

**AN INTERVIEW WITH RICK POPLACK, WHO RETIRED AFTER 28 YEARS AS
AN IRS ESTATE AND GIFT TAX ATTORNEY**

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Idaho has had two Internal Revenue Service stalwarts in the Estate and Gift Tax Return area (and may be working on a third). Bill Hayes retired in 1995 after twenty-five years. Rick Poplack retired early last year after almost 29 years.

I had the pleasure of interviewing Rick in February of 2007. His insights are helpful to all attorneys, especially to those practicing estate planning.

- Q.** Rick, why don't you tell us what year you started with the Internal Revenue Service reviewing estate and gift tax returns and about how many returns you think you've audited in your career.
- A.** Well, I began working with the IRS in April of 1978. "Auditing" is kind of an expansive word. I have looked at thousands of returns in my career, because many returns used to come up to me and Bill Hayes for classification. Originally, the service center would box a hundred returns and send them to us for review. So, I'm guessing we have looked at several thousand returns over the years. We used to examine approximately 50 returns a year, and now, we may only work on 25 or 30 returns primarily because the size of the returns have increased dramatically over the last few years.
- Q.** Why don't you explain the current IRS review process and how returns are selected for audit at this point in time.
- A.** That's a little bit of a mystery for everyone. All tax returns are filed in Cincinnati and have been for the last four or five years. There's a staff of attorneys in Cincinnati who look through returns and try to determine those returns which might have audit potential and those which will have very little audit potential. I don't know the criteria they use, but a full marital deduction case would likely not be sent to Boise unless there's a question of whether or not there's a marital deduction qualification. Valuation issues of either closely held businesses or large parcels of land (which may or may not be accompanied by appraisals) will likely be sent out to Idaho or one of the other states to be reviewed. After Cincinnati determines what case they think should be audited, they include a classification sheet on the front of the tax return with issues they think exist in a return (which may or may not be any issues we follow-up on after reviewing a return). The tax return is then sent to the group in which our state participates. For the last five or six years, Idaho has been in the Seattle group. So, Cincinnati would forward the case to Seattle. The Seattle group manager then determines where the case will be examined and

she sends it to individuals in a given state for their review and their determination whether or not there are issues worth working on.

Q. For many years if a decedent passed away a resident of Idaho we were almost guaranteed that the audit would take place by the Idaho estate and gift tax examiners. What's the present correlation of the domicile of the decedent with where the return might be audited?

A. In general, I think that's still true. After my retirement, Mary Kimmel is going to be the only attorney handling estates in Idaho; most Idaho cases probably will be sent to her. The IRS attempts to keep cases in the decedent's state; however, given the number of people who just retired (the government recently provided buy-outs for about 77 or 80 attorneys and 18 or 20 managers), the core of working attorneys has decreased enough that cases now may go to people in other states. In fact, this has been occurring for a few years.

For instance, Mary has had cases from San Francisco where they used to have 33 people, and now they only have two people. Most of my largest cases came from Washington state where they only now have three people remaining and a few years ago they had eight attorneys. Unfortunately, there's no guarantee that just because a person dies in a specific state the audit will be handled by an attorney in that state.

Q. When a return is selected for audit, how much review is given to the Forms 1040 and 1041, in addition to the form 706?

A. It's more particularized by the attorney. I didn't spend an awful lot of time looking at 1041s or 1040s, but Bill Tucker in Portland, who is an expert and taught 1041 and 1040 law as they applied to estates, spent a lot of time on that. Perhaps more time than he did on the 706 itself. So it's dependent upon the attorney and the group manager. There have been 1041 classes for decades that Bill Tucker taught around the country, so there are a lot of people who do look for 1041 issues. But I would say I would spend maybe less than 1% of my time on those issues, though we would ask for 1040s all the time. There might be issues that would arise. And you're also trying to trace assets by obtaining 1040s. Mary tends to ask for 1041s and 1040s more than I do. The government makes an effort to have estate tax attorneys obtain 1041s and 1040s; typically, they are not included with a return.

Q. Who prepares the estate tax returns that you have reviewed in Idaho? Does it tend to be more the accountant, the attorney or even the personal representative?

A. Very few personal representatives prepare returns unless they happen to be lawyers, which occasionally occurs. It used to be 90% CPAs or accountants would prepare the returns. I would guess because there really are not that many returns filed and there are more specialized practitioners in this area now, it's probably about half accountants, half lawyers.

- Q.** A key area of dispute over the past decade has been the use of family limited partnerships, especially to obtain discounts from the fair market value of the underlying assets. If a taxpayer had an estate of more than four million dollars, should family limited partnerships be used as a matter of course?
- A.** I wouldn't think as a matter of course. I mean it's making judgments about the proper use of entities in the estates. They are fairly common though, and I've seen them in much bigger estates than four million dollars. I've seen them in 50 or 60 million dollar estates. Often they're formed on the deathbed, especially when we're dealing with investment assets, such as stocks and bonds, that otherwise wouldn't be discounted. I had a case about two years ago in which a family limited partnership was formed the day before the person died and they put in 20 million dollars of investment assets and wanted a discount. So I don't think as a matter of course you're going to form a family limited partnership, but, as a practical matter, if you form one there possibly is going to be some discount, although it may require a fight.
- Q.** What do you see as the current hot issues for estate and gift tax returns?
- A.** Family limited partnerships are the big issues. That has morphed into LLC entities that are being used more frequently, so it's not always just a limited partnership that we'll see on a return. The national office is spending a lot of time reviewing cases for various issues related to family limited partnerships and there's a lot of litigation on that. Another issue that is much smaller in dimension, but which is getting a lot of national attention relates to conservation easements because people can use conservation easements to obtain substantial tax benefits. They're being frequently used and the Service has set up a task force and has a special group of engineers looking at appraisals of the land on which easements have been granted to determine whether or not people are over-appraising their property. In general, land valuation issues themselves are of lesser importance than they historically have been simply because the entity issues have arisen as the all-encompassing discount vehicles.
- Q.** For Idaho decedents, have you seen much in the way of grantor retained annuity trusts, known as GRATs, or maybe intentionally defective grantor trusts, or items of that nature?
- A.** Mary has several cases now dealing with intentionally defective trusts. I've had a few cases in Idaho dealing with GRATs and I've had some big cases out of Washington state dealing with GRATs, with many millions of dollars in assets put into GRATs; there are some interesting inclusion and qualification issues. We can't say we've seen a lot of these issues, but when we see them they are generally large dollar issues. We see them on both estate and gift tax returns. On gift tax returns they are usually short-term GRATs that generally play themselves out because there isn't any appreciation. These GRATs often roll over into succeeding years.

Q. With your many years of experience as an estate and gift tax examiner, what advice would you have for Idaho attorneys, and specifically for Idaho attorneys practicing in the estate planning area?

A. Well, just in terms of filing, this advice isn't much different than Bill Hayes gave when he had a similar interview with you in 1995 -- that is to make the return as complete as possible. One of the difficulties that's arisen in the last ten, 12 years is that as attorneys working for the government we don't have easy access to people who are connected with estates without giving all sorts of disclosure notices. In past years, if we had questions we'd simply call up the appraiser, ask the questions and if we were satisfied we'd close the return out. We can't do that any longer -- well, my successors can't do that any longer because Congress created anti-disclosure limitations that are fairly strict. So instead of contacting appraisers directly we have to first notify the estate that we have the case, that we intend to contact the appraiser and then we have to wait ten days after we give notice before we can contact anyone. In those cases that we might have closed the same day that we received it from the service center, we may now have them in our files for a month or two just because we don't have the option to call anyone immediately.

Q. The reduction in force and the many retirements that have taken place, I'm assuming that the number of estate and gift tax examiners now versus a year ago is roughly 60% of what it used to be?

A. I'd say probably that -- 60, 70, something like that.

Q. And what impact do you see that having on the estate planning practice?

A. Well attorneys in the private sector are now going to be dealing long distance with attorneys who may know nothing about the law in their state. It makes it difficult to conduct an exam. Not primarily because of distance or no personal contact, but because the person doesn't have any experience in the decedent's state. If you're trying to gain experience in learning California or Idaho law from New Jersey or Minnesota or New York, you're going to have to do a lot of research, which probably will tend to delay the closing of cases.

Q. Rick, I have a question about return preparers who would like to avoid any contact with the Internal Revenue Service other than getting a letter that the return has been accepted as filed. Any suggestions on how that can be accomplished?

A. Well, the first suggestion is to file a complete return with all the appraisals, all copies of wills and trust instruments, and if you've done discounting in the estate have a complete explanation. Presumably there'll be an appraisal, but have a complete explanation of why you believe the estate's entitled to the discounts. The Service tends to view discounting as something that's common to estates but can be overdone. To the extent that you subscribe to the pig theory and believe that huge discounts will gain you some advantage, it generally will gain you the disadvantage of an audit and if your discounts

are so abnormal that we don't believe there's anywhere to negotiate, it'll probably buy you a trip to appeals and potentially to Tax Court. So if you're going to take huge discounts you'd better have a very substantial appraisal that justifies it because the Service is extremely wary, especially in the family limited partnership area -- especially on investment assets.

- Q.** Assuming for the sake of argument that a 20% discount is reasonable, how does one document why it's 20% versus 15% versus 30%?
- A.** Your appraiser is presumably going to do the documentation. He should come up with both the theory and the judgment which supports the level of discount that he takes. In any valuation issue, there is no single right answer. There's always a range of answers, whether we're valuing a piece of land or you're taking discounts within an entity. For example, the entity discounts may range from 15 to 25% in theory. In theory, there may be support on either end. Some appraisers will simply take a middle ground and hope that's sufficient. Courts have gotten fairly sophisticated in analyzing where that range should be, and the service has gotten fairly sophisticated about determining what a proper range is that's supportable in court. We always have Tax Court in the back of our minds, and we don't have appellate courts necessarily in the back of our minds unless the appellate decision directly on point is in the Ninth Circuit. You can argue a Fifth Circuit decision to us, but a Fifth Circuit case doesn't control in the Ninth Circuit nor does a Tenth or Eighth Circuit case. So the Tax Court is the primary generator of decision in this tax area. The Tax Court ranges in values are generally fact dependent and they generally will assist the Service in determining what is a reasonable range for the type of asset, the type of entity, and the amount of control that the decedent had. In entity valuations, control is the key element of valuation. To the extent that you have total control, we likely will give you no discount. To the extent you have zero control you'll probably get a much higher discount. So degrees of control and the specific terms of any entity documents are going to be examined pretty carefully by estate tax attorneys and they will determine the level of discounts extended.
- Q.** Another question would be the attorneys that you've dealt with over the years. Where do you tend to see the attorneys' locale?
- A.** Well, we used to have large cases in Idaho where all the attorneys would be local and I've had them with your firm and I've had them with most of the large firms in the state, and many of the smaller firms. Recently, I've had a number of cases in Washington state where counsel in large cases came out of Seattle, and their names would be fairly generally known in the region. I've had dealings with well-known attorneys out of Texas. So we have primarily seen out-of-state counsel in our largest cases over the last four years, whereas in previous years Idaho counsel handled a lot of the large cases.
- Q.** In looking forward, what does the future hold for Rick Poplack?

A. Sleeping in, mostly, at this point. Some travel. Raising a new golden retriever puppy. And the rest of it, I don't know. The future's open.

Q. Any races to Robie Creek?

A. I think my racing days are behind me.

Q. Thank you and the best of luck in your retirement.

A. Thank you.

[END OF INTERVIEW]