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Liabilities for Closing Agents, and Realtors, on the death of Foreigners (Nonresident Aliens)



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U.S. title insurance agents, attorneys, and others, who act as closing agents for a U.S real estate sale by a foreign decedent, (and sometimes for the foreign spouse of a foreign decedent), should advise the buyer of the IRS tax liability that is being assumed by the buyer, if an IRS release has not been obtained.

On the death of a nonresident alien owning U.S. real estate, an automatic, implied 10-year IRS estate tax lien[1] attaches to the property until an IRS tax release (transfer certificate) is received for that specific property. The lien is usually not recorded in the county records. Therefore it will not appear in a title search, but the failure of anyone on recent title to show up at closing might be a hint!

If this lien is not addressed by the closing agent, the buyer of the property will unwittingly take title to the property subject to that lien, and likely be unhappy if there is a subsequent surprise.

What are the Implications for the Closing Agent?

If the closing agent “misses” the lien, he/she will fail to warn the buyer of the buyer’s liability concerning the lien and also fail to warn all the other parties of their various tax liabilities associated with the death. (See **LIABILITIES**, below).

What are the Implications for Realtors?

Any Realtor handling funds of a decedent may have a contingent estate tax liability if there is no U.S. court probate of the property.[2]

Realtors for buyers will want to advise their buyers of the buyers’ potential liability for the 10-year IRS estate tax lien, and how it can be avoided by filing the required U.S. estate tax return. Realtors for buyers would normally not have any liability for any related estate tax, (if they do not have control of any funds of the seller). However, they may wish to consider how they may be impacted, if the buyer later has problems because of the IRS lien.

Realtors for sellers, upon initially being contacted by sellers to list such property for sale, will want to advise the sellers of the requirement for the estate tax return, to ensure there is no unexpected delay at the time of closing, with disappointments for the Realtors, the seller, and the buyer.

LIABILITIES

Example 1: Foreign Decedent with Foreign Surviving Spouse

John and Mary are Canadian citizens, resident in Canada, (Ontario), and nonresident aliens of the U.S. In 2014 they jointly purchased Florida real estate, as tenancy by the entireties. All the purchase funds were provided by John. John passed away in 2019, at which time the Florida property was valued at \$500,000, and John owned no other U.S. situs assets. Of course, because of the joint ownership, Florida law does not require U.S. court probate of the property, and the property automatically passes solely to Mary. A title insurance agent, attorney, or other person may therefore prepare a new deed in Mary’s name and record it in the county records with other documents, to reflect Mary’s sole ownership of the property. Assume XYZ Title Co prepares and files the new deed.

XYZ Title Co will want to:

- Advise Mary that a U.S. estate tax return must be filed,[3]
- Advise Mary there is 10- year IRS lien on the property which will make the property difficult to sell until the estate tax return is filed, and an IRS release is obtained,
- Advise Mary she has personal liability for any unpaid U.S. estate tax, penalties and interest,[4] and
- Advise Mary that when she sells the property in the future, she will have zero U.S. cost basis in the property, at the time of death, and therefore will generally be taxed directly on the gross proceeds of the sale, (less expenses and

subsequent improvements), unless a U.S. estate tax return is filed.[\[5\]](#)

Example 2: Mary Sells the Property Inherited from John

The facts are the same as Example 1, except in 2020 Mary sells the property for US \$550,000, with XYZ Title Co acting as closing agent. An estate tax return for John has not yet been filed.

At the time of closing XYZ Title Co will want to:

- Be aware that, on receipt of the sale proceeds, XYZ Title Co should contact its tax advisor to determine if XYZ Title Co has a potential contingent liability for John's estate tax because of presently handling sales proceeds that were originally attributable to John's estate. [\[6\]](#)
- Remind Mary that she still has a personal liability for any unpaid U.S. estate tax, penalties and interest with respect to John's estate,
- Advise the buyer that he/she is taking title subject to an IRS estate tax lien,
- Advise Mary to consult with her tax adviser about the fact that, absent filing an estate tax return for John, she will have to report zero cost basis for U.S. purposes (ignoring any subsequent improvements) when she files her U.S. income tax return to report the sale.

Example 3: Estate of Foreign Decedent Sells Property

Michael, a Canadian citizen and resident, (Ontario) and nonresident alien of the U.S., buys Florida real estate directly in his own name in 2014 for US \$500,000, and he passed away in 2019 when the property is valued at US \$550,000. He owned no other U.S. "situs" property. In 2020 Michael's estate contacts to sell the property. In 2020 ABC PA, Attorney, became qualified to act as personal representative of the estate in the U.S., and conducted court probate of the property. [\[7\]](#) The sale will be closed by XYZ Title Co.

ABC PA:

- Would be cognizant it has the responsibility to ensure a U.S. estate tax return is filed, and any estate tax is paid, and has a contingent liability for the estate tax, [\[8\]](#) and a lien is placed on all ABC PA's assets if the estate tax is not paid, [\[9\]](#)
- Would be cognizant that, as a practical matter, that ABC PA's personal discharge of liability under section 2204 and 31 U.S.C. 3713(b), does not discharge the property itself from its section 6324(a)(1) special IRS estate tax lien.
- Should advise Michael's Canadian executor that a U.S. estate tax return is required, and the estate and/or heirs will have a zero-cost basis in the property as at the date of death, until an estate tax return is filed,
- Should remind XYZ Title Co to advise any potential buyer, that until an estate tax return is filed, and an IRS release is received, the property purchased by the buyer is subject to a 10-year IRS lien,
- Should advise the Canadian executor of Michael's estate that Michael's heirs, have potential transferee liability for the IRS estate tax liability. [\[10\]](#)

XYZ Title Co will want to:

- Advise the Canadian executor of Michael's estate that a U.S. estate tax return is required,
- Advise any buyer that until an estate tax return is filed, and an IRS release is received, the property purchased by the buyer is subject to a 10-year IRS lien, and
- Consider what its position would be versus ABC PA, and the buyer, if the sale of the property is closed without obtaining an IRS transfer certificate, and the IRS later asserts the lien on the property, or the lien on ABC PA.

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- [1] IRC 6324(a)(1)
- [2] IRC 2002 and 2203. See also IRC 6018(a)(2) and Reg. §20.6018-2
- [3] IRC 6018(a)(2), and Reg. §20.6018-2
- [4] IRC 2002, and IRC 2203. Pursuant to IRC 2002 the executor has the responsibility to pay the tax, and pursuant to IRC 2203 Mary is a “statutory executor”. Mary also has transferee liability under IRC 6901, and her assets may be subject to lien under IRC 6321
- [5] IRC 1014(f), IRC 6035(a)
- [6] IRC 2002 and IRC 2203.
- [7] If Michael had been a resident of Quebec, and the U.S. property had been governed by a Quebec Notarial Will, U.S. court probate might not have been required
- [8] IRC 6018(a)(2), IRC 2002, and 31 U.S.C. 3713(b)
- [9] IRC 6321
- [10] IRC 6901

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