

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-92(2)M  
Estate Tax  
September 21, 1992

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. M920701A

On July 1, 1992, a Petition for Advisory Opinion was received from Donald C. Lubick, as Executor of the Estate of David H. Lloyd, 1800 One M&T Plaza, Buffalo, New York 14203.

The issue raised by Petitioner, Donald C. Lubick, as Executor of the Estate of David H. Lloyd, is whether pursuant to Section 962 of the New York Tax Law, the time limitations of Sections 249-x, 249-aa or any other sections thereof will preclude the Estate of David H. Lloyd from obtaining (1) a supplemental determination by the surrogate revising the value of the New York taxable estate of David H. Lloyd, the decedent, and the tax for which it is liable, and (2) a refund of the amount of overpayment of such tax, upon an application filed by Petitioner within one year after the date of the final federal determination changing or correcting the amount of the federal taxable estate reported on the federal estate tax return.

The Decedent, David H. Lloyd, a resident of the City of New York, County of New York, died on January 15, 1988. He left a Last Will and Testament that was admitted to probate in the Surrogate's Court of the New York County. On July 21, 1988, Letters of Testamentary were issued to Petitioner.

On February 25, 1991, an Order of Surrogate's Court was entered fixing the New York estate tax liability of the Estate of the Decedent. On March 20, 1992, the Court entered a Supplemental Order fixing such estate tax liability taking into account changes resulting from an audit of the taxable estate of the Decedent by the Internal Revenue Service.

The Decedent was married on May 13, 1984. Subsequently, the Decedent and his spouse separated and entered into a Separation Agreement dated June 26, 1987. Pursuant to the Separation Agreement, the spouse (hereinafter "XYZ") relinquished all rights to the estate of Decedent. On or about January 11, 1989, subsequent to the death of Decedent, XYZ filed an exercise of her alleged right of election to take a claimed intestate share as a distributee of the Decedent on the basis that the waiver of rights under the Separation Agreement was procured by fraud and that it should be set aside. XYZ petitioned the Court to treat her as a distributee of one third of the Estate of the Decedent.

Petitioner has resisted XYZ's claim on the ground that to the knowledge of Petitioner the allegations of fraud are without substance and there is no basis for setting aside the Separation Agreement. The matter is currently in the pre-trial discovery stage in the Court and has not proceeded pending decision by the Court upon a motion to issue a commission to take the testimony of a mediator. Such motion was filed with the Court in 1990. Petitioner contends that it is unlikely that the merits of the claim of XYZ will be resolved before the expiration of the

normal statute of limitations for petitioning to enter a further supplemental order fixing the tax liability of the Estate of the Decedent.

Petitioner further contends that should XYZ prevail in the proceedings to set aside the separation agreement and become entitled to exercise the alleged right of election to take an intestate share, payment of the amount to which she will be entitled will qualify as a deduction under Sec. 955 of the New York Tax Law as an interest passing from a decedent to a surviving spouse. Similarly, should the claim of XYZ be resolved by settlement involving a payment or payments to her of an amount in a form meeting the requirements of Sec. 2056 of the United States Internal Revenue Code of 1986, such payment or payments will qualify as a deduction under Sec. 955 of the New York Tax Law as an interest passing from a decedent to a surviving spouse.

Petitioner asserts that it is also possible that the litigation to decide the right of election may involve attorneys' fees for the estate in an amount that, when added to other fees paid, will exceed the amount allowed as an administration expense deduction under Sec. 955 of the Tax Law under the prior orders of this Court and thus entitle the estate to larger deductions for administration expenses. In any of the foregoing events, the estate will be entitled to a further refund of estate tax, if the bar of the statute of limitations does not preclude it.

The Estate of the Decedent has filed a protective claim for refund with the Internal Revenue Service. The claim seeks a refund of federal estate taxes paid by the estate and a reduction in the federal taxable estate based upon the amounts that will qualify for the federal estate tax marital deduction if XYZ's claim prevails and based upon additional attorney fees potentially involved in litigating such claim. The Internal Revenue Service has not disallowed the estate's claim for refund of the estate, but is currently awaiting the resolution of XYZ's claim. Petitioner contends that if a payment is made to XYZ, it will be allowed as a marital deduction and reduce the federal taxable estate. No statute of limitation begins to run so as to preclude a suit based on a claim for refund of federal estate tax until the claim has been formally disallowed. Sec. 6532(a)(1), Internal Revenue Code of 1986.

Petitioner asserts that it is reasonable to anticipate that if payment is made to XYZ in respect of her claim, whether by decree or by settlement, the amount of such payment will result in a marital deduction for the estate and a determination of reduced federal estate tax liability.

Chapter 190 of the Laws of 1990, § 385(i)(1) provides that Section 962 of the Tax Law and the procedural provisions of Article 10-C (including §§ 249-m to 249-ee) remain in force with respect to estates of decedents dying before May 25, 1990. Under Section 961 of the Tax Law a final determination of an issue is determinative of the same issue for New York purposes (unless shown to be erroneous). Thus a final federal determination allowing a marital deduction for payment in respect of XYZ's claim and allowing additional attorneys' fees is binding for New York purposes.

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For decedents dying before May 25, 1990, Section 249-aa of the Tax Law provides a general two-year limitations period for modification of orders of the surrogate fixing estate tax.

In the event of such a final federal determination made at any time, pursuant to Section 962(b)(5)(A) of the Tax Law for such an estate, the surrogate may make a "supplemental determination" of the correct New York tax liability, upon request of the executor, if the request is filed within one year after the date of the final determination. Section 962(b)(5)(C) of the Tax Law provides that:

If a supplemental determination fixing such [New York estate] tax is made pursuant to this paragraph, and it appears that the amount of tax due is less than the amount paid pursuant to a prior determination, the tax commission ... shall refund the amount so paid in excess of the tax fixed by such supplemental determination, provided application for such refund be filed ... within one year from the entry of such supplemental determination .... Such refund shall be made in accordance with the provisions of section two hundred forty-nine-aa but without regard to the fact that the supplemental determination may have been made and entered more than two years after entry of the original taxing order. [emphasis added]

Accordingly, Section 962(b)(5) of the Tax Law by its terms overrides Section 249-x of the Tax Law and the two year limitation period of Section 249-aa of the Tax Law and as such permits the correction in the event of a federal change, even though it occurs after the normal statutory time period for revision. Therefore, since the decedent died in 1988 Petitioner will not be precluded from obtaining a supplemental determination by the surrogate revising the value of the New York taxable estate of David H. Lloyd and a refund of the amount of overpayment of such tax, upon application filed by Petitioner within one year after the date of the final federal determination changing or correcting the amount of the federal taxable estate reported on the federal estate tax return.

DATED: September 21, 1992

/s/  
Paul B. Coburn  
Deputy Director  
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.