

Major Developments With Estate Tax Lien Releases

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The government has changed the rules regarding Estate Tax Lien Releases, in a big way. Moreover, the changes were made apparently, with no notice to, and presumably no guidance from, practitioners. If your client wishes to convey real estate unencumbered by the automatic estate tax lien (under §6324 of the Internal Revenue Code), you will want to be aware of these new rules.

To obtain a discharge (sometimes referred to as a release) of the lien against real estate which is included in the decedent's gross estate, you will now need to provide documentation that the selling price is a fair price, and your client will not be permitted to access the net proceeds from the sale. When the government is satisfied with the submissions, you still won't get a certificate actually discharging the lien until the net proceeds are paid as the government requires. Only then is the certificate discharging the lien issued by the government.

Here is a summary of the new requirements as explained to the author by two employees of the IRS, including a recap of the telephone conferences.

Fair Price? Now, the government requires submission of third party documentation that the selling price is a fair price.

Government: We will also need an appraisal.

Author: A what?

G: An appraisal, so that we know the selling price is for fair value.

A: Uh, this is a sale to an unrelated third party, you know. Isn't that the very definition of getting a fair price, you know that "fair market value" concept?

G: Well sure you are selling to an unrelated third party. But how do we know that the selling price is a fair price?

A: We don't really have time to get an appraisal. [Thinking: my client has bigger problems than the government if he is selling an estate asset for less than fair market value.]

G: Oh, can you get a letter from a real estate broker who is knowledgeable about the market and comparable properties, instead of an appraisal? Maybe a letter from the broker who is handling the sale?

A: You mean the listing broker?

G: Yes, that would be perfect!

A: Sure, let me try that. [Thinking: no person on the face of the planet has a bigger conflict of interest in making the representations required by our government than the listing broker. Of course, the listing broker will be more than pleased to say that he knows the particular market well and that the price on the contract is a fair price.]

Access to Sales Proceeds: Now, the entire net proceeds will either be (i) sent to the IRS as payment toward estate tax or (ii) held in escrow. The only permitted reductions seem to be for

amounts needed to satisfy mortgages and for "reasonable" selling expenses. So, don't plan on using net proceeds to pay claims, administration expenses, or cash gifts.

Government: The net proceeds must be held in escrow.

Author: Until when?

G: Until the government receives full payment of estate tax, after either the return has been accepted as filed or an audit or litigation has finally determined the amount of estate tax.

A: But the net proceeds will be several thousand dollars and the estate tax return won't be filed for months.

G: Well, instead of escrowing the net proceeds, the amount can be paid to the government as a prepayment of estate tax.

A: But there won't be any estate tax due for this estate!

G: Well, then you'll want to use the escrow arrangement. When you tell me the name of the escrow agent, I'll send you a form for the Escrow Agreement. But don't even think of changing anything in the Escrow Agreement; some lawyers try to change it, but we don't allow it because our lawyers at the IRS have already approved this form.

A: Uh, okay. [Thinking: my client really wants this sale to close. Good thing these funds are not needed for paying debts or expenses.]

G: We can fax a draft of the Escrow Agreement to you for your review.

A: Why would I want to see a draft if you won't accept any changes?

G: Good point. So, tell me who the escrow agent will be, and I'll complete the Escrow Agreement with the legal description that you already provided and send you the Escrow Agreement to be signed by the escrow agent and your client.

A: Great. Will you send that by e-mail, and then I can get signatures from the escrow agent and the personal representative and send it back to you?

G: Oh, we don't email. We fax. But you can't fax the signed agreement back. You see, we need "pen and ink" signatures from each party; from the personal representative, from the Escrow Agent, and from my supervisor at the IRS. Oh, and even though I'm in California, my supervisor is in New Jersey.

A: So, you can fax to me the Escrow Agreement, I can get it signed by the Escrow Agent, and then send that by overnight delivery to the personal representative for him to sign, and then he can send it to your supervisor in New Jersey, and then he can sign and send it to you in California. Then you'll send us the certificate discharging, or releasing, the real estate from the automatic lien?

G: Well, we don't actually issue the discharge at that point. We issue a conditional commitment, which will allow the sale

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to close. Once we have confirmation that the funds are in the possession of the Escrow Agent, we can issue the actual certificate discharging the lien.

Certificate Discharging the Real Estate from the Lien: Before issuing the actual certificate that discharges, or releases, the real estate being sold from the lien, the funds must be received by the escrow agent (or paid to the IRS).

Government: Once we have approved all of the submissions, including the fully executed original Escrow Agreement, then I will send you a Conditional Commitment to Discharge Certain Property from Federal Estate Tax Lien. The closing agent can close based upon that document.

Author: What if the closing agent wants the property to be discharged or released from the lien before paying the net proceeds, and won't rely upon that conditional document?

G: I don't know. But that has never happened.

A: Ok. [Thinking: Well, I hope I'm not the first. And how long did she say she'd been working on these lien releases - two weeks?] Will you fax that document to me when it is ready?

G: Sure. But I've got a lot of releases in front of yours, so I am not sure when that will be.

A: Oh. Thanks. I appreciate the help and I'll get the materials to you as quickly as possible!

These discussions occurred after submission of a completed Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien, with all of the attachments required in the instructions for that form. The form can still be provided as part of the submission, but the author's impression is that the form is no longer required. The author's suggested optimal submission, which should be sent to Guy Esposito, National Advisory Estate Tax Manager, Internal Revenue Service, 4 Paragon Way, Suite 2, Freehold, New Jersey 07728-7895, contains the following:

1. Completed, and signed, Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien.


2. Appraisal or letter from broker, indicating the sales price is a fair price.

3. Title insurance commitment, which will show the legal description and the exception for the lien for which release is being requested. (For goodness' sake, if the commitment does not require addressing this lien, then just close the transaction and avoid these issues altogether!).

4. Draft of the closing statement, showing closing costs and net proceeds. (You'd better like the amount of the net proceeds shown on the closing statement because that will be the amount referenced in subsequent documents from the government.)

5. An indication of whether the net proceeds will be paid to the IRS toward estate taxes or held by an escrow agent. If held in escrow, you should also provide the name of the escrow agent. You could try to submit an Escrow Agreement signed by the personal representative and the Escrow Agent, and that might be accepted if it is in the form used by the government. See www.Lile-Hayes.com for the form of Escrow Agreement provided to the author by the government.

6. When in doubt, call Guy Esposito at 732.761.3340. He is the manager at the IRS for this new process. And he was very helpful.

Please see www.Lile-Hayes.com/Resources for any updates on these issues. 



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Laird A. Lile specializes in estate and trust matters, based in Naples, Florida. Keeping busy with the Board of Governors of The Florida Bar, the Supreme Court's Judicial Management Council and the Florida Courts Technology Commission and as a past Chair of the Real Property, Probate and Trust Law Section, he is most proud of his 17 year old daughter, Allie, and his 22 year old son, Langdon.

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The purpose of the Confidential Judicial Feedback Program is to promote judicial self-improvement and enhance the quality of our judiciary as a whole. Attorneys are asked to evaluate the judge's demeanor, knowledge, fairness, and other factors, but not to discuss issues of their specific cases. The commenting attorney's identity is kept confidential and the comments are provided only to the judge who is the subject of the review. All feedback is and remains confidential pursuant to Florida Rule of Judicial Administration 2.051(c)(4).

There are separate forms for trial court judges and appellate court judges. Feedback may be provided two ways: by completing the forms online at www.floridabar.org/JudicialFeedback or by downloading the forms at www.floridabar.org/JAEC and following the instructions.

Update on Estate Tax Lien Release

Update as of September 27, 2016:

The author understands the government now is requesting submissions be sent to Julie Garza, Estate Tax Advisor, Internal Revenue Service, 55 South Market Street, Suite 8000, San Jose, California 95113, instead of Guy Esposito. As of October 3, 2016, Guy Esposito's responsibilities will be transferred temporarily to Kathleen Kelm, who can be reached at 651.312.7972. We will update further when the responsibilities are again reassigned.

The IRS has issued a revised Form 4422, Application for Certificate Discharging Property Subject to Estate Tax Lien, that must be submitted to the IRS along with the supporting documents described in the instructions to Form 4422. See lile-hayes.com/resources for the Form 4422.