recognizing the serious deficiencies of current law with regard to the tax treatment of unrealized appreciation in property held at death, professors Jay A. Soled, James Alm, and Kathleen DeLaney Thomas have written an interesting article suggesting a carryover basis regime applicable to marketable securities. ("A New Carryover Tax Basis Regime for Marketable Securities," *Tax Notes*, Feb. 13, 2017, p. 835.) As one of the Treasury officials intimately involved in the 1977 to 1980 debate over the provision, I am well aware of the arguments offered then and now. The limited solution proposed by the three professors is elegantly simple, but it is susceptible to avoidance. Indeed, absent elaborate rules, well advised taxpayers will transfer their marketable securities to an S corporation or partnership. Either would present the possibility of avoiding the new realization regime. While the authors recognize the issue in a footnote, I suggest they underappreciate its significance and the difficulty in drafting and enforcing appropriate anti-avoidance rules. Moreover, it is difficult to understand why, if the policy concern is capturing unrealized appreciation in property held at death, the authors choose a deferral regime for the very assets most easily taxed upon a deathtime transfer. Basis is known and the assets are liquid. Why deferral?

There are six major problems to be solved when addressing how to treat the transfer of appreciated property at death. The first is basis identification, the second is valuation, and the third is liquidity. The fourth is interaction with the estate tax. The fifth is how to treat lifetime transfers in a consistent manner. The sixth is transition. These are not new problems. For the moment, suffice it to say that all are soluble.

I suggest a regime in which, taking into account appropriate transition rules and exemptions, transfers at death and gratuitous lifetime transfers will be income tax realization events. Deathtime transfers of marketable assets and all lifetime transfers (subject to loss limitations) will be recognition events. Gain on the deathtime transfer of a nonmarketable asset will be calculated at death, but recognition will be deferred until the sale of the asset. Tax will be due upon sale together with interest in an amount that will make the present value of the deferred tax payment equal to that which would have been due had the tax been paid at death. The latter rule should ease the pressure on the need for extensive anti-abuse rules because the deferral advantage is removed.

My proposal is not conceptually different from that proposed by Treasury in 2015, nor from its prior proposals in 1977 and 1969. I will explore the details and issues in a forthcoming article. The timing is auspicious as President Trump made an unarticulated reference to taxing unrealized gain in property held at death in connection with his campaign proposal to repeal the estate tax.

Harry L. Gutman
Of Counsel, Ivins, Phillips & Barker, Chartered
Attorney-Adviser and Deputy Tax Legislative Counsel, Treasury Department Office of Tax Policy, 1977-1980
Chief of Staff of Joint Committee on Taxation, 1991-1993
Mar. 2, 2017 ■



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