Recent Tax Legislation—The Excise, Estate and Gift Tax Adjustment Act of 1970

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THE EXCISE, ESTATE AND GIFT TAX
ADJUSTMENT ACT OF 1970

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The Excise, Estate and Gift Tax Adjustment Act of 1970\(^1\) will result in a temporary increase in the revenue derived from estate and gift taxes, a potentially longer-term increase in excise tax revenues\(^2\) and a permanent decrease in the revenue generated by the minimum tax on items of tax preference income and by the aircraft use tax.\(^3\) More important, it will have an enduring effect on estate, gift and income tax planning and procedures. The origins and principal provisions of the Act will be discussed in the first few pages of this article, after which the provisions relating to the estate tax will be considered in detail. They will receive special attention because they are more numerous, more complex, and more important than those of any other segment of the Act.

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1. 84 Stat. 1836 (codified in scattered sections of INT. REV. CODE of 1954 [hereinafter cited IRC]).

2. The excise tax on new automobiles and communications services was extended by the Act for a number of years. See text accompanying notes 31-33, infra. However, on August 15, 1971 President Nixon proposed the repeal of the excise tax on automobiles as a part of “the most comprehensive new economic policy to be undertaken in this Nation in four decades.” The President’s Radio and Television Address to the Nation Outlining a New Economic Policy for the United States, Aug. 15, 1971, in 7 WEEKLY COMP. OF PRES. DOCS. 1168, 1171 (1971). On December 10, 1971 President Nixon signed the Revenue Act of 1971, Pub. L. No. 92-178 (Dec. 10, 1971), 7 WEEKLY COMP. OF PRES. DOCS. 1642 (1971), which liberalized the federal tax laws in many respects and repealed the excise tax on passenger automobiles and trucks weighing 10,000 pounds or less effective December 11, 1971. In addition the 1971 Act provided for the refund of excise taxes on automobiles sold after August 15, 1971 and lightweight trucks sold after September 22, 1971. Thus a revenue increase may be derived from the extension of the excise tax on communications services but the anticipated increase in revenue from the extension of the automobile excise tax will not be realized because of its subsequent repeal.

3. The excise, estate and gift tax provisions of the Act were originally contained in H. R. 19868, 91st Cong., 2d Sess. (1970), which passed the House on Friday, December 11, 1970. 116 CONG. REC. H11566 (daily ed. Dec. 11, 1970). When the House action was reported to the Senate the following Monday, the bill was ordered held at the desk and was not referred to the Senate Finance Committee as would be customary. 116 CONG. REC. S20055, D1270 (daily ed. Dec. 14, 1970). Nevertheless, the Senate Finance Committee considered it in executive session and reported it out with relatively few
I. ORIGINS OF THE ACT

In mid-1970 the administration recommended three revenue-raising measures to Congress for the purpose of limiting the budget deficit which was projected for fiscal 1971. The first, which was announced by the President on April 3, 1970, called for the accelerated collection of estate and gift taxes. The other two, announced in July of 1970, proposed a one year extension of the excise taxes on automobiles and communications services and the imposition of a special tax on lead additives to gasoline. The doubling-up in estate and gift tax collections which would result from the first proposal was expected to yield a one-time revenue increase of $1.5 billion, all of which would be realized in fiscal 1971.

changes on December 15, 1970 as an amendment to H.R. 16199, 91st Cong., 1st Sess. (1970), a minor bill before the Committee which had originally provided only for the establishment of a working capital fund for the Department of the Treasury. S. REP. No. 91-1444, 91st Cong., 2d Sess. (1970) [hereinafter cited as 1970 S. REP.]. The establishment of the working capital fund will not be mentioned again because of its minor importance and lack of connection with the principal contents of the Act. The record does not indicate the reason H.R. 19868 was not referred to the Finance Committee when it reached the Senate. Possibly it was not referred to the Committee in order to expedite Senate consideration of the bill. The remarks of the Senate Finance Committee Chairman, Senator Long, indicate some dissatisfaction with the procedure which was followed:

In the Finance Committee we were forced to add the excise and estate and gift tax bill to a small bill pending in our committee because this bill was not referred to our committee. We thought that as the Finance Committee of the U.S. Senate, we should consider important legislation of this type before action is taken by the Senate. We took that action in the only way we could—by adding the excise and estate and gift tax bill to a minor bill before our committee.


4. When former Secretary of the Treasury David M. Kennedy testified before the House Ways and Means Committee on September 9, 1970, he stated that the budget deficit for 1971 would be greater than the $1.3 billion which had been projected in May and added that "we desperately need the revenues that we have recommended." Hearings on the Tax Recommendations of the President Before the House Comm. on Ways and Means, 91st Cong., 2d Sess. 67 (1970) [hereinafter cited as 1970 Tax Hearings].


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“prevent a revenue loss of $650 million in the fiscal year 1971 and $1,250 million the fiscal year 1972.”9 The lead tax was expected to “result in a first year revenue gain of approximately $1.6 billion.”10 Modified forms of the estate and gift tax acceleration proposals and the excise tax extension were enacted, but the lead tax proposal did not survive the House Ways and Means Committee’s hearings.11

At the time the proposals were made public the administration expected budget deficits of $1-2 billion for each of fiscal 1970 and 1971.12 President Nixon explained that the deficits were anticipated because of a “shortfall” in tax collections, “increases in uncontrollable outlays, such as interest on the public debt, farm price supports and public assistance grants, as well as a Federal employees pay raise” and Congressional largesse.13 The administration proposed measures which would produce only temporary increases in tax yields because of an expectation that the economy would “shortly resume a more rapid yet steady and more sustainable rate of increase that will not fuel a new inflation.”14 Economic activity did not revive in the ensuing months, which led the President to propose a seriously unbalanced budget for fiscal 1972,15 to order the liberalization of income

11. On February 8, 1971 the President announced that he would “again propose a special tax to make the price of unleaded gasoline lower than the price of leaded gasoline.” The President’s 1971 Environmental Program, Feb. 8, 1971 in 7 WEEKLY COMP. OF PRES. Docs. 187, 190 (1971).
14. Id.
15. The budget President Nixon submitted to Congress for fiscal 1972 contemplated an actual deficit of $11.6 billion. When it was submitted it was heralded as coming within $100 million of the “full employment budget”—“the revenue the economy could generate under the existing tax system at a time of full employment.” The President’s Message to the Congress Transmitting the Budget for Fiscal Year 1972, Jan. 29, 1971, in 7 WEEKLY COMP. OF PRES. Docs. 130, 131 (1971). It reflected an abandonment of the strict “pay-as-you-go” policy which the administration had espoused earlier. See President’s Message to Congress in Connection With Settlement of the Postal Dispute, supra note 5, at 471.
tax depreciation regulations and, finally, to adopt a sweeping new economic policy on August 15, 1971.

The history of the Act spans the nine month period between April 3, 1970, when the President proposed that the collection of estate and gift taxes be accelerated in order to offset the cost of wage increases granted government employees, and December 31, 1970, when the

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16. See Statement by the President Upon Announcing Changes in the Depreciation Provisions, Jan. 11, 1971, in 7 WEEKLY COMP. OF PRES. DOCS. 58 (1971). The new rules were adopted as Treas. Reg. § 1.176(a)-11 on June 22, 1971. In August, 1971, the Treasury issued a 37 page statement explaining the regulations, the major reasons for their adoption, their intended economic effects and a general defense of their propriety and legality. 1971 INT. REV. BULL. No. 34, at 29. Paradoxically, the new depreciation rules will reduce the annual federal income tax payments of business by more than the entire annual yield of the estate tax. See Statement by the President Upon Announcing Changes in the Depreciation Provisions, supra at 58. The changes are intended to permit "business firms to reduce tax payments now, when additional purchasing power is needed." Id. at 59. The changes would appear to run counter to the administration's previous anti-inflationary efforts.

17. The new economic policy of the administration was announced by the President with apparent enthusiasm although it included elements which he had long spurned. Its principal features were (1) a tax credit of 10 percent for investment in new equipment, reducing to 5 percent in 1972; (2) the repeal of the 7 percent excise tax on automobiles; (3) an advance of the scheduled $50 increase in the personal income tax exemption from January 1, 1973 to January 1, 1972; (4) a 90 day price and wage freeze; (5) a general suspension of the convertibility of the dollar into gold; and (6) an additional duty of 10 percent on a broad range of imports. The President's Radio and Television Address to the Nation Outlining a New Economic Policy for the United States, supra note 2. The price and wage freeze was ordered in Exec. Order No. 11615, 36 Fed. Reg. 15727 (1971), and the additional duty was imposed by Proclamation No. 4074, 36 Fed. Reg. 15724 (1971). It is interesting to note that less than two months before the President's announcement Secretary of the Treasury John B. Connally, Jr. had stated that the President has considered, at great depth, all of the advice he has had from all of the many sources. He has come to the conclusion that, number one, he's not going to institute a wage-price review board; number two, he's not going to impose mandatory wage and price controls; number three, he's not going to ask the Congress for any tax relief; and number four, that he's not going to increase fiscal spending. Remarks of Secretary Connally. June 29, 1971, in 7 WEEKLY COMP. OF PRES. DOCS. 1002, 1003 (1971). For good or ill, the new policy included practically all of the ingredients the President was reported to have spurned.

18. The President's statements indicate that he might consider the history of the Act as beginning with the Tax Reform Act of 1969. In making the revenue-raising proposals in 1970, the President repeatedly chided Congress for having included excessive tax reductions in the Tax Reform Act. With respect to 1971 fiscal problems, the President stated: "It should be noted that the deficit now projected for fiscal 1971 would have been more than covered by the amount of revenue which the Congress chose to eliminate from my recommendations for the Tax Reform Act of 1969." Statement by the President Upon Issuing Revised Estimates for Fiscal Years 1970 and 1971, supra note 7, at 659. As it happened, the deficits projected in May of 1970, $1.8 billion for fiscal 1970 and $1.3 billion for 1972, proved to be far too optimistic. The actual deficit for 1970 was $2.8 billion and in January of 1971 the deficit for 1971 was estimated at $18.6 billion. The President's Message to the Congress Transmitting the Budget for Fiscal Year
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Act was finally passed by Congress. The principal events which took place in the interim are discussed below.

II. PRINCIPAL PROVISIONS OF THE ACT

A. Estate and Gift Tax Acceleration

The administration's proposals for the accelerated collection of estate and gift taxes were spoken of as a unit, but they were in fact independent and met somewhat different fates. The relatively simple gift tax proposal was enacted by Congress without substantial change, whereas the more complex and controversial estate tax proposal was abandoned in favor of an alternative plan sponsored by the Trust Division of the American Bankers Association and the Tax Section of the American Bar Association.

The administration's gift tax proposal required "the filing of the gift tax return and the payment of the gift tax ... on a quarterly basis, that is, on the last day of the month following the end of the calendar quarter in which the gift was made." It was intended to limit the extent to which the payment of gift taxes could be deferred and to place the gift tax on a "pay-as-you-go" basis. Formerly a gift tax payment might not be due until as much as fifteen and one-half months after the gift was made. Quarterly returns were not expected to be burdensome because "a substantial majority of taxpayers...

1972, supra note 15, at 131. See also Wall St. Journal, Feb. 1, 1971, at 4, col. 1 (Pacific Coast ed.). Secretary of the Treasury Connally observed in June of 1971 "that the deficit is going to run substantially in excess of the $18 billion that has been anticipated." Remarks of Secretary Connally, supra note 17, at 1003.


20. Letter from Secretary Kennedy to Speaker McCormack, in 1970 Tax Hearings, supra note 4, at 9 (describing the administration's proposal and forwarding drafts of the proposed legislation). The estate and gift tax proposals were first described in detail in a letter Secretary Kennedy sent to congressional leaders on April 15, 1970. 2 CCH FED. EST. & GIFT TAX REP. ¶ 8260 (1970). The contents of this letter are described in 129 J. ACCOUNTANCY 73 (1970); Treasury Tells How Estimated Estate and Gift Taxes Would Work, 33 J. TAXATION 53 (1970); and 1970 Tax Hearings, supra note 4, at 1 (press release containing Chairman Mills' announcement that hearings would be held on the President's recommendations).
making taxable gifts make all such gifts in a single calendar quarter of any taxable year."\textsuperscript{21}

The estate tax proposal required the filing of an estimated tax return within seven months of death if the decedent’s gross estate exceeded $150,000 in value on the date of death. In those cases an estimated estate tax payment of the lesser of “80 percent of the estate tax which would be due if the gross estate were valued as of the date of death” or “the value of the ‘net liquid assets’ six months after death” would be due when the return was filed.\textsuperscript{22}

Both proposals were swiftly condemned by interested groups, particularly the Tax Section of the American Bar Association and the Trust Division of the American Bankers Association.\textsuperscript{23} The Tax Section’s Committee on Estate and Gift Taxation prepared a statement

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\item Letter from Secretary Kennedy to Speaker McCormack, in 1970 Tax Hearings, supra note 4, at 10.
\item Id. As a result of limiting the estate tax plan to gross estates exceeding $150,000, the proposal was expected to affect only 35,000 of the 100,000 estates for which returns are filed annually. Id.
\item "Net liquid assets" was defined to include cash, readily marketable securities, and other liquid assets in the gross estate less funeral and administrative expenses, debts payable within fifteen months after death, and an allowance of $15,000 for a surviving spouse or minor child plus $5,000 for each additional surviving minor child. Id. This limitation was intended to “prevent hardship for those estates which consist of non-liquid assets. . . .” Id.
\item Surprisingly, the administration appears not to have discussed the proposals with representatives of any interested groups outside the government prior to making them public. The reason for that tactic is uncertain. The possibility of engaging in advance discussions may have been overlooked or it may have been considered and rejected on the ground that conduct of such discussions would jeopardize, or at least delay, the enactment of any acceleration proposal. Had advance discussions taken place, the administration might have been spared the embarrassment of sponsoring a measure as deficient as the original estate tax acceleration proposal. On the other hand, the original estate tax proposal might have been advanced principally as a strategem, intended to induce agreement to a less radical measure. That possibility is suggested by testimony given at the hearings to the effect that the bar feared the original proposal and that the alternate proposal was conceived and sponsored out of that fear. 1970 Tax Hearings, supra note 4, at 275-76 (testimony of Harrold J. McComas). But see id. at 89 (testimony of John S. Nolan).
\item It is also surprising that the Treasury appeared not to have considered accelerating estate tax collections by simply advancing the payment date in the manner of the alternative. See Letter from Secretary Kennedy to Speaker McCormack, in 1970 Tax Hear- ings, supra note 4, at 10-11; 1970 Tax Hearings, supra note 4, at 43 (testimony of Secre-
setting forth "(1) policy objections to and technical deficiencies in the Administration's proposal, and (2) an alternative proposal designed to achieve the revenue increase sought by the Administration . . . without the technical defects and complexities in, and certain of the policy objections to, the Administration's proposal." The statement registered relatively mild opposition to the gift tax acceleration proposal and offered no alternative to it. The principal objections to the gift tax plan were that it was a thinly-disguised tax increase, that it would not result in a revenue increase because donors would defer making gifts until the last quarter of the calendar year and that it should not be considered apart from overall estate and gift tax reform.

The dates for payment or deposit of other taxes have been advanced enough times in recent years for the Treasury to have more than a passing familiarity with the technique. Perhaps the most well known accelerations have taken place with respect to the payment of corporate income taxes. Prior to 1954, the tax was paid after the close of the tax year to which the liability related. In the Revenue Act of 1939, §§ 52-56. Beginning in 1954, corporations were required to pay part of their income tax on a current basis—during a tax year they had to file declarations and make installment payments of part of their estimated income tax liability for the year. IRC § 6154. Amendments made in 1964 and 1966 changed the scheme to put corporations on a fully current basis to the extent their estimated tax liability exceeded $100,000. Finally, provision was made to phase out the $100,000 exemption from estimated tax payments. Tax Expenditure Control Act of 1968, § 103(b), IRC § 6154(c). The dates for payment for the estate and gift taxes had not previously been advanced. On the contrary, the payment date for each of them had been moved back once. From the enactment of the original estate tax in 1916, Revenue Act of 1916, ch. 463, tit. II, 39 Stat. 777, until 1935 the estate tax return was due and the tax was payable within twelve months following death. The period was lengthened to fifteen months when the alternate valuation provisions were adopted in 1935. From 1932 through 1954, gift tax returns were due and the tax was payable "on or before the 15th day of March following the close of the calendar year." Revenue Act of 1932, ch. 209, tit. III, § 509, 47 Stat. 245. The 1954 Code moved the date back one month. IRC § 6075(b). The tax was payable at the same time. Id. § 6151(a).

24. Report of the Committee on Estate and Gift Taxes, 23 TAX LAWYER 711 (1970). The Council of the Tax Section approved the statement later in May and distributed it to each member of the House Committee on Ways and Means and the Senate Finance Committee and to Treasury and Congressional tax officials. Id.

25. It is fortunate that the consideration of the proposals was not deferred until the administration delivered its long-promised estate and gift tax reform package. Secretary of the Treasury John B. Connally, Jr. has made it clear that he disapproves of most of the estate and gift tax reform proposals which have been advanced and that the Treasury does not intend to submit any estate and gift tax reform plan to Congress in 1971. Wall St. Journal, March 10, 1971, at 4, col. 2 (Eastern ed.); N.Y. Times, Feb. 27, 1971, at 34, col. 1. Secretary Connally's intention contrasts with the House Ways and Means Committee's announced intention to study the estate and gift tax laws "as soon as possible." H.R. REP. No. 91-413, 91st Cong., 1st Sess., pt. 1, at 2 (1969). It also contrasts with the administration's prior plans. For example, on September 9, 1970, then Acting Assistant Secretary of the Treasury John S. Nolan told the Ways and Means Committee: "As far as we know, the committee will want to take this subject up next year and we will present recommendations at that time." 1970 Tax Hearings, supra note 4, at 88.

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The estate tax proposal was also opposed as a tax increase and as a matter which should await the overall reform proposals. In addition, the statement criticized this proposal because it "would permanently impair prudent and orderly estate administration, create unforeseen hardships, add to the already heavy burden of taxes on estates, be expensive to administer and to comply with, and foment uncertainties and litigation." More specific criticisms were that (1) executors would be required to determine the content and value of decedents' estates within an unreasonably short time, (2) the estimated tax return would be due before decisions regarding the alternate valuation and other matters affecting the estate tax could be made, and (3) the amount of estimated tax due would not be diminished although the "liquid assets" included in the gross estate were not in the executor's possession or subject to his control (e.g., life insurance passing to named beneficiaries or securities gratuitously transferred in contemplation of death) or were exonerated from the burden of the tax by tax apportionment provisions of the decedent's will or by applicable state law. It also would reduce an executor's freedom in arranging for the orderly liquidation of assets to meet the estate's cash requirements:

In a falling market the executor, faced with the problem of having to raise an estimated tax based on date of death values out of a shrinking estate, may be forced into wholesale and precipitate liquidation at the very worst time. In a rising market the executor, caught between the Scylla of the six-month holding period for long-term capital gain and the Charybdis of the seven-month payment date, would, in this era of brokerage house paperwork jams, have substantially less than a month in which to liquidate a substantial proportion of the estate's assets.

The preparation and processing of an additional estate tax return for all estates subject to the estimated tax would impose a substantial burden on taxpayers and the government. Also, penalties would be imposed if the estimated tax was underpaid, which might occur if the assets of the estate were undervalued on the date of death. Thus, an executor electing to use the alternate valuation date in the final estate tax return might be called upon to substantiate his valuation of assets on two dates—the date of death and the alternate valuation date.

27. Id. at 684-86.
28. Id. at 685.
Appreciating that the administration viewed the accelerated collection of the estate tax as a fiscal imperative, the Tax Section proposed an alternative plan, the substance of which was accepted by the administration\(^\text{29}\) and, ultimately, enacted. It called for an advance of the due date for the estate tax return and the tax payment date to nine months after death, an acceleration of the alternate valuation date from one year to six months after death, and a reduction of the general three year estate tax limitations period of section 6501 of the Internal Revenue Code to one year after the due date of the return. In order to facilitate those changes, the Tax Section also proposed a liberalization of the rules under which extensions of time to pay the tax might be granted and a change of the holding period rules to provide that gains or losses realized on the sale or exchange of property included in the gross estate within six months of death be treated as long term.\(^\text{30}\)

The administration was wise in accepting the alternative plan in lieu of its original proposal. Although each would generate approximately the same amount of additional revenue, the alternative was superior in practically every respect. It was much simpler and stayed well within the framework of the existing law. Unlike the original proposal, the alternative plan did not involve the adoption of new and uncertain concepts and would not require additional tax returns of any estate. Also, by advancing all of the steps in the estate tax determination process, the alternative plan would facilitate the earlier settlement of estates and the earlier distribution of property to beneficiaries. In contrast, the original proposal would only have advanced the time at which large estates were required to pay a substantial part of the tax. Finally, the alternative was accompanied by proposals which called for some generally desirable liberalizations of related laws. Those which were carried forward into the Act expand the circumstances under which executors and other fiduciaries may obtain discharges from personal liability for a decedent’s federal taxes, amend the holding period rules to provide that property acquired

\(^{29}\) On September 9, 1970, then Secretary of the Treasury Kennedy told the House Ways and Means Committee that “[a]fter study we have concluded that this alternative is preferable to our original proposal for an estimated estate tax, and accordingly we now recommend the principal features of the proposal to you. . . .” 1970 Tax Hearings, supra note 4, at 43.

\(^{30}\) Tax Section Statement, supra note 23, at 687-88.
from a decedent is deemed to have been held for more than six months and relax the rules under which extensions of time for paying the tax may be granted.

B. Excise Tax Extension

In July of 1970 the administration proposed that the scheduled reductions in the excise tax rates applicable to automobiles and communications services be postponed for one year.31 As noted above, the postponement was sought because it would preserve $650 million of revenue in fiscal 1971 and $1,250 million in fiscal 1972, all of which the administration had taken into account when the 1971 budget was prepared. Under this proposal, the rates would have remained at seven percent for automobiles and ten percent for communications services in 1971, decreasing to five percent each in 1972, three percent each in 1973, one percent each in 1974 and expiring January 1, 1975.32 The Act contains a different reduction schedule which the Ways and Means Committee devised in order to assure that these unpopular taxes are eventually eliminated and that Congress would not again be asked to extend them.33 In order to provide further budg-
etary relief, the Act extends the existing rates through 1972 and gradually reduces them over a ten year period so the taxes will be eliminated at the end of 1981. The extension of the automobile excise tax will not provide any budgetary relief because of its repeal in December 1971.34

The Act also made four technical changes in the excise tax laws. The first set of changes prescribes a special rule for determining the constructive sale price of motor vehicles sold by a manufacturer to an affiliated distributor which then sells them to independent retailers.35 The change is intended to eliminate the tax incentive which the Tax Reform Act of 1969 had inadvertently given auto manufacturers to establish and channel sales through affiliated distributors. Under the new rule the constructive sale price in such cases will be 98.5 percent of the lowest price at which the affiliated distributor sells the vehicles in arm's-length transactions to independent retailers rather than the generally applicable 90 percent.36 The second set is intended to clarify the determination of the tax in the case of "further manufacture"—where a new taxable article is created from tax-paid components. The clarifications "are intended in effect to result in no item being in-

34. The excise tax on automobiles and lightweight trucks was repealed by the Revenue Act of 1971. See note 2, supra. The repeal will result in a revenue loss of $2.5 billion in fiscal 1972. See note 9, supra.
35. IRC § 4216(b)(5).
36. Id. In order to minimize the impact of excise taxes on competition in industries where some manufacturers sell through affiliated distributors and others sell through independent wholesalers, the Tax Reform Act of 1969 provided that manufacturers who sell to affiliated distributors should pay an excise tax based upon a constructive sale price equal to 90 percent of the lowest price at which the affiliated distributor regularly sells the goods to independent retailers. Although manufacturers of motor vehicles usually sell directly to independent retailers and had not been subject to the type of competitive disadvantage the rule was intended to reduce, it appeared that they could qualify for the 90 percent treatment under the literal language of section 4216(b)(3), thereby reducing the amount of excise taxes they paid:
Such a manufacturer could then sell its cars and trucks to its affiliated wholesale distributor and the distributor could then sell the cars and trucks to an independent retailer at the same price that the manufacturer would otherwise have charged on a direct sale to the retailer. Even though the creation of the affiliated distributor in these cases is apt to have little or no economic effect (except that arising from the tax reduction), it nevertheless results in a reduction of the base upon which the manufacturers tax is computed and therefore results in a reduction in the tax.
1970 H.R. REP., supra note 33, at 20. Accordingly, the Act raised the constructive sale price in such cases to 98.5 percent. The new provision was expected "to be used essentially to simplify recordkeeping and is not expected to result in the auto industry being able to gain a tax advantage from the creation of affiliated distributors. In effect, then, it is expected and intended that the tax will be neutral with regard to competition within the auto industry." 1970 H.R. REP., supra note 33, at 20-21; 1970 S. REP., supra note 3, at 21.
cluded in the tax base more than once. In addition, they are intended to exclude from the tax base that part of the final price that is essentially a retailing or distributing markup, as distinguished from a manufacturing markup." 37 Third, the excise tax exemption for camper coaches was extended to units which are designed to be used primarily as "camping accommodations." 38 The amendment resolves the question of whether a one-piece top designed to be mounted on the body of a pickup truck is within the "camper coach" exemption which was added to the Code by the Excise Tax Reduction Act of 1965. 39 Finally, the Act requires window stickers affixed to new automobiles distributed after March 31, 1971, to state that the excise tax was imposed and the rate at which it was imposed. 40 The requirement is intended to increase consumer awareness of the tax and thereby to "make more likely the future adherence to the scheduled reduction in passenger automobile tax rates." 41 The subsequent repeal of the excise tax on automobiles and lightweight trucks largely moots this change.

C. Tax Reduction Provisions

In view of the need for revenue which led the administration to propose the revenue raising measures included in the Act, it is ironic that the Act ultimately came to include provisions which will reduce

38. IRC § 4063(a)(1).
39. Id.

This provision apparently originated with Representative Charles E. Chamberlain, a member of the Ways and Means Committee from Michigan. During the hearings he stated his opposition to “hidden taxes”, such as the excise tax on passenger automobiles. and said: "I feel certain that if we had on that sticker how much everyone has to pay to the Federal Government in taxes when they buy an automobile you would not have as much trouble getting rid of the tax." 1970 Tax Hearings, supra note 4, at 86. In what might be viewed as a dazzling display of governmental neutrality in consumer affairs, Acting Secretary Nolan responded that the administration would not resist “anything of that nature if the automobile companies were willing to live with such a requirement.” Id. Extrapolating from that exchange and the provisions of the Act, it appears that the companies did not object to a “requirement” that the sticker state the tax had been imposed at a certain rate, but that they did object to a requirement which would reveal the amount of the tax. As Mr. Nolan observed, a manufacturer "could show the tax separately if he chose to do so. Apparently, he doesn't want to because by arithmetic computation you could determine his price to the dealer and I suspect he doesn't want to show that." Id.
the yield of two federal taxes—the aircraft use tax, and the minimum tax on tax preferences. The first, which originated in an amendment offered by Senator Howard W. Cannon, will reduce the revenue derived from the annual use tax on civil aircraft by exempting the first 2,500 pounds of weight of piston-powered aircraft from the two cents per pound additional tax which the Airport and Airway Revenue Act of 1970 had made applicable to the entire weight of such aircraft weighing more than 2,500 pounds. The second, which is attributable to Senator Jack R. Miller, will further minimize the minimum tax on items of tax preference by $100 million per year. It amended section 56 of the Code to allow a seven year carryforward of a taxpayer's ordinary income tax liability as a deduction in computing the amount of his tax preference income which is subject to the minimum tax.

42. The excise tax exemption for camper coaches intended for use primarily as camping accommodations will doubtless also reduce excise tax revenue by some amount, although that feature was not mentioned in the committee reports. In 1965 it was estimated that the exemption of camper coaches intended for use primarily as living accommodations would reduce revenue, earmarked for the Highway Trust Fund by $6 million per year. S. REP. No. 324, 89th Cong., 1st Sess. 44 (1965).
44. IRC §§ 4491-94, 6426.
45. The amendment will reduce the revenue derived from the annual use tax on civil aircraft imposed by the Airport Act by an amount which will increase from $2.9 million in fiscal 1972 to $4 million in 1980. 116 CONG. REC. H12576 (daily ed. Dec. 31, 1970) (remarks of Congressman Mills). All aircraft used during a year remain subject to an annual use tax of $25 and all jet powered aircraft remain subject to an additional tax of 3½ cents per pound.
47. Under the provisions of section 56 as enacted in the Tax Reform Act of 1969, the base of the minimum tax was computed by deducting a taxpayer's current basic income tax liability from the amount by which his tax preference income for the year exceeded $30,000. The provision for that deduction originated from a floor amendment to H.R. 13270, 91st Cong., 1st Sess. (1969), which was also authored by Senator Miller. During the debate on the 1970 Act, Senators Miller and Long observed that the lack of a carryforward or carryback of the deduction was a "defect" which should be cured. 116 CONG. REC. S20578-79 (daily ed. Dec. 18, 1970). They also stated that the defect was not remedied at the conference on the Tax Reform Act of 1969 because neither the House nor the Senate version of H.R. 13270 provided for a carryforward or carryback of the deduction. It is true that the Rules provide that the managers of a conference must confine themselves to the differences committed to them and may not include subjects not within the disagreements, however germane. RULES AND MANUAL OF THE HOUSE OF REPRESENTATIVES FOR THE NINETY-FIRST CONGRESS, H.R. DOC. NO. 402, 90th Cong., 2d Sess. § 546 (1969). However, it is not at all clear that the conferees would have provided for a carryforward or carryback of the deduction had they been free to consider the subject. Indeed, the history of Senator Miller's amendment to the 1970 Act suggests that the House probably would have resisted an attempt to do so.

The carryforward-carryback provision was first offered by Senator Miller and was first passed by the Senate as an amendment to an excise tax measure, H.R. 17473, 91st Cong., 2d Sess (1970). 116 CONG. REC. S20579 (daily ed. Dec. 18, 1970). Under it, a
The irony would have been greater had the Hollings-Thurmond bill for the benefit of the University of South Carolina and the beneficiaries under the will of a deceased South Carolinian also become part of the Act.\textsuperscript{48} With good taste, however, the bill was offered and adopted as an amendment to another tax measure.\textsuperscript{49} The Hollings-Thurmond bill was intended to facilitate a multi-million dollar gift from the beneficiaries of the estate of Martha W. Brice to the University of South Carolina by allowing the estate a charitable deduction for "an amount equal to any amounts transferred, prior to the taxpayer's basic income tax liability could be carried back as a deduction for 3 years and forward for 5 years in computing the amount of tax preference income which was subject to the minimum tax. The House rejected the amendment because of the Treasury Department's objection that it would complicate the calculation of the minimum tax and would reduce the projected $635 million annual yield of the tax by $100 million per year.\textsuperscript{116} Congress agreed to the House action, "reserving the right of the Senator from Iowa to offer his amendment on a subsequent bill." 116 CONG. REC. S21125 (daily ed. Dec. 22, 1970) (remarks of Senator Long). Accordingly, on December 29, 1970, Senator Miller offered the provision as an amendment to H.R. 16199, 91st Cong., 2d Sess. (1970). 116 CONG. REC. S21367 (daily ed. Dec. 29, 1970). The Senate passed it again and resolved to insist upon all its amendments to H.R. 16199. 116 CONG. REC. S21368, 21369 (daily ed. Dec. 29, 1970).

When H. R. 16199 again came before the House, Congressman Mills described the Miller amendment to the House and pointed out that failure to act on it would jeopardize the entire bill and, thus, the additional revenue it would raise in fiscal 1972. Because of that risk the Treasury Department recommended that the Senate provision be accepted by the House in a modified form which would allow a 7 year carryforward but no carryback. The modification was proposed by Congressman Mills and passed by the House. 116 CONG. REC. H12577, 12578 (daily ed. Dec. 31, 1970). Senator Miller acquiesced to the change and it was approved by the Senate. 116 CONG. REC. S21708 (daily ed. Dec. 31, 1970).

Several Congressmen decried the procedure followed by the Senate. Congressman Byrnes, ranking minority member of the House Ways and Means Committee, said:

\begin{quote}
I am not happy about the procedure used by the Senate, and I believe it is most unfortunate. I believe we should make it clear, that by accepting this amendment—which I consider satisfactory under current circumstances—we do not condone this method of procedure nor foreclose review of the minimum income tax. In fact, in my judgment the Senate amendment should be reviewed along with other items in that minimum tax area, early next year.
\end{quote}


According to a statement attributed to a Treasury official the administration will not seek to reverse the change in section 56 despite the substantial loss in revenue it will cause. Wall St. Journal, Jan. 13, 1971, at 1, col. 5 (Eastern ed.). The minimum tax has already been jocularly referred to as "the giant that Jack killed" because of Senator Miller's success in blunting the thrust of the version contained in the Tax Reform Act of 1969. Andrews, Outfoxing the IRS, Wall St. Journal, Apr. 14, 1971, at 1 col. 1 (Pacific Coast ed.).


\textsuperscript{49} H.R. 17473, 91st Cong., 2d Sess. (1970). Originally, H.R. 17473 was concerned only with extending the period during which certain excise tax refunds might be filed. It was passed as amended and signed by the President on December 31, 1970. 7 WEEKLY COMP. OF PRES. DOCS. 51 (1971).
time prescribed by law (including extensions thereof) for the filing of an estate tax return for such estate, from the proceeds of such estate to a charitable use specified by Item III of the will of the said Martha W. Brice. . . ." The sponsors justified the bill on the ground that the decedent had intended to provide for a larger gift to the University but her will "was improperly drawn and due to a technicality in the Federal estate tax regulation the executors of the estate are prohibited from fully carrying out the wishes of the testatrix," that educational institutions are "stretching every dollar to meet current demands" and that it would "insure that a substantial gift will be directed for capital needs of a university." Apparently our representatives were persuaded by the argument that the federal tax laws should be bent a bit to provide financial assistance to a venerable educational institution. In view of the burgeoning enrollments and straitened circumstances which face most educational institutions today, they doubtless visualized that the federal funds which would be made available to the University of South Carolina would be used to build classrooms, dormitories or other structures necessary to the educational mission of the institution. It is an outrage and an affront to Congress that $2.75 million of the funds given the University will be used to finance a 14,456 seat expansion of the school's already ample football stadium.

50. 84 Stat. 1880. Mrs. Brice's will required her beneficiaries to expend not less than $1 million to erect a building for the benefit of one or more of the University of South Carolina and two other charitable institutions named in her will. The text of the will is printed in 116 Cong. Rec. S20577 (daily ed. Dec. 18, 1970). "The heirs," as Representative Boggs explained to the House, "now would like to fulfill the intent of the decedent and give an additional $4 million to the University of South Carolina, but financially in order to do so need to have this recognized as a charitable deduction in the estate of the decedent." 116 Cong. Rec. H12288 (daily ed. Dec. 22, 1970).


52. Id. The Treasury Department initially opposed the bill. Letter from John S. Nolan to Senator Thurmond, Dec. 16, 1970, in 116 Cong. Rec. S20577-78 (daily ed. Dec. 18, 1970). However, its opposition was withdrawn "reportedly after Senator Strom Thurmond of South Carolina asked the White House to intervene." Shanahan, Minimum Tax Law Eased by Congress, N.Y. Times, Jan. 7, 1971, at 20, col. 4. On the floor of the Senate only retiring Senator Williams spoke against the bill. He opposed it because (1) other estates did not have the same opportunity (i.e., to make gifts after a decedent's death and receive an estate tax charitable deduction for the gifts); (2) it diverted $3 million from the federal treasury to a privileged charitable donee and (3) it would establish a precedent for other special legislation. 116 Cong. Rec. S20578 (daily ed. Dec. 18, 1970). The bill was not opposed on the floor of the House.

53. The executors contributed a total of $3.5 million to the University of which $2.75 million was earmarked to the enlargement of the football stadium. Columbia, S.C., State, Jan. 3, 1971, at 1.

This gift will finance the major portion of the first of four phases of a $20 million
III. PROVISIONS RELATING TO THE ESTATE TAX

The provisions of the Act relating to the estate tax can be divided into three general categories: (1) those dealing principally with the mechanics of filing returns and paying the tax;\( ^{54} \) (2) those affecting the amount of estate and income taxes;\( ^{55} \) and (3) those relating to the discharge of executors and other fiduciaries from personal liability for federal taxes.\( ^{56} \) The period after which fiduciaries may be discharged from personal liability for estate taxes and after which executors may be discharged from personal liability for income and gift taxes is reduced from one year to nine months effective with respect to decedents dying after December 31, 1973.\( ^{57} \) With this exception, the estate tax provisions apply in cases of decedents dying after December 31, 1970.\( ^{58} \)

A. Changes in the Mechanics of Filing Returns and Paying the Tax

The principal change in this category shortened the period within which the estate tax return must be filed from fifteen months to nine months after death.\( ^{59} \) As the estate tax must ordinarily be paid when the return is due, the change served also to advance the payment date to nine months after death.\( ^{60} \) Other changes lengthen the period by which District Directors may extend the time for payment of the estate tax under section 6161(a) from six months to one year and give the Service authority to require estate tax returns to be filed either in the internal revenue district of the decedent's domicile at the time

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project. The first phase, expected to cost $5 million, will add a deck of seats on the Bluff Road or west side of the stadium and increase the seating capacity by 14,456 seats.

Id. Earlier the South Carolina General Assembly had authorized the trustees of the University to issue $5 million in bonds to finance the construction of an addition to the stadium. Prior to the addition the stadium was reputed to have a seating capacity of 43,000. UNIVERSITY OF SOUTH CAROLINA, BULLETIN A-19 (1970).

54. IRC §§ 6075(a), 6161(a) and 6091(b).
55. Id. §§ 2032, 2055(b)(2)(C), and 1223.
56. Id. §§ and 2204 and 6905. Section 6905 was added by the Act.
57. Id. §§ 2204, 6905.
59. IRC § 6075(a).
60. Id. § 6151(a), which provides that the tax shown by a return to be due must be paid "at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)."

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of his death or with the regional service center for that district.\textsuperscript{61} Section 6091(b)(3) formerly required returns to be filed in the district in which the decedent was domiciled at the time of his death.

1. \textit{Advance of the Filing and Payment Date}

The change in the filing and payment date is responsible for the expected $1.5 billion increase in estate tax collections for fiscal 1972,\textsuperscript{62} and is the \textit{raison d'etre} for most of the other provisions relating to the estate tax.\textsuperscript{63} The advance required that some change be made in the sections of the Code dealing with the alternate valuation date\textsuperscript{64} and the designation of a charitable appointee by a surviving spouse.\textsuperscript{65} At the instance of the Trust Division and the Tax Section, Congress concluded that the advance also justified, if not required, the amendment of several other Code sections. In particular, Congress was urged to liberalize the holding period rules applicable to property acquired from a decedent,\textsuperscript{66} to lengthen the period for which extensions may be granted under section 6161(a), and to broaden and relax the rules relating to the discharge of fiduciaries from personal liability for a decedent's taxes.\textsuperscript{67}

\textsuperscript{61} \textit{Id.} § 6091(b)(3). The Act also amended section 6091(b)(4) to continue to permit hand carried returns to be filed in the district of the decedent's domicile at the time of his death. \textit{See} notes 93-94 and accompanying text, \textit{infra}.

\textsuperscript{62} \textit{See} note 8 and accompanying text, \textit{supra}. The statement Secretary Kennedy submitted to the House Ways and Means Committee indicated that $1.5 billion of additional estate taxes would be collected in fiscal 1971 if the alternate estate tax acceleration proposal were adopted and estate tax returns of persons dying prior to September 30, 1970 were required to be filed no later than June 15, 1971, 9 months after death, and the returns of persons dying after September 30, 1970 were required to be filed 9 months after death. \textit{1970 Tax Hearings, supra} note 4, at 43-44. Based upon the December 31, 1970 effective date specified in the Act, the committee reports stated that

\textsl{[It is expected that the shortening of the period for the payment of the estate tax will result in an increase in tax collections in the fiscal year 1972 of $1,500 million. The shortening of the filing and payment periods for estate tax are expected to increase receipts in fiscal year 1972 by six months' estate tax collections.]} \textit{1970 H.R. Rep., supra} note 33, at 3; \textit{1970 S. Rep., supra} note 3, at 3.


\textsuperscript{64} IRC § 2032.

\textsuperscript{65} \textit{Id.} § 2055(b)(2).

\textsuperscript{66} \textit{Id.} § 1223 (11).

\textsuperscript{67} \textit{Id.} §§ 2204, 6905. These changes were proposed in the statements the Trust Division of the American Bankers Association and the Tax Section of the American Bar Association submitted to the House Ways and Means Committee. \textit{1970 Tax Hearings, supra} note 4, at 236, 248.
The advance also affects provisions of the Code which require the performance of acts "before the date prescribed for the filing of the estate tax return," such as sections 2053, 2055 and 2056. Under section 2053(c)(2) funeral expenses, administration expenses, claims and debts in excess of the amount of property subject to claims must be "paid before the date prescribed for the filing of the estate tax return," in order to be allowable as deductions. Under section 2055(a) a disclaimer in favor of a charitable organization must be made before the return is due in order for the estate to be entitled to a charitable deduction for the value of property passing to the charity pursuant to the disclaimer. Finally, under section 2056(d) a disclaimer by or in favor of a surviving spouse must be made within that time to be given effect for estate tax purposes.

With respect to the revenue effect of the advance, the committee reports stated that it would result in a revenue saving "attributable to the decreased interest costs from having these funds available earlier in each year from now on." Actually, this is not an additional saving but merely indicates the economic value of the advance to the federal fisc. The correlative economic cost devolves on the estate-tax-paying public.

Viewed from the taxpayer's perspective, the advance in the payment date is equivalent to an across-the-board increase in estate tax rates. The advance will deprive payors of the use of the amount of the tax six months earlier than before. Stated generally, the advance will cost an estate at least the yield the estate would have received on the amount of the tax over the six month period of the advance. Thus, if an estate were to earn a return of six percent per annum on the funds, the advance will cost one-half of the annual return, or three percent of the amount of the tax. A determination of the actual cost in any case would have to take into account the additional income taxes, fiduciaries' commissions, attorney's fees and other costs which would be incurred by reason of the receipt of the return from the fund over

69. This aspect of both the original and the alternate acceleration proposals was referred to at the hearings by spokesmen for various groups: "The new proposal still represents a tax increase for all estates affected. . . . While the tax increase under this proposal might be slightly less than under the original proposal, it is still a significant and discriminatory feature of the acceleration process." 1970 Tax Hearings, supra note 4, at 143. "The payment acceleration proposals are actually estate and gift tax rate increases in disguise [sic]." Id. at 249 (Statement of the Tax Section of the American Bar Ass'n).
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the six month period. In some cases the advance in payment date would probably also involve costs which are not susceptible of measurement, such as the loss of investment opportunities over the period of the advance and losses and increased costs caused by the forced earlier liquidation of assets. All in all, the cost to taxpayers may far exceed the benefit to the Government.

Proponents of the advance also heralded it as "a real reform in the administration of estates." The Congressional committees reported that it was "designed to decrease the period of estate administration and to facilitate a more rapid distribution of property to the beneficiaries." In this respect their enthusiasm for the proposal may have resulted in some exaggeration. By hastening the process of settling estate tax liabilities the advance will facilitate the attainment of those goals, but it does not assure that they will be attained. The advance will reduce the extent to which the federal tax laws actually are the cause of delay in the settlement of estates and the extent to which they may legitimately be cited as the cause of delay. It remains to be seen, however, whether the changes made by the Act will shorten the length of time estates are under administration. Perhaps the impact of the changes on the time taken to settle estates will be assessed in a later empirical study.

72. "These changes, along with new procedures to be adopted by the IRS, will speed up estate administration, at least as far as the tax audit goes." Trust Department of the Bank of California, Estate Planning Briefs (Feb. 1971) (emphasis added).
73. The length of time required to settle an estate reflects a serious deficiency in our system of estate administration. That and other deficiencies were parlayed by Norman Dacey into a national best-seller, How To Avoid Probate (1965). Dacey's charges were quite specific and quite serious. He asserted that probate law and procedure are archaic, needlessly complex, and exist principally for the benefit of lawyers and probate judges. As a result, succession through probate is terribly time-consuming and costly. . . .

Unfortunately, from the view of those who dislike Dacey's charges, there is much in them that cannot be denied, particularly if we focus on the estate of modest size and the relationships most commonly encountered in succession. Probate laws in almost all of our states, including some with recently adopted codes, are undeniably obsolescent. Wellman, The Uniform Probate Code: A Possible Answer to Probate Avoidance, 44 Ind. L.J. 191, 192-93 (1969).

A recent study of a sample of probate estates closed in Cuyhoga County, Ohio, in 1965 indicated that the majority of persons interested in decedents' estates were disturbed by the length of time the estates were under administration. M. Sussman, J. Cates & D. Smith, The Family and Inheritance 260-61 (1970).

74. Although decedents' estates have been the subject of a few empirical studies,
The changes made by the Act cannot overcome the obstacles that cumbersome and often archaic state estate administration procedures and estate tax laws place in the way of the early settlement of estates. With the advance in the payment date for federal estate tax as a precedent, the states may advance the date for payment of their death taxes. The pressure to advance the state death tax payment dates may be irresistible. Such action offers a relatively non-controversial means of augmenting current revenue and possibly also removes one of the obstacles to the earlier settlement of estates. Some professional taxes are infrequently mentioned. The studies have been principally concerned with the composition of the decedent population, the nature of its assets, and the distribution of its property. See, e.g., Powell & Looker, Decedent's Estates, 30 COLUM. L. REV. 919 (1930); Browder, Recent Patterns of Testate Succession in the United States and England, 67 MICH. L. REV. 1303 (1969); Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 U. CHI. L. REV. 241 (1963); Ward & Beuscher, The Inheritance Process in Wisconsin, 1950 WIS. L. REV. 393. The study of a sample of probate estates closed in Cuyahoga County, Ohio, in 1965 conducted by two sociologists and a law professor confirms many of the conclusions reached in earlier studies and adds some useful data, particularly with respect to the views of the participants in the estate settlement process. M. Sussman, J. Cates & D. Smith, The Family and Inheritance (1970). However, as the title indicates, it was not concerned with tax matters. Some of the Brookings Institution studies of Government Finance are concerned with the impact of death taxes and provide a wealth of statistical data regarding them. See G. Jantscher, Trusts and Estate Taxation (1967); C. Shoup, Federal Estate and Gift Taxes (1966).

The obstacles created by local laws and the need for their modernization is well known:

Although expediting federal estate tax procedures will accelerate the federal tax aspects of estate administration to a considerable extent, there remains a need to modernize local probate and state death tax procedures. Trustmen should work with local and state bar associations so as to shorten applicable probate claim periods, the time for filing inventories and accountings, the time for renunciations, and the time for the filing, payment and audit of state death tax returns. Shortening the time for probate should make probate administration more efficient and permit corporate fiduciaries to provide an improved service to beneficiaries of estates. Stevens, Estate Tax Acceleration Promotes Efficient Administration, 110 TRUSTS & ESTATES 168, 171 (1971); Wellman, The Uniform Probate Code: A Possible Answer to Probate Avoidance, 44 IND. L.J. 191 (1968).

For example, the date for payment of the Washington inheritance tax was advanced from 15 months to 9 months after death during the 1971 Extraordinary Session of the legislature. Ch. 132 [1971] WASH. LAWS 1ST EX. SESS. 667.

The advances which were made in the early 1960's by New Jersey and New York led to substantial one-time increases in the yield of their death taxes. Prior to 1962 the New Jersey law allowed the inheritance tax to be paid within one year of death without imposing an interest charge. N.J. STAT. ANN. § 54:35-3 (1960). In 1962 the law was amended to impose an interest charge of 10% per annum if the tax was not paid within 8 months after death. N.J. STAT. ANN. § 54:35-3 (1969 Supp.). At the same time the inheritance tax rates were increased. N.J. STAT. ANN., § 54:34-2 (1969 Supp.). The total New Jersey death tax collections increased from $24.6 million in 1962 to $41.8 million in 1963. N.J. DEPT. OF TREAS. (TAX. DIV.) ANN. REP. 96 (1963). While the published data does not provide a basis upon which the increase can be allocated between the advance in payment date and the increase in rates, a substantial portion of
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fiduciaries advocate an advance of the state payment dates for the latter reason. In order to achieve the economies which would result if state and federal death tax returns were prepared and filed at the same time some professional fiduciaries might support movements to make state death taxes due at or about the same time as the federal estate tax. Attention given this subject may also serve to spur interest in the revision of estate administration laws.

The Tax Section of the American Bar Association was probably too optimistic when it suggested that a substantial reduction in estate administration expense might follow if the alternative acceleration proposal was adopted and the period allowed for audit was shortened. Although methods of reducing the cost of estate administration should be earnestly pursued, it seems unlikely that any politically

the increase was probably attributable to the advance in payment date. One can infer than an advance of 4 months, or 1/3 of the period during which collections are received in a fiscal year, would increase collections by roughly 1/3 of the amount collected in the preceding fiscal year. On that basis, the advance in payment date was responsible for slightly more than $5.7 million of the total increase of $17.2 million.

Until April, 1964 the estate tax law of New York allowed a discount of 5% for tax payments made within 6 months of the date of death. In 1964 the New York law was amended effective April 1, 1964 to provide that an interest charge would be imposed unless at least 80% of the tax finally determined to be due was paid within 6 months of the date of death (the percentage was 90% for decedents dying before April 1, 1965, 85% for those dying before April 1, 1966, and 80% for those dying on or after April 1, 1966). N.Y. TAX LAW § 249-z (McKinney Supp. 1969).

The 1963-64 and 1964-65 annual reports of the New York State Tax Commission indicate that the change in the payment date may have been responsible for a substantial portion of the amount by which the 1964 estate tax collections exceeded the 1963 collections. In the fiscal year ending March 31, 1963 $91.3 million was collected, in 1964 $111.1 million was collected and in 1965 $106.4 million. The fluctuations are attributable to the combined effect of the advance in payment date, a probable normal annual increase due to inflation and an increase in the number of deaths and the abolition of the discount for payments made within 6 months of death.

The change in the federal law will almost certainly lead to corresponding changes by the states which only impose a "pick-up" tax (a death tax equal in amount to the maximum credit allowed under the federal estate tax law for state death tax payments). Included in that category are Alabama, Arkansas, Florida and Georgia. CCH INH. EST. & GIFT TAX REP., ¶¶ 70,111, 70,141, 70,201 and 70,211. Some of the states which now allow more than 9 months for payment of their death taxes will probably also change their laws to require the taxes to be paid within 9 or fewer months. For example, the present laws of Delaware, Maine, Massachusetts, Pennsylvania, Tennessee, Texas and Utah allow payments to be made within fifteen months following death. Id. at ¶¶ 70,181, 70,301, 70,321, 70,491, 70,551, 70,561 and 70,571. As indicated, the date for payment of the Washington inheritance tax was recently advanced from 15 months to 9 months after death. See note 76, supra. California and Vermont, which allow 2 years for the payment of death taxes, will almost certainly advance those dates. CCH INH. EST. & GIFT TAX REP. ¶¶ 70,151 and 70,581.


79. Tax Section Statement, supra note 23, at 687.
feasible changes in the federal estate and gift tax laws would have such a result. Shortening the period during which an estate is under administration would probably not significantly reduce the amount of executors' commissions and attorneys' fees which are usually the largest administration expense. Shortening the audit period would surely not affect the amount of those items in jurisdictions where commissions and fees are determined by reference to the inventory or principal value of estates.  

2. Extensions of Time

Section 101(h) of the Act lengthens the period by which District Directors may extend the time for payment of the estate tax from six months to one year. The change was intended to compensate for the advance of the tax payment date by lengthening the permissible extension period by a similar period.  

The House and Senate Committees also made it clear that extensions of time under section 6161(a)(1) should be made more generally available and should not be limited by the Service to cases involving "undue hardship." The Committees noted the previous administrative practice of so limiting the availability of extensions and obtained an undertaking from the "Treasury Department that extensions of time

80. To the extent that commissions and fees are computed on the income received by an estate, a reduction would take place if a change in the estate tax law caused an earlier distribution of income-producing assets of estates. In 21 states (including Washington) the gross income of an estate during probate is not included in the base upon which attorneys' fees are computed. American College of Probate Counsel, Attorneys' Fees in Probate (1967). Gross income is included in the fee base in 18 states and the District of Columbia; the practice in 11 states is unclear. Id. The data for this pamphlet was compiled by Harold I. Boucher, a partner in the San Francisco law firm of Pillsbury, Madison and Sutro. It is amusing that the publication bears a legend in bold face type worthy of a warranty disclaimer which reads "Personal—Confidential."  

81. IRC § 6161(a)(1). The provision was not included in the administration's draft proposals, but was added by the House Ways and Means Committee at the suggestion of the Trust Division of the American Bankers Association and the Tax Section of the American Bar Association. See text accompanying notes 66-67, supra.

82. The committee believes that any problems which may occur as a result of shortening this period of time from 15 to 9 months for the filing of the return and the payment of the tax can be eliminated by increasing the maximum extension of time available for the payment of the estate tax where there is reasonable cause from 6 to 12 months. As a result of this change an estate obtaining an extension of 12 months for the payment of the estate tax will have the same 21 month period after the date of the decedent's death for the payment of the estate tax as is available under present law where the 6 month extension of time is granted.

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will be made available in the future under this provision (sec. 6161(a)(1)) on a more liberal basis than in the past and that in the future they will be available whenever there is reasonable cause.83 Extensions will continue to be available under other provisions of the Code on the same bases as before. Thus, a showing of undue hardship will continue to be necessary in order to obtain an extension under section 6161(a)(2).

The Committees' statement of their understanding of the specific cases in which the Internal Revenue Service would grant extensions give some indication of the liberality with which extensions are to be granted under section 6161(a)(1).84 In the future the Service is to grant an extension, limited to the amount of the cash shortage, where (1) a gross estate includes a farm or closely held business which could be sold to unrelated persons at its fair market value but instead the executor seeks an extension in order to raise funds for the payment of the tax from other sources;85 (2) an estate includes sufficient liquid funds but they are located in several jurisdictions and cannot be marshalled by the executor within the time allowed for payment of the tax; (3) an estate is composed in substantial part of assets in the form of payments to be received in the future, such as royalties or annuities, which cannot be borrowed upon except upon terms which would inflict loss upon the estate; (4) an estate includes a claim to substantial assets which cannot be collected without litigation; (5) the assets of the estate which must be liquidated to pay the tax must be sold at a sacrifice or in a depressed market;86 and (6) an estate does not, without borrowing at a rate of interest higher than that which is generally available, have sufficient funds to pay the entire tax and at the same time to provide a reasonable amount for the support of the surviving spouse and dependent children and to satisfy claims against the estate. It was also agreed that the Service would institute a procedure under which an executor whose request for an extension under section 6161(a)(1) was denied by a District Director could appeal the decision to the Office of the Regional Commissioner.87

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83. Id.
86. Essentially the same circumstances constitute a ground of undue hardship. Id.
The liberalization of the rules under which extensions of time will be granted under section 6161(a)(1) will provide some relief for estates which have a serious liquidity problem but for which the timely payment of the tax would not constitute "undue hardship." However, because of the differential in the applicable interest rates, it will continue to be more advantageous for estates to obtain extensions of time under section 6161(a)(2). Amounts with respect to which an extension is granted under that section are subject to interest at the rate of four percent per annum rather than the generally applicable six percent rate.88 The six percent rate will continue to apply to amounts with respect to which an extension is granted for reasonable cause under section 6161(a)(1). An extension under any provision would, of course, avoid the imposition of an addition to tax under section 6651(a)(2). The addition to tax provisions imposes an additional tax of 0.5 percent of the amount of the tax for each month a tax payment is delinquent up to a maximum of 25 percent, unless the failure to pay was due to reasonable cause and not due to willful neglect.89 If an extension of time to pay a portion of the estate tax is granted, the executor may be required to post a bond not exceeding double the amount with respect to which the time to pay was extended.90

In the estate planning context, the liberalized extension rules should be viewed primarily as imparting a slightly greater degree of flexibility to the post mortem planning process. They are not a substitute for the planning which should be done during a client's lifetime. Although they may offer some relief from liquidation problems arising from failures in lifetime planning, the liberalized rules will likely not offer much relief from oversights or failures to exercise due diligence during the administration of an estate. The costs and delays which inhere in extensions dictate that they be resorted to only when actually needed and when an extension would be of real advantage to the estate.

88. IRC § 6601.
89. IRC § 6651.
90. IRC § 6165.
3. **Place of Filing**

The Act also made some minor changes in section 6091, which deals with the place of filing estate tax returns. It allows the Service to provide that estate tax returns should be filed with the internal revenue district in which a decedent was domiciled at the time of his death or with a service center serving the district.\(^9\) Previously, the Code did not permit the Service to vary the place of filing for domiciliary decedents.\(^9\) The general instructions printed on the July 1971 revision of the estate tax return (form 706) direct that the return for a resident decedent must be filed at the regional office listed for the state in which the decedent had his domicile at the time of his death.

The amendment of the filing provisions seems worthwhile. The shift to a requirement that estate tax returns be filed with the regional service centers might expedite the processing of returns at little or no inconvenience to taxpayers. If the requirement does not prove beneficial, the Service can revert to the old rule. Notwithstanding the change, estate tax returns may continue to be hand delivered within the district of a decedent's domicile at death.\(^9\) "This aspect is considered important by executors who want verification of their timely filing and payments in order to avoid any danger of a penalty for late filing."\(^9\)

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91. The administration's original proposal did not include this provision. See 1970 Tax Hearings, supra note 4, at 17-27. However, it was part of the draft bill which Secretary Kennedy submitted to the House Ways and Means Committee on September 9, 1970. Draft Bill § 3(e), Id. at 60.

92. Prior to the amendment, IRC § 6091(b)(3) provided:

Returns of estate tax required under section 6018 shall be made to the Secretary or his delegate in the internal revenue district in which was the domicile of the decedent at the time of his death or, if there was no such domicile in an internal revenue district, then at such place as the Secretary or his delegate may by regulations prescribe.

93. IRC § 6091(b)(4). A hand carried return is defined in the regulations as one which is brought to the district director by the person required to file the return or other documents, or by his agent. Examples of persons who will be considered to be agents for the purposes of the preceding sentence are: Members of the taxpayer's family, an employee of the taxpayer, the taxpayer's attorney, accountant or other tax adviser, and messengers employed by the taxpayer. A return or document will not be considered to be hand carried if it is sent to the Internal Revenue Service through the U.S. Mail.


B. Changes Affecting the Amount of Estate and Income Taxes

The Act made three changes which more or less directly affect the amount of federal taxes which will be due by reason of an individual's death. Section 2032 was amended to change the alternate valuation date from one year to six months after death, section 2055(b)(2) was amended to reduce similarly the period within which an octogenarian surviving spouse may designate the charities to which he will appoint remainder interests in property included in his spouse's gross estate and thereby entitle the estate to a charitable deduction, and the holding period rules of section 1223 were amended to provide that property acquired from a decedent and sold or exchanged within six months of his death shall be considered to have been held for more than six months.

1. Advance of the Alternate Valuation Date

The advance of the filing and payment date required that the alternate valuation date be similarly advanced to avoid making changes in the relatively simple alternate valuation procedures. Accordingly, the Act amended section 2032 to advance the alternate valuation date to six months after death. As a result of the change executors will continue to have three months following the alternate valuation date within which to file the estate tax return and pay the tax.\(^{95}\)

The exercise of the election, which fixes the valuation of assets for estate tax purposes, affects the size of the gross estate and, thereby, the amount of estate tax liability. As the estate tax valuation of assets also establishes their bases for income tax purposes, the election also affects the income tax liability of estates and distributees. Because the valuation of assets on the old and new alternate valuation dates will seldom be the same, executors will obviously be faced with quantitatively different elections than they formerly were.\(^{96}\) However, the Act

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\(^{95}\) IRC § 2032 requires that the alternate valuation election be made by the executor on the return, which must be filed within the time prescribed, including any extensions.

\(^{96}\) The advance of the filing and payment date may have reduced the need to provide an alternate valuation election. The alternate valuation procedure was added to the Code in 1935 to prevent estates from being entirely consumed by the estate tax in the event of a sudden economic decline. See note 101, infra. Assuming that the valuation of assets made longer after death will deviate from the date of death valuation more than
did not change section 2032 in any other respect. Thus the considera-
tions which impel a decision regarding the exercise of the election
remain the same, as do the consequences of the exercise of the elec-
tion.

The advance, coupled with the advance of the filing and payment
date and the change in the holding period rules, facilitates the earlier
distribution and sale of estate assets and may also improve the effi-
ciency of estate administration and the quality of some post mortem
planning. Estate assets may now be sold, exchanged or distributed six
months earlier than under the old alternate valuation date without
affecting their estate tax valuation. The earlier distribution, sale or
exchange of assets (including redemptions under section 303) will be
encouraged because the income tax bases of assets will be known at
an equally early time. The efficiency of estate administration should
also be improved because the estate administration process should be
more continuous than before. Previously, estate administrations were
often characterized by two bursts of rather intensive activity, one
shortly after death and one a year later, shortly after the alternate val-
uation date. By halving the length of the interval between those pe-
riods of activity the advances should encourage the more productive
use of the interval and should reduce the need of those involved in the
process to re-educate themselves about an estate after the alternate
date has passed.

The advance should increase the quality of some post mortem tax

valuations made sooner after death, the protection afforded by the alternate valuation
method is less necessary as the alternate valuation date is advanced. By narrowing the
difference between date of death valuation and alternate date valuation, the advance
may also be viewed as reducing the significance of the election as a means of achieving
the optimum tax advantage from the option.

97. For the discussion of these two topics see, respectively, text accompanying notes
70-74, supra, and text accompanying notes 117-20, infra.

98. If the alternate valuation date is elected, assets distributed, sold, or otherwise
disposed of within the valuation period are valued as of the date of distribution, sale or
disposition. IRC § 2032(a)(1).

99. The income tax consequences arising from the sale or exchange of assets is af-
fected by the valuation of assets because the amount of gain or loss is determined by re-
ference to their estate tax valuation. The amount of gain or loss recognized upon certain
distributions, such as distributions of assets in kind in satisfaction of pecuniary legacies
is similarly determined by reference to their estate tax valuation. Under IRC § 1014 the
income tax bases of assets distributed by an estate or otherwise acquired from a dece-
dent are normally determined in the same way. The valuation of assets also determines
whether an estate may avail itself of the special tax payment extension provisions of sec-
tion 6166.
planning in the sense that it can now take place at an earlier time than before. The income tax consequences flowing from the sale, exchange or distribution of particular assets made more than six months after death can now be projected with reliability. Also, by having the alternate valuation of assets in hand at an earlier time, and thereby knowing the extent of any gains the estate has realized or will realize upon the sale, exchange or distribution of assets, executors can make a more intelligent selection of an income tax year for the estate. If an income tax year is carefully selected, capital gains and other income of an estate can be spread over the maximum number of taxable periods. The connection between the valuation of assets and the selection of an income tax year for an estate suggests that an income tax year should normally not be adopted which would require an income tax return to be filed prior to the alternate valuation date.\textsuperscript{100}

It seems unlikely that the alternate valuation provisions, which have been in effect since 1935,\textsuperscript{101} will be materially changed in the foreseeable future. The possibility of eliminating the alternate valuation option was raised during the hearings on the Act and was rejected by

\textsuperscript{100} The trustee of a revocable trust may similarly select any taxable year he chooses for the trust upon the grantor's death, where the fiduciary income tax returns filed prior to death were information returns and all of the income of the trust prior to the grantor's death was reported by and taxed to him. Rev. Rul. 57-51, 1957-1 CUM. BULL. 171.

Upon the death of the grantor the trust became a separate entity for Federal income tax purposes for the first time and hence a new taxpayer. Therefore, the trustee may elect to file the first return for the trust either on the basis of a calendar year or a fiscal year without the consent of the Commissioner.provided it fulfills the other requirements of a taxpayer filing its first return. For tax purposes, the existence of the trust in this case, prior to the time it became irrevocable, is ignored.\textsuperscript{id}

The income tax return of an estate or trust must be filed on or before the fifteenth day of the fourth month following the close of its taxable year. IRC § 6072(a). Those provisions interrelate with the alternate valuation date rules as follows: The first income tax return of the estate of a decedent dying during the first 15 days of any month need not be filed prior to the alternate valuation date if the estate adopts a taxable year ending on the last day of the third month following death or later; in the case of a decedent dying after the fifteenth day of any month the first return need not be filed prior to the alternate valuation date if his estate adopts a taxable year ending on the last day of the fourth month following his death or later.

\textsuperscript{101} Revenue Act of 1935, § 202, 49 Stat. 1022. The drop in property values which took place during the depression of the 1930's led to several proposals for the relief of estates. The legislative history of the alternate valuation option is summarized in the following passage:

As originally proposed, the 1935 Act would have allowed an additional deduction covering the shrinkage in value. In conference, this was changed to give the executor an election with respect to the time as of which the property included in the gross estate is to be valued. See H.R. Rep. No. 1885 (Conf.), 74th Cong., 1st Sess., p. 10. The inclusion of the alternate valuation provision in the 1935 Act was intended to prevent "in practically all cases the danger of complete confiscation of

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the administration's spokesman. The improbability of a major change is also indicated by the fact that neither the estate and gift tax recommendations of the American Law Institute, nor the Treasury Department's 1969 estate and gift tax reform proposals proposed any amendment of section 2032. Indeed, inertia and the apparent satisfaction of all concerned with the present provisions of section 2032 suggest that it will probably not be changed at all for some time.


H.R. 10236, 72 Cong., 1st Sess. (1932), which finally became the 1932 Act, contained a provision granting relief retroactively to estates whose assets greatly decreased in value subsequent to their valuation for estate tax purposes as of the date of death, the privilege being extended to have the estate valued as of a date 18 months subsequent to the date of death in the case of a decedent who died on or after September 1, 1928, and prior to January 1, 1932. On the basis of express solicitude for state revenues, as well as those of the Federal Government, the Senate struck this provision from the bill. See H.R. Rep. No. 708, 72d Cong., 1st Sess., p. 50; S. Rep. No. 665, 72d Cong., 1st Sess., p. 54. 2 J. MERTENS, FEDERAL GIFT AND ESTATE TAXATION 3, n.3 (1959).

102. See 1970 Tax Hearings, supra note 4, at 89-90 (discussing possible revenue losses from the use of the alternate valuation date). The Treasury Department should assemble the necessary data and project the loss in revenue which the new six-month alternate valuation date entails. With this information, one could balance the revenue cost of the provision against its benefit to taxpayers.


105. At some future time, the possibility of reducing the three month interval between the alternate valuation date and the filing and payment date should be explored. It would probably not be politically feasible to advance the filing and payment date closer to the alternate valuation date, but it might be possible to move the alternate valuation date back, closer to the filing and payment date. Because it is convenient to have as much time after the alternate valuation date as possible to prepare the federal estate tax return and to raise funds with which to pay the tax, the bar and professional fiduciaries might well oppose such a change. However, because of the existing degree of familiarity with the alternate valuation rules and technological advances, such as machine bookkeeping systems and generally available duplicating services, the period which was required in 1935 to give an opportunity to take advantage of the alternate valuation option may no longer be needed. "In order to give an opportunity to take advantage of this provision [alternate valuation], the due date of the tax is extended for a period of 3 months, that is, from 1 year after death to 15 months after death." S. Rep. No. 1240, 74th Cong., 1st Sess. (1935), reprinted at 1939-1 CUM. BULL. 651, 656.

From the estate administration point of view a reduction of one month would appear practicable. A considerable amount of the work required to prepare an estate tax return can be done prior to the alternate valuation date. Also, it would not actually reduce the period during which assets might be sold. In this connection it is pertinent to note that the holding period rules were amended by the Act to facilitate the sale of assets in the six months immediately following death. Finally, a reduction of the interval would increase the probability that the amount of tax paid will not be a greater percentage of the value of the assets of an estate on the payment date than it was on the alternate valuation date. The last statement is based upon two assumptions. One is that changes in value are more likely to take place over a longer, rather than a shorter period of time. The other is that, as nearly as possible, the amount of tax paid should bear the same relationship to the
2. Reduction in the Period During Which a Charitable Appointee May Be Designated Under Section 2055(b)(2)

The amendment of this relatively unimportant Code provision is noted here for the sake of completeness and to urge that it be repealed. Section 2055(b)(2) was added to the Code on August 6, 1956 for the apparent purpose of benefiting one estate. The character and content of the 1956 provision is perhaps best summarized in the following passage:

If the decedent's surviving spouse is over 80 years of age at the decedent's death, is entitled to the life income of a testamentary trust, and "has a power of appointment over the corpus of such trust, exercisable by will in favor of, among others, organizations [qualifying for the charitable deduction]," the value of the trust remainder is deductible in the decedent's estate. In order to qualify for the deduction, the surviving spouse must execute an affidavit within one year after the decedent's death specifying the organizations to which he intends to appoint and the amounts or proportions each organization is to receive. The deduction is subject to disallowance, however, if the power is not actually exercised in accordance with the affidavit, or if any part of the corpus "is distributed to a beneficiary during the life of the sur-

value of the assets of the estate on the payment date as it does to their value on the alternate valuation date.

106. 70 Stat. 1075. The provision was made retroactively applicable to August 16, 1954. Id.

It has been reported that the provision was enacted to reduce the estate tax liability of the estate of Mary Hill Swope, the wife of a former president of General Electric, by $4 million. P. Stern, The Great Treasury Raid 49 (1964); Surrey, The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted, 70 Harv. L. Rev. 1145, 1147 n.4 (1957). If legislative relief was to be provided the estate of Mary Swope, it should have taken the form of a private bill. The codification of a relief measure, which is often undertaken to conceal the identity of its intended beneficiaries, is particularly objectionable:

The technical amendment form has distinct disadvantages. The coverage, and therefore the revenue cost, of a technical amendment will generally exceed that of a private bill. Technical amendments also introduce further complexity into the Code simply by adding to that already lengthy statute another detailed provision which lawyers must learn to ignore. Ad hoc technical amendments may also create special problems of interpretation for courts; because underinclusive classifications are often employed and the purposes of ad hoc provisions are often either unclear or inconsistent with broader tax policy, the process of reasoned judicial elaboration may be extremely difficult. In contrast, private bills are limited in scope to the beneficiaries they name and present no real difficulties of interpretation. Since private bills are not codified, they add no complexity to the Code.


viving spouse. . . .” This crassly conceived and crudely drawn statute leaves many unsettled questions for the few taxpayers to whom it may apply.

In Miller v. Commissioner\(^\text{108}\) the court suggested that the Commissioner petition Congress for resolution of the complex problems “currently unanswered in the ‘special legislation’ of §2055(b)(2).”\(^\text{109}\) In that opinion the court also referred to the “[c]ryptic legislative report accompanying passage of the 1956 amendments” and described the provision as a “badly drafted subsection.”\(^\text{110}\)

The advance of the filing and payment date provided for in the Act made it necessary to change section 2055(b)(2) in some respect. Considering the lack of justification for the provision, its complexity and patent discriminatory character, the absurd results it has spawned and its conflict with provisions added by the Tax Reform Act of 1969, the administration should have sought its repeal.\(^\text{111}\) Instead the administration merely recommended that the time allowed the surviving

\(^{108}\) 400 F.2d 407 (3d Cir. 1968).

\(^{109}\) Id. at 413. The Court of Appeals for the Second Circuit also recently described section 2055(b)(2) as having “all the earmarks of special legislation.” Connecticut Bank & Trust Co. v. United States, 439 F.2d 931, 933 n.3 (2d Cir. 1971).

\(^{110}\) Miller, 400 F.2d at 412.

\(^{111}\) The absurdity of the provision is better illustrated by the results which were reached in Miller than by any hypothetical which might be stated. Mrs. Miller died in 1960 survived by her 84 year old husband for whom her will established a trust which met the requirements of section 2056 and over the corpus of which her husband was given a general testamentary power of appointment. Mr. Miller complied with the requirements of section 2055(b)(2), and Mrs. Miller's estate claimed both a marital deduction for the property transferred to the trust and a deduction for the charitable remainder interest in the same property. The double deduction was allowed by the Tax Court and upheld on appeal. Estate of Edna Allen Miller, 48 T.C. 251 (1967), aff'd, 400 F.2d 407 (3d Cir. 1968). Upon Mr. Miller's death, the corpus of the trust was included in his gross estate under section 2041 and his estate claimed a charitable deduction under section 2055(b)(1) for the value of the remainder interest he appointed to charity in his will in accordance with the affidavit he had executed under section 2055(b)(2). The Tax Court disallowed the deduction on the ground that the previous allowance of a deduction to the wife's estate for the remainder interest under the special provisions of section 2055(b)(2), precluded the allowance of a deduction to the husband's estate under the general rule of section 2055(b)(1), but the court of appeals reversed. Estate of Hugh Gordon Miller, 48 T.C. 265 (1967), rev’d, 400 F.2d 407 (3d Cir. 1968). Although the Tax Court and the court of appeals characterized the results as “anomalous,” 48 T.C. at 264, and “absurd,” 400 F.2d at 412, Congress has since taken no direct action which would prevent the future allowance of triple deductions in similar circumstances. As will be discussed, the limitations which the Tax Reform Act of 1969 imposed on the deduction of charitable remainder interests under section 2055(e)(2) would seem to prevent the estate of the first spouse to die from obtaining a charitable deduction under section 2055(b)(2) for the remainder interest in property the decedent transferred to a marital deduction trust. See text accompanying notes 114-116, infra.
spouse to execute the required affidavit be reduced from one year to six months. The change proposed by the administration was carried forward into the Act.

The limitations which the Tax Reform Act of 1969 imposed on the deductibility of charitable remainder interests are inconsistent with the provisions of section 2055(b)(2) and may have already eliminated the future allowance of deductions under it. In particular, the limitations which the Tax Reform Act imposed on the deductibility of charitable remainder interests in split interest trusts (those which have both charitable and non-charitable beneficiaries) for estate tax purposes under section 2055(e)(2), seem to prohibit the allowance of a deduc-

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In the Miller cases both the Tax Court and the Court of Appeals for the Third Circuit invited Congress to change or repeal section 2055(b)(2):

This or any other court should consequently hesitate to select the single appropriate statutory scheme, particularly when such factors as the age requirement suggest that the "loophole" left open may be used by a very few taxpayers before Congress acts to close it if such is the legislative decision.

Miller, 400 F.2d at 412. "[I]f the taxpayer has found a hole in the dike of the Internal Revenue Code, it is 'one that calls for the application of the Congressional thumb, not the courts.'" Estate of Edna Allen Miller, 48 T.C. 251, 264 (1967). aff'd, 400 F.2d 407 (3d Cir. 1968).

 Draft Bill § 3(c), 1970 Tax Hearings, supra note 4, at 56, 59.

 Apparently neither the administration nor the Congressional Committees considered deleting section 2055(b)(2) from the Code. The section was not discussed before the Ways and Means Committee and was mentioned in the committee reports only in a footnote. The footnote merely summarized the substance of the provision and stated:

The shortening of the time for filing the return necessitates a change in the period (from 1 year to 6 months) during which the surviving spouse must, under this provision, specify the charitable organizations in whose favor he intends to exercise the power.

1970 H.R. Rep., supra note 33, at 5 n.1; 1970 S. Rep., supra note 3, at 6 n.1. The provision was mentioned in the statement submitted by the Trust Division of the American Bankers Association, but the discussion there was limited:

Section 2055(b)(2)(C): This section is a substantive provision relating to the charitable deduction. If there is acceleration the period used must be reduced. Rather than using a 6-month period, it would be preferable to use the time for filing the estate tax return as is done in the provisions of section 2055.

1970 Tax Hearings, supra note 4, at 236, 240.

 See IRC §§ 170(f)(2), 664(d), 2055(e) and 2522(c). The limitations on the deductibility of charitable remainder interests for estate tax purposes are applicable to wills executed after October 9, 1969 but do not apply to wills executed before that date if (1) the decedent dies prior to October 9, 1972 without having republished the will by codicil or otherwise, (2) the decedent at no time after October 9, 1969 had the right to change the provisions of the will pertaining to the passage of property to a charity, or (3) the will is not republished prior to October 9, 1972 and the decedent on such date and at all times thereafter is under a mental disability to republish the will.

Professor Douglas Kahn recently noted the inconsistency between sections 2055(b)(2) and 2055(e), but concluded that "ii would appear that Congress intends to retain that deduction, notwithstanding the inconsistent language of IRC § 2055(e)." Kahn, A Guide to Estate and Gift Tax Amendments of 1970, 17 PRAC. LAWYER 13 (1971).
tion for the remainder interest in a trust which meets the requirements of section 2055(b)(2).115 A trust cannot meet the requirement of section 2055(b)(2) that "the surviving spouse of the decedent is entitled for life to all of the net income from the trust" and also meet the requirement of section 2055(e)(2) that it be either "a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664)." The definitions contained in section 664(d) strictly limit the extent of the non-charitable interests in charitable remainder annuity trusts and charitable remainder unitrusts. In general, the non-charitable interests in such trusts must be limited to the payment, at least annually, of "a sum certain (which is not less than 5 percent of the initial fair market value of all property placed in trust)" in the case of a charitable remainder annuity trust and a "fixed percentage (which is not less than 5 percent) of the fair market value of its assets, valued annually," in the case of a charitable remainder unitrust.116

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115. Neither the terms of section 2055(e)(2) nor the pertinent legislative history allows an interpretation which would exempt charitable remainder interests in section 2055(b)(2) trusts from the requirements of section 2055(e)(2). Section 2055(e)(2) provides that where interests in property (other than a remainder interest in a personal residence or farm or an undivided portion of the decedent's entire interest in property) pass from a decedent to a charity and a non-charity, "no deduction shall be allowed under this section for the interest which passes" to the charity in the case of a remainder interest unless it is in a charitable remainder annuity trust, a charitable remainder unitrust or a pooled income fund. The legislative history of the Tax Reform Act does not indicate any intention to exempt section 2055(b)(2) trusts from the restrictions imposed by section 2055(e):

For the reasons discussed above, the committee amendments provide limitations (for income tax, gift tax, and estate tax purposes) on the allowance of a charitable contribution deduction for a charitable gift of a remainder interest. As under the House bill, a deduction is to be allowed for a charitable gift of a remainder interest in trust, where there is a noncharitable income beneficiary, if the trust is either a charitable remainder annuity trust or a charitable remainder unitrust. The committee agrees with the House that this requirement will provide a better means of assuring that the amount received by the charity will accord with the charitable deduction allowed to the donor on creation of the trust. This is because the requirement will remove the present incentive to favor the income beneficiary over the remainder beneficiary by means of manipulating the trust's investments. The amount received each year by the income beneficiary, generally, will have to be either a stated dollar amount or a fixed percentage of the value of the trust property.

S. REP. No. 91-552, 91st Cong., 1st Sess. 88. If section 2055(b)(2) trusts were found to be exempt from the restrictions, it would be possible for the trustees of such trusts to accomplish the evil which the restrictions were intended to prevent: The surviving spouse could be favored "over the remainder beneficiary by means of manipulating the trust's investments." Id.

116. Nor does it appear that a trust which met the income distribution requirements of section 2055(b)(2) would qualify as a charitable remainder unitrust under the exception stated in section 664(d)(3). The exception provides that a trust may qualify as charitable remainder unitrust if the instrument requires the trustee to pay the non-
3. Change in the holding period rules

The Act amended section 1223 by adding a new paragraph, number 11, under which all gains and losses realized from the sale or other disposition of assets acquired from a decedent will be long term. The administration included substantially the same provision in its original proposal in order to avoid "taxing the executor too heavily on short term gain on appreciation in value occurring after the decedent's death where, for example, assets must be sold to make the estimated tax payment." The adoption of a universally applicable earlier estate tax payment date in lieu of an estimated estate tax payment requirement of limited applicability increased the justification for some modification of the holding period rules. The relaxation was urged by the Tax Section in connection with its alternate proposals:

The acceleration of the alternative valuation date to 6 months after the date of death and the payment date to 9 months after the date of death will require the executor to liquidate assets to pay the tax within a comparatively short period, frequently within 6 months after the date of death.

Present law provides for a 6-month holding period as the dividing line between short-term gain and the more favorably taxed long-term gain. A principal purpose of this 6-month dividing line is to distinguish between speculators and investors. This distinction is not relevant for liquidating sales by estates. Accordingly, the 6-month holding period requirement should be eliminated for property included in the gross estate; i.e., gains or losses on the sale or exchange of such property, even within 6 months after the date of death, should be treated as long-term gain or long-term loss. Under existing law pertaining to the basis of property included in the gross estate, gain or loss would be charitable beneficiary for any year, (1) the income of the trust if it is less than 5 percent of the fair market value of its assets valued annually, and (2) the income of the trust in excess of that amount to the extent that payments made in earlier years aggregate less than the distributions which would have been made had 5 percent of the fair market value of the assets of the trust (valued annually) been distributed in each earlier year. Thus, a trust which calls for the distribution of all of its net income to a non-charitable beneficiary as required by section 2055(b)(2) would not qualify under the exception.


118. Draft Bill § 6(h), 1970 Tax Hearings, supra note 4, at 27.

119. Letter from Secretary Kennedy to Speaker McCormack, in 1970 Tax Hearings, supra note 4, at 10.

120. Tax Section Statement, supra note 23, at 688.
realized on a sale within 6 months after the date of death only with respect to appreciation and depreciation since the date of death and then only if the alternative valuation date were not elected.

The administration and the proponents of the alternate proposals probably exaggerated the need for a change in the holding period rules. There are a number of reasons why the advance in the payment date would probably not have imposed too heavy an income tax burden on most estates. First, executors commonly have a number of assets from which to select ones to sell, not all of which will have appreciated substantially in the six months following death. Indeed, tax and investment strategy frequently calls for taxpayers (including estates) to offset gains realized from the sale of appreciated assets during a tax period by also selling assets which have declined in value. Second, executors often have considerable leeway in determining the time at which sales take place. In those cases the sale of assets which had appreciated in value could be deferred, as has been the practice, until six months or more after death. Third, if the executor elects to value the estate on the alternate valuation date, sales of assets taking place prior to that date will not result in any gains or losses. The election has other important ramifications—it will affect an estate’s estate tax liability and the basis of virtually all assets included in the gross estate. Fourth, the selection of a tax year for the estate could cause gains realized on sales taking place within six months of death to be spread over two of the estate’s tax years. Fifth, by accident or design all or a substantial part of the net gain realized on sales made during an estate’s income tax year might be offset by deductions for the period. A trade-off would be involved with respect to deductions which may alternatively be claimed on the estate tax return.

The consequences of the change in the holding period rules do not appear to be entirely favorable to taxpayers. Taxpayers may be disadvantaged because a net short-term capital loss can no longer be incurred on the disposition of assets acquired from a decedent. The importance of the distinctions between long-term and short-term losses was heightened by the Tax Reform Act of 1969, which amended section 1211 to make short-term capital losses potentially twice as valuable to taxpayers as net long-term capital losses. Capital losses may

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121. "[S]ection 1211, as amended, permits the deduction of only 50 per cent of net long-term capital losses against ordinary taxable income. Net short-term capital
of course be carried over from year to year under section 1212 and to the distributees upon the termination of an estate or trust under section 642(h). Nevertheless, the loss of the option of incurring a net short-term capital loss deprives taxpayers of some of the flexibility they formerly enjoyed.

The amendment may also have accomplished too much from the Government's point of view. The cure was not limited to the malady induced by the advance in the payment date. The new provisions apply regardless of the identity of the taxpayer involved (it is not limited to the executor or administrator of an estate) and regardless of amount (it is not limited to the aggregate of death taxes, administration expenses and debts).

Included in the cases where the holding period will be deemed to be 6 months are cases involving joint tenancies, community property and properties transferred in contemplation of death. For example, if a surviving tenant sells property acquired by right of survivorship within 6 months of the date of the decedent's death, and the basis of the property in the hands of the surviving joint tenant is determined (under sec. 1014(b)(9)) by reference to its value at the date of the decedent's death (or alternate valuation date), the property is to be considered to be held by the surviving joint tenant for more than 6 months. Similarly, a surviving spouse's share of community property is to be considered as held by her for more than 6 months if it is sold within 6 months of the date of the decedent's death, regardless of when the property was actually acquired by the marital community.

The function the change was intended to serve might have been met had the value of property which could be sold at a gain and be deemed to have been held for more than six months been limited, in the fashion of section 303, to the amount of death taxes and expenses.
of administration. The provisions might also have been made applicable only to property subject to claims or to sales made by persons who were obligated to pay the federal estate tax on a decedent's estate. The imposition of limitations such as these would concededly have complicated the holding period provisions, but at least they would have borne some relation to the need the change was intended to meet.

Although the reports did not indicate the revenue effect the change will have, presumably it will cause a decrease in the revenue derived from the income tax imposed on sales of property acquired from decedents. Unlike the one-time increase in revenue which will result from the advance of the payment date, this provision will have a continuing negative impact on revenue.

Two points regarding the change of the holding period rules should be emphasized because of their importance. First, the change will put information in the hands of planners at an earlier time in the estate administration process and will enable them to plan the affairs of estates earlier and with more certainty. Second, the new holding period rules apply to all persons who acquire property from a decedent within the meaning of section 1014 and sell or otherwise dispose of it within six months of the date of his death. On the other hand, the holding period of transferees of such persons will not be determined under the new rule.

C. Changes With Respect to the Release of Executors and Other Fiduciaries from Personal Liability for Federal Taxes

Prior to the Act, an executor could apply for discharge from personal liability for the estate tax under section 2204, in which case the government was required to notify him of the amount of the tax within one year after the application was made, or within one year after the return was filed, if later. Upon payment of such amount the executor was discharged from personal liability for any deficiency

124. Because of the preferential income tax treatment which is accorded long-term capital gains under sections 1201 and 1202, a measure causing gains which were formerly short-term to become long-term will almost certainly result in some reduction in the yield of the income tax.

125. Examples of such transferees are donees and trustees. See IRC §§ 1015, 1223(2).

126. The pre-1954 Code law on personal liability of fiduciaries is thoroughly re-
in the tax later found to be due. Discharge could be obtained only if the executor paid the full amount of the tax. The Act amended section 2204 to enlarge the circumstances under which an executor may be discharged from personal liability,\textsuperscript{127} and to extend essentially the same opportunity for discharge to fiduciaries other than executors.\textsuperscript{128} Also, a new section, 6905, was added to the Code under which an executor or administrator may obtain a discharge from personal liability for a decedent's income and gift tax liabilities. Finally, the period within which the government must notify an applicant under sections 2204 or 6905 of the amount of the tax due was reduced from one year to nine months with respect to decedents dying after December 31, 1973. None of these changes originated with the administration; they are all traceable to the alternate proposals which were advanced with various degrees of enthusiasm by the Trust Division of the American Bankers Association and the Tax Section of the American Bar Association.

1. Discharge of Executors and Other Fiduciaries from Personal Liability for Estate Taxes

As noted above, the Act liberalized the rules relating to discharge from personal liability for estate tax deficiencies in two respects. First, section 2204 was amended to provide that\textsuperscript{129}

The executor, on payment of the amount which he is notified (other than any amount the time for payment of which is extended under sections 6161, 6163 or 6166), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due.

The significance of this change is perhaps best indicated by briefly reviewing the scope of the personal liability of an executor or other

\textsuperscript{127} IRC § 2204(a).
\textsuperscript{128} Id. § 2204(b).
\textsuperscript{129} Id. § 2204(a).
fiduciary for the estate tax. Their personal liability is based on sections 3466 and 3467 of the Revised Statutes. Section 3466 provides that when an estate is insufficient to pay all the debts of a decedent, debts due the United States must be paid first. The priority established by section 3466 is enforced by section 3467, which subjects a fiduciary to personal liability for debts due the United States to the extent he pays other debts of the decedent "before he satisfies and pays the debts due the United States." The matter is of particular concern to fiduciaries because federal tax liabilities are considered debts due the United States and the regulations treat the distribution of property to a beneficiary as the payment of a debt. Funeral expenses, the costs of administering the estate, widow's allowances and a limited number of other obligations are not "debts" within the meaning of section 3467 and may be paid without subjecting the executor or administrator to personal liability for the amount of the payment. On the other hand, the expenses of the decedent's last illness are "debts." Liability does not attach where other debts are paid unless the executor has "personal knowledge of the debt [due the United States], or has such knowledge as would put a reasonably prudent man on inquiry." Despite this limitation, "potential per-

132. Treas. Reg. § 20.2002-1 (1958) provides:
Thus, if the executor pays a debt due by the decedent's estate or distributes any portion of the estate before all the estate tax is paid, he is personally liable, to the extent of the payment or distribution, for so much of the estate tax as remains due and unpaid.

The administrative extension of the meaning of "debts" to include the distribution of property to beneficiaries has been criticized by commentators. See, e.g., Alexander, Personal Liability of Executors and Trustees for Federal Income Estate and Gift Taxes, 9 Tax L. Rev. 1 (1953). The extension has been rejected by the Tax Court in at least two cases. Edward M. Leuthesser, 18 T.C. 1112 (1952); C. W. Posey, 10 T.C.M. 383 (1951). It has been upheld by some of the lower federal courts. See, e.g., United States v. Monroe, 65 F. Supp. 213 (N.D. Pa. 1946); United States v. First Huntington Nat'l Bank, 34 F. Supp. 587 (S.D. W. Va. 1940), aff'd 117 F.2d 376 (4th Cir. 1941); United States v. Cruickshank, 48 F.2d 352 (S.D.N.Y. 1931).
sonal liability naturally deters an executor or administrator from making estate assets available to the intended beneficiaries until such liability is eliminated.” The purpose of the amendments to section 2204 was to remove that deterrent to the early distribution of a decedent’s property.

This change is welcome even though it will benefit only the executors of estates which receive an extension under sections 6161, 6163, or 6166. In those cases it will enable an executor to distribute all of the assets of an estate at an earlier time free of the risk of personal liability for a deficiency in estate taxes later found to be due. An executor will no longer need to protect himself against personal exposure for the extended portion of the estate tax by retaining control over assets of the estate or by obtaining bonds, guarantees, or indemnity agreements from the distributees of the estate. The change should not impair the collectibility of the extended portion of the tax, which could be satisfied from assets remaining in the executor’s hands, from the assets of distributees or from the surety on the executor’s bond.

The second change added a provision to section 2204 which makes a similar procedure available to fiduciaries (other than executors) for resident decedents. The fiduciary may obtain a discharge from personal liability for the estate tax upon the discharge of the executor from personal liability for the tax or six months after the fiduciary makes application for discharge, if later. Read literally, the fiduciary may obtain a discharge only if an executor or administrator has been

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137. “If the estate tax imposed by chapter 11 is not paid when due, then the . . . transferee . . . who receives, or has on the date of the decedent’s death, property included in the gross estate under sections 2034 to 2042, inclusive, to the extent of the value, at the time of the decedent’s death, of such property, shall be personally liable for such tax.” IRC § 6324(a)(2).
139. Id. § 2204(b). The new provision requires that the application of a fiduciary for the determination of the tax for which he is liable “be accompanied by a copy of the instrument, if any, under which such fiduciary is acting, a description of the property held by the fiduciary, and such other information for purposes of carrying out the provisions of this section as the Secretary or his delegate may require by regulations.” Id. Presumably regulations will soon be issued furnishing further information regarding the form of the application, the mechanics for filing it and the further information which must be submitted with it.
appointed and has obtained a discharge from personal liability under section 2204(a). This aspect of the new rules provides another reason to conduct an estate administration proceeding even though few, if any, assets will be subject to administration. In any case, a fiduciary will be discharged only upon payment of the amount of the tax for which it is determined he is liable, excluding amounts for which the time for payment has been extended under sections 6161, 6163 or 6166. The amendment does not specify the manner in which the extent of the fiduciary's liability will be computed. It has been suggested that the fiduciary should be released "if as to property in his possession and control, all unextended estate taxes, at the estate's average estate tax rate have been paid and security interests have been created for any extended estate taxes on that property."  

As in the case of executors, the Act provides that a fiduciary may be required to furnish a bond covering any amount for which the time for payment has been extended.  

This second change was made principally for the benefit of the trustees of trusts created by a decedent during his lifetime. The apparent intention of the change was to provide a procedure under which a person subject to personal liability might obtain a discharge for the tax except to the extent of his beneficial interest in the decedent's property. The actual scope of the provision is somewhat vague because of the uncertain scope of the term "fiduciary." Generally, "the term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity of any person." Under that definition, persons who are not normally thought to be fiduciaries may take advantage of the new provisions of section 2204. For example, a life tenant might qualify under the rationale of a ruling which held a life tenant to be a fiduciary within the meaning of the Code where he had the power to sell the property in which he held a life interest and was under a duty to reinvest and conserve the proceeds of a sale for the benefit of the remain-

140. Memorandum of the Section of Taxation of the American Bar Association Containing Suggestions for Liberalizing the Current Extensions of Time for Payment of Estate Taxes, 1970 Tax Hearings, supra note 4, at 251, 253.
141. IRC § 2204(b).
142. Id. § 6324(a)(2).
143. Id. § 7701(6).
Presumably, a person to whom a decedent bequeathed property as a custodian for a minor under the Uniform Gifts to Minors Act would also be a fiduciary.\(^{144}\)

This change should also be welcome although it will probably most often only serve to relieve the anxiety of trustees and will not hasten the distribution of property to beneficiaries. This conclusion is founded upon the assumption that the corpus of trusts will most often remain intact and will not be distributed to the beneficiaries until a time beyond the normal final determination of federal estate tax liability. Even so, the change serves a useful purpose and should not impair the collectibility of the estate tax.\(^{145}\) As the Committees observed: “[A] fiduciary has a legitimate concern as to the extent of his personal liability and in your committee’s view should not be subject to a greater risk than is essential to the protection of the revenue.”\(^{146}\)

With respect to the extension to other fiduciaries of the opportunity to obtain a discharge, the committee reports stated that “Present law in the Internal Revenue Code (sec. 2204) authorizes an executor or administrator, but not a trustee, to be relieved of personal liability for estate tax if he makes written application. . . .”\(^{148}\) Presumably the Committees’ statements are based upon Revenue Ruling 57-424, which has led others to the same conclusion.\(^{149}\) In fact this Ruling does not support such a broad statement. The pertinent portion of the ruling reads:\(^{150}\)

\(\textit{Held, where there is an executor or administrator of the decedent's estate appointed, qualified, and acting within the United States, the term “executor” as used in section 2204 of the Code does not extend}\)

\(^{144}\) Rev. Rul. 61-102, 1961-1 CUM. BULL. 245 (life tenant should report the gain realized on a sale of the property on a fiduciary income tax return under section 641 rather than on his individual income tax return).


\(^{146}\) As indicated earlier in connection with the release of executors from personal liability for the tax, the government may recover a deficiency from assets still in the possession of the fiduciary, from a transferee personally liable for the tax or from the surety on a bond furnished with respect to the portion of the tax for which an extension of time to pay the tax was granted. \textit{See notes 137-38 and accompanying text, supra.}


\(^{148}\) \textit{Id.}


to any other person. Accordingly, the provisions of § 2204 are available only to the executor, the trustees of the trust created by the decedent, the assets of which were included in his gross estate, are not entitled to a certificate of discharge from personal liability.

By its terms the ruling applies only "where there is an executor or administrator of the decedent's estate appointed, qualified and acting within the United States." The ruling merely follows the definition of "executor" in section 2203, under which the trustee of an inter vivos trust created by a decedent would be an executor if there were no executor or administrator appointed, qualified and acting within the United States. As such, a trustee would have appeared entitled to apply for and obtain a discharge under the pre-existing provisions of section 2204.\footnote{Nothing in Revenue Ruling 57-424 suggests the contrary.} 2. Discharge of the Executor from Personal Liability for a Decedent's Income and Gift Taxes

The Act added section 6905 to the Code, thereby establishing a procedure whereby an executor can obtain a discharge from personal liability for the decedent's income and gift tax liability.\footnote{Under it, an executor may apply for a release from personal liability for such taxes at any time after the returns are filed for the taxes involved. If he does so he will be discharged from personal liability for the taxes involved either upon payment of the amount he is notified is due, or one year after the receipt of his application if he is not notified of the amount due within that period. Not surprisingly, the new procedure was urged on the House Ways and Means Committee by the Trust Division of the American Bank-}

\footnote{151. Sections 2203 and 2204, and Revenue Ruling 57-424 appear to have received this interpretation. Greenbaum, Tax Responsibilities of the Executor, The Administrator, The Trustee, in 3 J. Lasser, Estate Tax Techniques § 2026.12 (1970):

The discharge from personal liability for estate taxes may only be granted to an "executor" as that term is defined in section 2203. Where the executor of an estate and the trustees of an inter vivos trust, the assets of which were included in the estate for estate tax purposes, both applied for discharge from personal liability, the Commissioner ruled that the provisions of Section 2204 were available only to the executor.

152. "[T]he term 'executor' means the executor or administrator of the decedent appointed, qualified, and acting within the United States." IRC § 6905(b).}

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ers' Association.\textsuperscript{153} In accepting and supporting the proposal, the Committee argued, first, that "existing law contains no procedure whereby an executor can obtain a discharge from personal liability for these taxes" and, second, that\textsuperscript{154}

The continuing threat to the executor of personal liability for any income and gift taxes of the decedent in some instances is as much of a deterrent to the rapid completion of the administration of the estate and the distribution of estate assets as his personal liability for the estate tax.

The argument establishing the "need" for the new procedure completely ignored an existing procedure under which an executor can protect himself against personal liability for a decedent's unknown income and gift tax liabilities. And although the argument that there was no procedure under which an executor could be relieved from personal liability for a decedent's income and gift taxes is technically correct, it is misleading.

Previously an executor could not obtain a certificate of discharge. He could, however, achieve the functional equivalent—a limitation on the assessment of any deficiency for the income and gift taxes—by filing a request for prompt assessment under section 6501(d).\textsuperscript{155} The

\textsuperscript{153} At the hearings the Association's spokesman, Edwin R. MacKethan, complained that the administration's version of the alternate proposal did not include such a provision:

The administration's new proposal does propose that section 2204 be modified to permit a fiduciary other than an executor to secure a discharge for personal liability for estate tax. However, it fails to deal with the decedent's liabilities for income tax and gift tax. We have discussed this omission informally with representatives of the Treasury and been advised that extension of the discharge to income tax and to gift tax would present "administrative problems" for the Internal Revenue Service because audits of three types of returns are involved. We are unimpressed with the justification. The discharge provision should be expanded to covered [sic] income tax and gift tax as well as estate tax.

\textit{1970 Tax Hearings, supra} note 4, at 235. The House Ways and Means Committee accepted the argument and the provision was included in the bill reported out by the Committee. As there was little or no need for the new procedure, the Committee should have rejected the addition of another section of the Code which involves the filing of additional forms.

\textsuperscript{154} 1970 H. R. REP., supra note 33, at 7; 1970 S. REP., supra note 3, at 8.

provisions of section 6501(d) require that income or gift tax liabilities of a decedent be assessed within eighteen months after the receipt of a written request for prompt assessment. In the ordinary case, if the eighteen month period expires without assessment, an executor cannot be held personally liable for the taxes unless he had personal knowledge of the liability, or had such knowledge as would put a reasonably prudent man on inquiry. In most cases, a diligent executor could apply for discharge shortly after he was appointed and be discharged eighteen months thereafter.

The second statement in support of the new procedure, that it removes an obstacle to the rapid completion of estate administration, is also misleading. At most, the new procedure merely advances the time at which an intermediate obstacle can be eliminated. However, that advance will probably not advance the time at which a tax-liability-conscious executor will distribute the assets of an estate. The reason is that an executor's personal liability for the estate tax, which is normally of greater concern, will persist for some time after a discharge from personal liability for income and gift taxes can be obtained under the new procedure.

A discharge under section 2204 ordinarily cannot be obtained prior to twenty-seven months after the death of a decedent dying prior to January 1, 1971, twenty-one months after the death of a decedent dying between January 1, 1971 and December 31, 1973, and eighteen months after the death of a decedent dying on or after January 1, 1974. Where an early request for prompt assessment is made, the eighteen month limitation period of section 6501(d) will

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156. A request can only be made after a return has been filed. The regulations require that it be transmitted separately from any other document. Treas. Reg. § 301.6501(d)-1(b) (1956).

157. Other provisions of section 6501 allow an assessment to be made at any time in the case of false or fraudulent returns, willful attempt to evade tax, or when no return is filed. IRC § 6501(e). Assessment may be made within 6 years after filing in the case of substantial omissions from gross income. Id. § 6501(e). However, an executor is not personally liable for any of the taxes assessed under those provisions unless he had personal knowledge of the liability or had such knowledge as would put a reasonably prudent man on inquiry. Rev. Rul. 66-43, 1966-1 Cum. Bull. 291, 292.

158. The 15 month period within which the return could be filed plus the 12 month discharge period.

159. The 9 month period within which the return could be filed plus the 12 month discharge period.

160. The 9 month period within which the return could be filed plus the reduced 9 month discharge period.
expire prior to the time a discharge from personal liability for the estate tax could be obtained under section 2204. The estate tax, payment of which is considered by many to be a prerequisite to distribution of an estate's assets, is, and will continue to be the tax of most concern to executors who are apprehensive about their potential personal liability for taxes under section 3467 of the Revised Statutes. This marginally useful section of the Code is unfortunate because it calls for executors to file yet another document. The number of documents which may be filed by fiduciaries, if not the procedures themselves, have proliferated beyond all reason. Excluding tax returns and the preliminary estate tax notice, an executor may file seven separate notices or applications under the current provisions of the Code. With the exception of the application under section 6905, the same documents may be filed by a fiduciary other than an executor. The current law places a considerable burden on fiduciaries; they must maintain a stock of the required forms and applications, and calendar reminders to prepare them for each decedent they represent, as well as complete and file the forms. The government, as the recipient and processor of the forms, is also subjected to a considerable burden.

The Service should review each of the existing procedures to determine whether it fulfills a need which justifies its continuation. This review might be initiated by the government in connection with the issuance of regulations pertaining to the promised elimination of the preliminary estate tax notice. It would be an improvement if some of the procedures could be eliminated without prejudicing taxpayers or

162. *See* notes 131-136 and accompanying text, *supra*.
163. The preliminary estate tax notice has been discontinued. 1971 *Int. Rev. Bull.* No. 6, at 89. Although this notice has been discontinued, some other regulation may be issued requiring that a different notice of qualification be filed. Section 6036 still contains the basic requirement that "every executor (as defined in section 2203) ... give notice of his qualification as such to the Secretary or his delegate in such manner and at such time as may be required by regulations...."
164. The notices or applications include the following: (1) application for employer identification number, form S.S. 4, IRC § 6109; (2) notice of fiduciary relationship, form 56, id. § 6903; (3) notice of termination of fiduciary capacity and, possibly, change in fiduciary capacity, id.; (4) notice of qualification of fiduciary, id. § 6036; (5) request for prompt assessment of income and gift taxes, id. § 6501(d); (6) application for discharge from personal liability for estate taxes, id. § 2204; and (7) application for discharge from personal liability for decedent's income and gift taxes, id. § 6905.

A notice under section 6036 will also meet the section 6903 notice requirement. *Treas. Reg.* § 301.6036-1(c) (1960).
the government and without doing violence to the organizational structure of the Code. Even if none could be eliminated entirely, it might be possible to revise them to reduce the number of separate filings which may be made. Certainly some of the administrative burdens on taxpayers and the government could be reduced if some documents were made to serve multiple purposes.\(^{165}\)

The current law is probably also deficient in that it promotes unequal treatment of similarly situated taxpayers. Professional fiduciaries, who are fully aware of all of the available procedures, probably take advantage of them to the end that they are relieved from personal liability for a decedent's taxes earlier than inexperienced fiduciaries who are probably not even aware of the existence of most of the discharge procedures. As the inexperienced probably do comply with requirements which receive greater publicity, an effort should be made to increase general taxpayer awareness of the provisions. The unequal treatment of taxpayers which may result from some taxpayers' lack of familiarity with the procedures could be reduced if the estate tax return and other widely used documents were accompanied by instructions which described the effects of making the requests.\(^{166}\)

D. Administrative Changes Relating to the Estate Tax

During the hearings, the Congressional Committees were assured that the Internal Revenue Service would take some administrative ac-

\(^{165}\) For example, it should be possible to revise the application for employer identification number (form SS-4) which is required of all fiduciaries. See Treas. Reg. § 1.6109-1(c)(3) (1962). This form could also serve as the notice of fiduciary relationship under section 6903 (present form 56) and as the notice of qualification as a fiduciary under section 6036. If that revision were accomplished, a fiduciary would be required to file only one notice shortly after a decedent's death. Similarly, the request for prompt assessment of taxes under section 6501(d), and the applications for discharge from personal liability for estate tax (section 2204) and decedent's income and gift taxes (section 6905) might also be combined. A form could easily be constructed which would give a taxpayer the option of applying under each of those sections.

\(^{166}\) Perhaps the federal estate tax return could be modified to allow requests for discharges from personal liability to be made on it and to include complete instructions with respect to them. If that were done, requests under those sections could be made by filing a consolidated request form or by making the appropriate entries on the estate tax return. Of course the government might initially oppose such a change because of an apparent preference that each request be filed separately from other documents. See, e.g., Treas. Reg. § 301.6501(d)-1(b)(1956) (each request under section 6501(d) must be made and transmitted separately). Another reason for government opposition might be that such a change would increase the number of taxpayers making requests. Neither of these grounds are of sufficient weight to overcome the advantages of the suggested modifications. First, taxpayers could be required to file a sufficient number of copies of a
tions which would speed the settlement of federal estate tax liabilities. In particular, the Committees were given to understand that the Service would:

1. Issue instructions to the field offices to give high priority to the classification and audit of estate tax returns;

2. Eliminate the requirement for a preliminary notice (on form 704 or 705) of the death of a decedent having a gross estate in excess of $60,000; and

3. Revise instructions to executors regarding the supporting material which should be filed with the estate tax return in order to emphasize that the audit will be delayed if the material is not filed promptly.

Although the actions described may not have a substantial beneficial effect, they are steps in the right direction. The actions are perhaps more significant as indicia of an increased willingness on the part of the Service to modify its internal procedures to achieve a degree of "reform" than they are as "reforms" themselves.

Standing alone, the issuance of the instructions described in item 1 will not speed the tax determination process to any significant degree. On the other hand, if the instructions were accompanied by an increase in the number of personnel assigned to estate and gift tax audit groups, or a reduction in the number or thoroughness of estate tax audits they might have an impact. Whatever steps are taken, the Service should have in mind the provisions of the Act which will permit the earlier discharge of executors and other fiduciaries from personal liability for the taxes of persons dying after December 31, 1973.

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The preliminary estate tax notice (forms 704 or 705) has been eliminated as called for in item 2. While form 704 was not particularly burdensome to prepare and file, neither was it of particular value to taxpayers or to the government. In most cases in which it was filed, it provided the government with little information other than the fact of an individual's death. At the most it ordinarily provided the government with only an approximation of the size of a decedent's gross estate and little or no data regarding the composition of the estate.

The elimination of the form seemed clearly indicated as other filings will inform the government of an individual's death and as the time for filing the estate tax return has been advanced. Hopefully the demise of the preliminary notice will stimulate interest in the elimination of some of the other forms which are now required of fiduciaries.

The instructions to executors regarding the necessity of filing supplemental documents were amplified in the July 1971 revision of the estate tax return (form 706) in accordance with the Committees' understandings. Part G of the general instructions includes a warning in bold-face type that a failure to file the supplemental documents called for in the instructions accompanying the several schedules will delay the audit of the return. Part G was also improved by listing examples of the supplemental documents which must be filed with the return. The immediately preceding version of the estate tax return, which had been revised in 1966, only referred to the need to file a certified copy of the decedent's will and "[o]ther supplemental documents . . . required as hereinafter explained under the instructions for the several schedules." That hardly highlighted the need to file supplementary documents—particularly because supplemental documents might be required under virtually all nineteen of the schedules. The new form of the instructions should provide executors with useful and often needed guidance.

CONCLUSION

Conceived, debated and passed in haste, the Act, on balance, represents a modest improvement in the law. The provisions relating to

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168. See note 164, supra.
169. "As a matter of practice it is believed fiduciaries often state no more on the notice than "in excess of $60,000." Liability of Fiduciaries and Transferees for Federal Estate and Gift Taxes, 2 Real Prop., Prob. & Trust J. 250, 252 n.23 (1967).
the estate tax liberalize the law in some important respects and may result in a modicum of reform in estate administration procedures. Hopefully they will be followed by some administrative improvements, including revisions of the forms of notices called for by the Code and in the form of the estate tax return itself. The gift tax changes are essentially neutral in character—the burdens they impose on taxpayers and the government are not so onerous as to outweigh the benefits to be derived from the more current payment of the gift tax. Although the Act extended the excise taxes on automobiles and communications services for a substantial period, the automobile tax was subsequently eliminated as called for by the President. The extension may contribute to the ultimate demise of the excise tax on communications services. It is difficult, however, to muster any kind words for the two tax reduction features of the Act. There does not appear to be any sufficient justification for either the aircraft use tax exemption for non-jet aircraft or the further emasculation of the minimum tax on tax preference income. The latter, which the House would have rejected had it been free to do so without jeopardizing passage of the Act, is particularly objectionable and should be reconsidered at the earliest opportunity, despite the administration's reticence.

Although the Act is an important piece of tax legislation, hopefully it will not be taken as a substitute for the long-promised reform of the gift and estate tax laws. The recent lack of enthusiasm for reform manifested by Secretary Connally and some vocal spokesmen for interested groups should not delay Congressional consideration of the subject. An ample number of studies and recommendations are available for the House Ways and Means Committee to pursue without delay. Action by the Committee might induce the birth of Treasury proposals which have suffered through an uncommonly long gestation period.

170. See note 2, supra.
171. The statements of Secretary Connally on the subject are referred to in note 25, supra. For recent examples of the simplistic and generally unpersuasive criticisms of the proposed reforms, see Chabrow, Estate and Gift Tax Reform—Reform for Reform's Sake?, 110 TRUSTS & ESTATES 254 (1971), and Theis, Some Hard Questions About Estate and Gift Tax Reform, 109 TRUSTS & ESTATES 465 (1970). As might be expected, Rene Wormser has also loosed some barbed shafts at the reform proposals in The Capital Levy in the Capital Gains Tax, 110 TRUSTS & ESTATES 94 (1971), and Will Estate Tax Suffer Next "Reform," Wall St. Journal, Mar. 23, 1970, at 12, col. 3 (Eastern ed.).