

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2704**

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**Subject: Sharon L. Klein on Estate of Evelyn Seiden - New York
Strikes Back! Window to Claim Estate Tax Refunds for State Only
QTIP Property Closing**

“A proposal to change the result in the Seiden case has been released. It is contained in the proposed 2019-2020 New York Executive Budget, issued on January 15, 2019.”

Sharon Klein provides members with an important update on the *Seiden* case that she discussed in [Estate Planning Newsletter # 2676](#).

Sharon L. Klein is **President of Family Wealth, Eastern Region**, for **Wilmington Trust, N.A.**¹ She is responsible for coordinating the delivery of all Wealth Advisory Services by teams of professionals, including planning, trust, investment management, family governance and education, family office, and private banking services, to high net worth clients in the Eastern United States. Sharon has presented at the Heckerling Institute on Estate Planning, the New York University Institute on Federal Taxation, the Notre Dame Estate Planning Institute, the Duke University Estate Planning Conference, and the Bloomberg BNA Tax Management Advisory Board. Sharon is frequently featured or quoted in publications such as the Wall Street Journal, The New York Times, Estate Planning Magazine and Trusts & Estates Magazine.

Sharon is a Fellow of the American College of Trust and Estate Counsel and a member of New York Bankers Association Trust & Investment Division Executive Committee, The Rockefeller University Committee on Trust and Estate Gift Plans, the Professional Advisory Council of the Anti-Defamation League, the Estates, Gifts and Trusts Advisory Board for The Bureau of National Affairs and the Thomson Reuters Trusts & Estates Advisory Board. She is a past Chair of the New York City Bar Association's Trusts, Estates and Surrogate's Court Committee, a past Chair of the New York State Bar Association's Trusts and Estates Law Section Taxation

Committee, and a member of the New York City Bar Association's Matrimonial Committee. She is a member of the Board of Directors of the American Brain Foundation. In June, 2018, Sharon was honored by the UJA-Federation of New York Lawyers Division for her contributions to the Trusts & Estates community and the community at large.

Here is Sharon's commentary:

EXECUTIVE SUMMARY:

Not surprisingly, a proposal to change the result in the *Seiden* case has been released. It is contained in the proposed 2019-2020 New York Executive Budget, issued on January 15, 2019.

FACTS:

In [*Estate of Evelyn Seiden*](#), discussed by the author in [LISI Estate Planning Newsletter # 2676](#), a husband died in 2010, when his estate was not subject to the federal estate tax. Husband's executor made a qualified terminable interest property (QTIP) election on the pro-forma federal return filed with the New York return, and a marital deduction was allowed for New York estate tax purposes. When wife died, the Surrogate determined that the QTIP trust was **not** includible in her New York estate.

Under New York Tax Law § 954(a), an individual's New York gross estate is defined by reference to the federal gross estate. Under Tax Law § 954 (c)'s cross-referencing provisions, there is a specific reference to Internal Revenue Code (IRC) § 2044, which subjects to tax QTIP property for which a marital deduction was previously allowed. The Surrogate found that, since there was no federal estate tax return filed in 2010, there was no previously allowed marital deduction to trigger IRC § 2044's inclusion of the property in the surviving spouse's New York gross estate. Consequently, the QTIP property escaped federal and state taxation in both estates.

The Budget bill proposal would amend Tax Law § 954 to require that QTIP property (not otherwise included in the federal gross estate) be included in the surviving spouse's New York gross estate if a New York marital deduction was previously allowed with respect to that property. The QTIP property would be included whether the QTIP election was made on the transferring spouse's New York estate tax return or via a federal pro forma return, if a federal return was not required to be filed. In addition, the bill would amend Tax Law § 955 to require that the QTIP election for New York

estate tax purposes be made on the New York estate tax return of the transferring spouse.

COMMENT:

Note that the *Seiden* court specifically suggested that the legislature could amend the Tax Law to apply to **future** estates. Although there was some possibility the legislature might have attempted to enact a retroactive statutory change, the proposed bill would apply prospectively only, to estates of individuals dying on or after April 1, 2019.

This means there should still be a window of opportunity if a QTIP trust was created in the estate of a first spouse to die and no federal return was filed (including to elect portability), either because the first spouse died in 2010 or because the value of the first spouse's estate was under the federal filing threshold. If the second spouse dies before April 1, 2019, the logic of the *Seiden* case should continue to apply. If a QTIP trust was created under those circumstances and was taxed in the second estate, the executor should consider applying for a refund of estate taxes, if the refund period is open. If the second return has not yet been filed, the executor should consider taking the same filing position as the executor in the *Seiden* case. Other states with a statutory framework comparable to New York's before the proposed Budget bill changes might have a similar result.

Also on the transfer tax front, the proposed 2019-2020 Executive Budget includes a proposal to extend the New York three-year gift add-back until Jan. 1, 2026. While New York does not impose a current gift tax, as a result of 2014-15 Executive Budget changes, the New York gross estate of a deceased resident was increased by the amount of any taxable gift made within three years of death. The gift add-back expired for individuals dying on or after Jan. 1, 2019 (N.Y. Tax Law § 954(a)(3)). The proposed extension to Jan 1, 2026 would apply retroactively to include estates of individuals dying on or after Jan. 1, 2019, to eliminate any gap in the add-back period. Will a retroactive effective date be subject to constitutional challenge? To be determined!

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Sharon L. Klein

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CITES:

Estate of Evelyn Seiden, (N.Y. Surr Ct, Oct. 9, 2018); 2019-2020 New York Executive Budget; IRC § 2044; New York Tax Law § 954.

CITATIONS:

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