WHAT'S IT WORTH? HOW CAN AN ASSET WITHOUT A MARKET BE VALUED AT A *FAIR* MARKET VALUE?

Comment

by Steven Cannon

I. INTRODUCTION

When a person dies, all of their assets usually go to their beneficiaries in some form or fashion.[1] However, if that person dies with a large estate, it will

1. *See* UNIF. PROBATE CODE § 2-101(a) (amended 2011).

be subject to a large federal estate tax.[2] This estate tax is based on the value of the entire estate.[3] The majority of assets are easy to value including: cash, stocks, bonds, jewelry, cars, and real estate.[4] Issues arise with the valuation rarer items: collectibles, artwork, and guns.[5] Rarer items are harder to value because they typically have smaller markets.[6]

What if someone in your family passes away with more than $1 billion in collectible art, and your family member's estate sells a large amount of the art to pay the government more than $471 million in estate taxes? The art appraisers did not value the collectables higher, because they valued one of the pieces at $0 for purposes of the estate tax return. The appraiser's valued the piece at $0 since that piece of art could not be sold legally. The Internal Revenue Service (IRS) then tells you it is really worth $15 million as a piece of art. The estate then stands by its valuation of $0 from three different appraisers, but the IRS responds by increasing its valuation to $65 million dollars and assessing $29 million in taxes for the item and $11.7 million in penalties for the misstatement on the return. Does that seem fair? Why must you pay additional taxes on an item valued at $65 million dollars when you cannot sell it legally?

This is precisely what happened to one of New York's largest art dealers.[7] The IRS used black market values to appraise illegal assets in the past.[8] However, another issue arises with the black market of Robert Rauschenberg's "Canyon"; there is no black market for this artwork because it is so heavily watched by the government and media after this estate tax fiasco.[9]

This comment will generally discuss the federal estate tax as well as different valuation methods used to determine the value of an estate.[10] It will also focus on the Sonnabend estate and the difficulties that have arisen regarding Rauschenberg's "Canyon."[11] Last, this comment will discuss the IRS, the estate, and the estate planner's possible solutions to this problem.[12]

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2. *See* I.R.C. § 2001 (2013).
3. *See id*. § 2001(b).
4. *See* Julie Garber, *What Value of an Asset is Used for Estate Tax Purposes?*, ABOUT.COM (last visited Jan. 24, 2013), http://wills.about.com/od/understandinge statetaxes/a/valuationused.htm (showing that stocks are valued based on the stock market price of the date of death).
5. *See Valuing Collectibles*, RARE TREASURES (last visited Jan. 24, 2013), http://www.rare-treasures.com/What-is-it-worth.html (describing the difficulty in valuing collectibles).
6. *See id.* (explaining that an easy way to value collectibles is looking at prices online of comparable items. However, "[f]or some collectibles, this is relatively easy. For others, it is harder." For the rarer items, it may be necessary to use a professional appraiser.).
7. *See* Eileen Kinsella, *Rauschenberg Eagle Ruffles Feathers*, ARTNEWS.COM (May 1, 2012), http://www.artnews.com/2012/05/01/rauschenberg-eagle-ruffles-feathers/.
8. *See* Jones v. Commissioner, T.C.M. (RIA) 1991-28.
9. *See The Value of Unsalable Art*, FRANKFURT KURNIT KLEIN & SELZ P.C. (last visited Jan. 21, 2013), http://fkks.com/article.asp?articleID=224.
10. *See infra* Parts II, III.
11. *See infra* Part IV.
12. *See infra* Part VII.

II. ESTATE TAXES IN GENERAL

Federal *estate* taxes are very similar to the dreaded federal *income* taxes.[13] The major difference is that income taxes are charged upon an individual's income, whereas estate taxes are charged upon a deceased person's estate based on the deceased person's overall wealth at the time of their death.[14] Not every estate must file an estate tax return; not every estate must pay estate taxes.[15] Of all the deaths in the United States in 2008, only about 33,500 estate tax returns were filed in 2009, and less than half (14,700) of those returns actually had to pay taxes.[16] This discrepancy is because of the exemption limit that Congress has set and continuously changed since 2001.[17]

Only estates of deceased United States citizens with a gross estate exceeding the limitation set forth by Congress for that year must file a federal estate tax return.[18] Whether an estate qualifies for an exemption depends entirely on the value of the estate and the exemption limits in place during the year of death.[19] Tax appraisers calculate the tax levied on the estate as a percentage of the value of the estate that is greater than the relevant exemption limitation.[20] Over time, Congress has changed the percentage of tax that is charged, just as they have done with the exemption limitations.[21]

Congress does allow some deductions from the estate.[22] Specifically, estate administration expenses and losses, funeral costs, and debts of the decedent are deductible in calculating the gross estate.[23] Also, the value of property bequeathed to the surviving spouse or to charity is deductible.[24] State death taxes paid on the estate are also deductible for purposes of the federal estate tax.[25] The estate has nine months after the date of the decedent's death to file the estate tax return.[26]

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13. *Compare* I.R.C. § 1 (2013) (income tax) *with* I.R.C. § 2001(a) (2013) (estate tax).

14. *See id.* §§ 1, 2001.

15. *See id.* § 6018.

16. *See generally The Tax Policy Briefing Book, Wealth Transfer Taxes: How Many People Pay the Estate Tax?*, TAX POLICY CENTER (last updated June 13, 2011), http://www.taxpolicycenter.org/briefing-book/key-elements/estate/how-many.cfm (showing how many more people died in 2008 than filed estate tax returns in 2009, and even less paid taxes).

17. *See id.*

18. *See* Darien B. Jacobson et al, *The Estate Tax: Ninety Years and Counting*, 118, 124 (2007), http://www.irs.gov/pub/irs-soi/ninetyestate.pdf.

19. *See* I.R.C. § 2001.

20. Henry A. Babcock, *Appraisal Principals and Procedures*, 14 (1968).

21. Julie Garber, *Exemption From Federal Estate Taxes: 1997-2003*, ABOUT.COM, http://wills.about.com/od/understandingestatetaxes/a/estatetaxchart.htm (last visited Sept. 20, 2012).

22. *See* Jacobson et al, *supra* note 18, at 118.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

A. History of Estate Taxes

Congress began the modern estate tax around 1916 with the enactment of the Revenue Act of 1916.[27] An estate tax differs from an inheritance tax, as it is a tax levied on the estate, and not the beneficiaries.[28] Initially, the one carrying out the will, the executor, determines the value of the gross estate at the date of death; however, the enactment of the Revenue Act of 1935 created what is known today as the "alternative valuation date."[29] This allows the executor to value the gross estate at a date no more than six months from the decedent's date of death.[30] The executor elects to use the alternative valuation date in situations where the value of the estate drops significantly within six months of the date of death.[31]

The enactment of the Revenue Act of 1948 allowed the estate to deduct the value of property passing directly to the surviving spouse; however, the estate may deduct only half of the value of the gross estate.[32] Although the estate tax affects only a small percentage of estates, there has been a large amount of policy debate on the fairness of taxing transfers at death.[33]

B. Federal v. State (Inheritance Tax)

The federal government imposes an estate tax only on the estate, while states impose taxes in addition to the federal estate tax—some states impose no additional taxes.[34] Some of the different types of taxes the states impose include: estate taxes, inheritance taxes, and pickup taxes.[35]

State estate taxes are very similar to federal estate taxes, except the state imposes them instead of the Federal government.[36] An estate tax is "[a] tax imposed on the transfer of property by will or by intestate succession."[37] The states impose this tax on the estate and not the beneficiaries.[38]

Inheritance taxes are different from estate taxes because of whom the state levies the tax against.[39] An inheritance tax is "imposed on a person who

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27. *Id.* at 120.
28. *Id.*
29. *Id.* at 122.
30. *Id.* (The Act originally allowed for a date up to one year after the decedent's death, but later changed the to just six months).
31. *Id.*
32. *Id.*
33. *Id.* at 128.
34. *See Inheritance Tax*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/state-inheritance-taxes.html (last visited Oct. 2, 2012).
35. *See State Death Tax Chart*, MCGUIREWOODS LLP, http://www.mcguirewoods.com/news-resources/publications/taxation/state_death_tax_chart.pdf (last visited July 7, 2012) (listing all states and their respective taxes imposed at death).
36. *Compare* DEL. CODE ANN. tit. 30, § 1502 (West 2012) *with* I.R.C. § 2001 (2013).
37. BLACK'S LAW DICTIONARY 1595 (9th ed. 2009).
38. *See* DEL. CODE ANN. tit. 30, § 1502 (West 2012).
39. BLACK'S LAW DICTIONARY 1596.

inherits property from another."[40] Only some states have inheritance taxes, while there is no federal inheritance tax.[41] States impose a type of death tax, which is referred to as a "pickup tax."[42] These taxes are "[a] state death tax levied in an amount equal to the federal death-tax credit."[43]

Although there are many different types of taxes states impose on an estate, this comment will focus on the federal estate tax and the valuations used by the Internal Revenue Service.[44] This comment will not discuss, or refer, to any state matters.

C. Exemptions

The exemption amount is the threshold at which the estate tax is applied.[45] Thus, the amount of the estate that exceeds the exemption amount is taxable.[46] Therefore, gross estates valued below this threshold will not owe any federal taxes.[47]

The exemption amount changed constantly over the past fifteen years, even disappearing for one year.[48] In 1997, the exemption amount was $600,000, and any amount above that the government taxed at a rate of 55%.[49] Over time, with the help of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the exemption amount increased and the tax rate decreased.[50]

EGTRRA included an elimination of the estate tax for 2010.[51] Essentially, this law allows the estate to choose between two options.[52] The first option is to take the exemption amount at $5 million with an estate tax rate of 35% with the beneficiaries receiving a basis in the property inherited at fair market value, or a stepped-up basis.[53] The second option is to not pay any estate tax at all, no matter the value of the estate, but the beneficiaries will take a basis in the

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40. *Id.*

41. Timothy J. Witt, *Individuals and Inheritance Taxes: A Praxeological Examination of Pennsylvania's Inheritance Tax*, 114 PENN ST. L. REV. 1105, 1106 (2010) (showing that only eleven states have an inheritance tax).

42. BLACK'S LAW DICTIONARY 1596.

43. *Id.*

44. *See infra* Part V.

45. *See The Rules and the Exemptions*, ABOUT LIVING TRUSTS, http://www.aboutlivingtrusts.com/Inheritance%20Taxes/EstateTax.htm (last updated Apr. 2, 2011) (explaining the method and calculation of the estate tax with exemptions).

46. 2-51 Fed. Tax Guidebook § 51.02.

47. *See The Rules and the Exemptions*, *supra* note 45.

48. *See* Garber, *supra* note 21.

49. *Id.*

50. *Id.*

51. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

52. *See id.*

53. *See id.*

property received at a modified carryover basis.[54] The options are a completely different issue that the court's decide on a case-by-case situation.[55]

For example, if a decedent that died in 2010 left an estate valued less than $5 million, there would be no tax assessed.[56] Therefore, the beneficiaries would receive the property with a basis of the fair market value of the property as if the government taxed the property.[57] If the decedent left an estate valued over the threshold, however, the decision is a little trickier. If the value is closer to the threshold, it could be worth it to pay the small amount of tax in order to receive the higher basis in the inherited property. However, if the value greatly exceeds the threshold, the tax liability could be so great as to outweigh the benefits of the stepped-up basis.[58]

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.[59] The Act reinstated the estate tax and extended the "Bush Tax Cuts" from EGTRRA, which were set to expire December 31, 2010.[60] This Act stated that the estate tax exemption would go back to $5 million with a 35% tax rate for 2011 and 2012, adjusted for inflation in 2012.[61] At midnight on December 31, 2012, the exemption amount and tax rate returned to the amounts in effect in 2001 and 2002: $1 million and 55%.[62] However, on January 1, 2013, Congress passed the American Taxpayer Relief Act of 2012, which President Obama signed on the next day.[63] This Act avoided the reversion to the 2001 and 2002 levels and raised the estate tax rate to 40% instead and left the exemption level at $5 million adjusted for inflation (estimated to be $5.25 million for 2013).[64] The American Taxpayer Relief Act of 2012 essentially made the estate tax permanent.[65]

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54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (2010).
60. *See id.*
61. *See id.*
62. *See id.*
63. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2012).
64. *See id. See also*, Hani Sarji, *More Estate Tax Changes Could Follow Fiscal Cliff Deal*, FORBES.COM (Jan. 6, 2013, 12:20 AM), http://www.forbes.com/sites/hanisarji/2013/01/06/more-estate-tax-changes-could-follow-fiscal-cliff-deal/ (explaining the estimation of the exemption indexed for inflation for 2013).
65. *See id.*

D. Penalties

When a taxpayer does not pay the proper amount required, the IRS imposes a 20% penalty on the amount of underpayment.[66] This applies mostly to a "substantial" underpayment or misstatement.[67]

For estate and gift tax purposes, the penalties apply to "[a]ny substantial estate or gift tax valuation understatement."[68] A substantial estate tax valuation understatement occurs when "the value of any property claimed on any return . . . is 65 percent or less of the amount determined to be the correct amount."[69] Imposition of the penalty requires the portion of the underpayment from the understatement to exceed $5 thousand.[70]

If the understatement is considered a gross valuation understatement, the penalty is doubled to 40%.[71] A gross valuation misstatement, for estate tax purposes, is when the reported value is 40% or less of the amount determined to be correct.[72]

III. VALUATION METHODS

There are many different aspects of the valuation process for a tangible piece of property including: using an appraiser, choosing the right valuation date, and using the right valuation method.[73] As seen from the penalties mentioned above, the valuation process can be very important.

Valuation has always been an issue with the IRS.[74] The proper valuation can "mitigate the examination risk and increase protection on future returns."[75] Wealthy individuals should be very diligent with regards to the valuation process in order to avoid a larger tax liability.[76]

A. The Importance of an Appraiser

The key to avoiding a penalty is an accurate valuation, because an undervaluation will lead to a penalty, and an overvaluation will incur a larger tax bill.[77] Because accuracy is important, it is wise to use a qualified

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66. I.R.C. § 6662(a) (2013).
67. *See id.* § 6662(b).
68. *Id.* § 6662(b)(5).
69. *Id.* § 6662(g)(1).
70. *Id.* § 6662(g)(2).
71. *Id.* § 6662(h)(1).
72. *Id.* § 6662(h)(2)(C).
73. *See infra* Parts III.A–B, D.
74. *See* Estate of Mitchell, T.C.M (CCH) 2011-94 (discussing the process of a valuation dispute with the IRS).
75. Paige Goepfert, *Important Lessons Regarding Valuation Issues*, THE FREE LIBRARY (Apr. 1, 2012), http://www.thefreelibrary.com/important&lessons&regarding&valuation&issues-a0287392190.
76. *Id.*
77. *See Appraisals May Be Needed to Avoid Valuation Penalties*, LEGAL METHODS OF ASSET

appraiser.[78] With a qualified appraisal, the IRS had difficulty disputing the valuation; therefore, using a qualified appraiser provides extra protection from substantial penalties.[79]

Using a qualified appraiser is the key component of a qualified appraisal, according to the definition of the Internal Revenue Code.[80] A qualified appraiser is typically someone who "has earned an appraisal designation from a recognized professional appraiser organization" and has performed appraisals consistently for compensation.[81] The appraiser must also demonstrate verifiable education and experience regarding the type of property being valued.[82] A qualified appraiser understands that a false valuation of the property could lead to a civil penalty for aiding and abetting an understatement of tax liability.[83]

The Department of the Treasury accepts the use of more than one appraiser.[84] When more than one appraiser is used, each appraiser must meet the qualifications for the appraisal to be deemed qualified.[85]

The appraiser must furnish an appraisal report, and the report must, at minimum, include the following:

> A summary of the appraiser's qualifications; [a] statement of the value and the appraiser's definition of the value he has obtained; [t]he bases upon which the appraisal was made, including any restrictions, understandings, or covenants limiting the use or disposition of the property; [t]he date as of which the property was valued; [and] [t]he signature of the appraiser and the date the appraisal was made.[86]

For artwork, however, the report should include more data, such as:

> A complete description of the object . . . ; [t]he cost, date, and manner of acquisition; [a] history of the item including proof of authenticity such as a certificate of authentication if such exists; [a] photograph of a size and quality fully identifying the subject matter . . . ; [a] statement of the factors upon which the appraisal was based . . . .[87]

These specific factors for artwork include: other sales of work by the same artist, quoted prices of other artworks by the artist in a dealer catalog, the state of the art market near the valuation date, a record of the exhibitions where the

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PROTECTION, http://www.offshorepress.com/protection/apvalue.htm (last visited Sept. 20, 2012).

78. *See id.*
79. *See id.*
80. I.R.C. § 170(f)(11)(E)(i) (2011).
81. *See id.* § 170(f)(11)(E)(ii).
82. *Id.* § 170(f)(11)(E)(iii)(I).
83. Treas. Regs. § 1.170A-13(c)(5)(i)(D) (as amended in 1996).
84. *Id.* § 1.170A-13(c)(5)(iii).
85. *Id.*
86. Joni Larson, *Larson on Valuation of Tangible Personal Property*, 2010 Emerging Issues 5171.
87. *Id.*

piece was on display, and a statement regarding the artist's standing in his profession during the relevant time period.[88]

B. Valuation Dates

In general, the property of an estate is valued on the date of the decedent's death.[89] However, if the value of the property substantially declines after death, the tax code allows the estate to use the value of the property on a date six months later, known as the "alternate valuation date."[90]

Electing to use the alternate valuation date must be made by the executor of the estate on the estate tax return.[91] If the executor makes the election, the entire estate must be valued at this alternative date, not just the property that has decreased in value.[92] The goal of the alternate valuation date is to help reduce the tax liability for the estate; it cannot be used if it will increase the gross estate.[93]

For example, assume, as a hypothetical, a wealthy investor (Investor) died on April 1, 2011, with a gross estate of $5.4 million. The entire estate consists of investments. Because Investor's estate is valued at over $5 million, the estate will be subject to taxes on the $4 hundred thousand exceeding the tax-exempt cap.[94] However, the Investor's investments plummeted after the date of death, and six months later, on October 1, 2011, the investments were valued at $4,800,000. If the executor of the estate elects to use the alternate valuation date of October 1, 2011, no taxes will be owed on the estate because it falls under the exemption limit.[95]

C. Fair Market Value

Black's Law Dictionary defines "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction."[96] A forced sale does not determine fair market value.[97] Fair market value also cannot be determined by a sale "in a market other than that in which such item is most commonly sold to the public."[98]

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88. *Id.*

89. I.R.C. § 2031(a) (2013).

90. *See id.* § 2032(a).

91. *Id.* § 2032(d).

92. *See* § 2032(a); *see also* Garber, *supra* note 4 (stating the date of death value is based on the fair market value of the date of death).

93. *See* § 2032(c); Garber, *supra* note 4 (stating the date of death value is based on the fair market value of the date of death).

94. *See* 2-51 Federal Tax Guidebook § 51.02. (The exemption was $5,000,000 in 2011).

95. *See id.*

96. BLACK'S LAW DICTIONARY 1691 (9th ed. 2009).

97. Treas. Reg. § 20.2031-1(b) (as amended in 1996).

98. *Id.*

When an appraiser establishes the fair market value, all facts and circumstances of the property must be considered, "such as its desirability, use, and scarcity."[99] Also, the IRS requires inclusion of "any restrictions, understandings, or covenants limiting the use or disposition of the property" in determining the fair market value.[100]

When dealing with art, the IRS recommends using an appraiser to examine all of the factors mentioned above.[101] The IRS gives great deference to the valuation of a piece of artwork when an art appraiser conducted the appraisal.[102] More deference is given to an appraiser's valuation when the appraiser is certified in the type of art at issue than when the appraiser is only a general art expert.[103]

D. Three Approaches to Valuation

There are three approaches to reaching a fair valuation of tangible property: the market approach, the income approach, and the cost approach.[104]

The market approach determines valuation based on what price a purchaser could get the same tangible property, in the same condition, on an open secondary market.[105] The market approach takes into account additional costs such as tax, transportation or delivery, and installation.[106] One of the main factors taken into consideration in the valuation of the asset is the relevant market condition.[107] The market approach is typically used when there is an abundance of similar property in a secondary market.[108] Thus, the market approach should be used only "when an adequate secondary market exists from which to extract a good indicator of value."[109]

The cost approach focuses on the current cost, or replacement cost, of the property and relevant expenses, such as depreciation.[110] Appraisers must evaluate replacement cost by using the same attributes of the relevant asset.[111] The expense deductions usually taken into account "include material, labor,

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99. IRS Publ'n 561 (1994).
100. *See id.*; *see also* Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? $29 Million*, NY TIMES, July 22, 2012, at A1 (quoting the same language).
101. *See id.*
102. *See id.*
103. *See id.*
104. *See* Robert Reilly & Manoj Dandekar, *Complexities Involved in Valuing Tangible Personal Property*, 4 VALUATION STRATEGIES 1 (2001).
105. *See id.* at 2.
106. *Id.*
107. *See id.*
108. *See id.*
109. *See id.* at 5.
110. *See id.* at 3.
111. *See id.* at 3.

overhead, developer's profit, and entrepreneurial incentive."[112] Last, the cost approach adjusts the value for any damage or deterioration that has occurred.[113]

The income approach theory is "based on income capitalization or on the present value of future 'economic income' to be derived from the use."[114] When using the income approach, the valuation must take into account "the opportunity cost of capital, the time value of money, and the risk of the investment."[115] Also, it must account for the remaining useful life of the asset, because the income from the asset cannot extend beyond the life of the asset.[116] However, appraisers do not use the income approach very often with personal property.[117]

Often "it is not possible or practical to apply more than one approach when valuing tangible personal property."[118] Generally, the appraiser selects the most appropriate approach to determine the value.[119] They base their determination on the relevant data and circumstances surrounding the asset.[120]

IV. "CANYON"

A piece of art can be valuable, yet difficult to value.[121] This is seen firsthand with a piece entitled "Canyon."[122] The Sonnabend estate and the Internal Revenue service have debated the value of this art piece for about five years.[123] Two laws that have been in place for over half a century heighten the difficulty in finding a proper valuation.[124] The IRS wants to use the black market to value the piece, but an issue arises with regards to whether the particular black market even exists.[125]

A. Background on Artwork, Artist, and Owner

Robert Rauschenberg, a well-known artist, created a combine work called "Canyon" in 1959.[126] He passed away in 2008, at the age of 82.[127] Some of his

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112. *Id.* at 4.
113. *See id.*
114. *Id.* at 3.
115. *Id.*
116. *See id.*
117. *See id.* at 5.
118. *Id.* at 3.
119. *See id.*
120. *See id.*
121. *See Valuing Collectibles, supra* note 5.
122. *See infra* Part IV.C.
123. *See infra* Part IV.C.
124. *See infra* Part IV.B.
125. *See infra* Parts IV.C, VI.B.
126. *See* Michael Kimmelman, *Robert Rauschenberg, American Artist, Dies at 82*, NYTIMES (May 14, 2008), http://www.nytimes.com/2008/05/14/arts/design/14rauschenberg.html?pagewanted=all&_r=0.
127. *Id.*

other notable works include his famous combines from the 1950s–60s.[128] An anonymous bidder paid $14.6 million for one of Rauschenberg's pieces at auction in May 2008, the most ever paid for a Rauschenberg piece.[129]

The "Canyon" piece is an assemblage of buttons, photographs, nails, woods, mirrors, and, most notably, a stuffed bald eagle.[130] This piece even included a rope attached to a pillow, perched from the main panel, and tied to a string.[131] As a very unique piece, one viewer can have a completely different interpretation from another viewer, and one art historian can have a completely different interpretation from those two viewers and any other art historian.[132]

In 1959, Ilena Sonnabend acquired "Canyon" from her ex-husband's gallery.[133] After Sonnabend acquired "Canyon," Sonnabend often loaned the piece to major museum venues in the United States and Europe.[134] In 1964, the Venice Biennale, a contemporary art exhibition contained the piece, where the museum awarded Rauschenberg the grand prize for a foreign artist.[135]

In 1981, "Canyon" returned to the United States, and "Fish and Wildlife agents became aware 'of the peculiar situation involving a protected bird carcass that was affixed to a great American masterwork.'"[136] The agents notified the Sonnabend Gallery that the piece violated The Bald and Golden Eagle Protection Act and The Migratory Bird Treaty Act of 1918.[137] Sonnabend originally received a special permit to keep possession of the artwork.[138] Governmental officials required Sonnabend to keep the whereabouts of the piece on record at all times.[139] In order to send the piece abroad for display, she had to obtain special permission.[140]

In 1998, the Department of Interior's new administrator received a letter from a coordinator within the Fish and Wildlife Service that "said the department had been in error previously when permits had been issued to the Sonnabend Gallery to retain possession of *Canyon*, as the statutes clearly stated that such permits should only be granted to nonprofit institutions."[141]

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128. *Id.*
129. Kinsella, *supra* note 7.
130. *See IRS Values Stolen or Illegal Items at Black Market Rate*, SPENCERLAWFIRM.COM, http://www.spencerlawfirm.com/Publications/IRS-values-stolen-or-illegal-items-at-black-market-rate.shtml (last visited Sept. 20, 2012).
131. *See id.*; Kinsella, *supra* note 7.
132. *See* Mike Giuliano, *Robert Rauschenberg Combines: Painting + Sculpture*, CITY PAPER (Jan. 10, 2001) http://www2.citypaper.com/arts/story.asp?id=3929 (showing how there are many different interpretations of the piece).
133. Kinsella, *supra* note 7.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See id.*
138. *See id.*
139. *See id.*
140. *See id.*
141. *Id.*

Sonnabend had to prove either nonprofit status or "that the bird was killed and stuffed prior to 1940" to avoid revocation of the permit.[142]

Sonnabend, with the personal help of Rauschenberg, proved the pre-1940 status of the eagle; and therefore, she continued to possess the art as well as loan it out to other museums.[143] Her proof came in the form of a notarized statement where:

> [Rauschenberg] recounted that an artist named Sari Dienes lived in the building above Carnegie Hall in New York during the 1950s. Among the other tenants was a member of Teddy Roosevelt's Rough Riders, the first U.S. Volunteer Cavalry. The man, who was not named, "acquired from the wild, a bald eagle which he had taxidermied prior to 1940," the statement said. After the man died in 1959, Dienes retrieved the eagle from the trash and offered it to Rauschenberg.[144]

Over her lifetime, Sonnabend acquired a large collection of paintings and artwork.[145] In October 2007, Sonnabend died at the age of 92 leaving her $1 billion art estate to her daughter and adopted son.[146] The federal portion of the government taxed the estate $331 million, coupled with New York's $140 million the estate had to pay New York in estate taxes.[147] To pay this large bill, the estate sold over $600 million in artwork.[148]

B. Overview of The Bald and Golden Eagle Protection Act & The Migratory Bird Treaty Act of 1918

Congress enacted The Bald and Golden Eagle Protection Act in 1940.[149] The Act prohibits anyone from taking bald eagles, including their parts, nests, or eggs.[150] It also prohibits possessing, selling, purchasing, bartering, transporting, and exporting bald eagles.[151]

The Bald and Golden Eagle Protection Act applies to any bald eagle, "known as the American eagle, or any golden eagle, alive or dead."[152] A person violating this act for the first time can receive a fine of up to $100,000 up to one year in prison, or both.[153] A second violation is a felony, and hence,

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142. *Id.*
143. *Id.*
144. *Id.*
145. *See* Roberta Smith, *Ilena Sonnabend, Art World Figure, Dies at 92*, NYTIMES.COM (Oct. 24, 2007), http://www.nytimes.com/2007/10/24/arts/24sonnabend.html?pagewanted=all.
146. Kinsella, *supra* note 7.
147. *Id.*
148. *Id.*
149. *See* The Bald and Eagle Protection Act, 16 U.S.C. § 668 (2013).
150. *See id.* § 668(a).
151. *Id.*
152. *Id.*
153. *See Bald Eagle Management Guidelines and Conservation Measures*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/midwest/Eagle/guidelines/bgepa.html (last updated June 28, 2007).

the punishment increases substantially.[154] The Act specifically states that it does not prohibit the actions with any bald eagle lawfully taken before June 8, 1940.[155]

The Migratory Bird Act went into effect July 3, 1918.[156] This act states that it is unlawful "to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess," sale, purchase, barter, or transport any migratory bird, in whole or part.[157] The eagle is considered a migratory bird, and hence is protected under this statute.[158] According to this Act, a violation is a misdemeanor and subject to a fine of up to $500, jail up to six months, or both.[159] An intentional violation of this act is a felony, with fines up to $2,000, jail up to two years, or both.[160]

C. Sonnabend Valuation v. IRS Valuation

When it came time to value the piece for the estate tax calculation, the heirs, with the help of three independent appraisers, determined that the value of "Canyon" was $0, because it could not be sold under federal law.[161] After the IRS analyzed the piece, it believed that "Canyon" was worth $15 million.[162] The attorney for the estate, Ralph E. Lerner, an art law specialist, refused to agree, insisting the piece was still worth $0.[163]

After the attorney's refusal, the IRS came back with a valuation of $65 million and requested taxes of $28 million and penalties of $11.7 million for a gross valuation understatement and interest.[164] The Sonnabend estate brought suit against the commissioner of the IRS to dispute the IRS's valuation of the "Canyon" and the deficiency in taxes.[165]

V. IRS VALUATION PROCESS

When artwork is included in a tax return, the IRS sends the valuations to the Office of Art Appraisal Services (AAS) for review.[166] When a taxpayer

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154. *See id.*

155. 16 U.S.C. § 668(a).

156. *See id.* § 703.

157. *Id.* § 703(a).

158. *See* U.S. Fish & Wildlife Service, Migratory Bird Program, http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/mbtandx.html.

159. Melissa Mayntz, *Migratory Bird Act*, ABOUT.COM, http://birding.about.com/od/birdconservation/a/Migratory-Bird-Act.htm.

160. *Id.*

161. *See* Janet Novack, *Even Rich Heirs Deserve a Fair Shake From the IRS*, FORBES (Feb. 23, 2012), http://www.forbes.com/sites/janetnovack/2012/02/23/even-rich-heirs-deserve-a-fair-shake-from-the-irs/.

162. *See* Kinsella, *supra* note 7 (Some sources say the IRS responded with a value of $16 million).

163. *See id.*

164. *See id.*

165. Novack, *supra* note 160.

166. *See* Alan Breus, *Valuing Art for Tax Purposes*, J. ACCT., (July 2010), http://www.journalofaccountancy.com/NR/exeres/57632DA9-E92C-485A-A73B-09ABBBB6E991.htm.

case selected for audit includes a piece of artwork with a claimed appraised value of over $20,000, it must be referred to the Art Advisory Panel (Panel), who determines the valuation position that the IRS adopts.[167]

The IRS created the Art Advisory Panel in 1968.[168] The Panel "provides advice and recommendations to the [AAS] unit in the Office of Appeals for the [IRS]" on all art referred to if from the AAS.[169] The Panel's recommendations are strictly advisory.[170] The AAS reviews the Panel's values and makes a decision based on those values and its own findings.[171] In 2011, the AAS adopted 93% of the Panel's valuations.[172] Upon approval by the AAS, the IRS will adopt the values as its official position.[173]

The Art Advisory Panel is composed of nationally prominent art museum directors, curators, art scholars, members of distinguished auction houses, and art dealers.[174] Members are not paid for their services but are merely compensated for cost reimbursements.[175]

VI. USING THE BLACK MARKET

The black market is a market where the illicit buying and selling of goods in violation of law occurs.[176] A black market exists for both legal and illegal items.[177] The markets stretch all across the globe and includes counterfeit goods, drug-trafficking, environmental crimes, financial crimes, prostitution, and transnational crimes.[178]

Black market values can differ significantly from fair market values depending on the item.[179] An illegal item, such as an illicit drug or weapon, will have a higher black market price than an item that is available legally.[180] Other items will have lower prices in the black market than the legal market, because the sellers do not have to pay production costs or taxes; typically these

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167. *See id.*

168. *See The Art Advisory Panel of the Commissioner of Internal Revenue*, ANNUAL SUMMARY REPORT FOR FISCAL YEAR 2011 2 [hereinafter *Art Advisory Panel*]; *see also* Ralph E. Lerner, *Valuing Works of Art for Tax Purposes*, 28 REAL PROP. PROB. & TR. J. 593, 605 (1993) (Lerner is the attorney for the Sonnabend estate).

169. *Art Advisory Panel*, *supra* note 167, at 3.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Larson, *supra* note 85. *See also Art Advisory Panel*, *supra* note 160, at 6–7 (listing the 2011 members of the Panel).

175. Larson, *supra* note 85.

176. *See* THE MERRIAM-WEBSTER DICTIONARY 156 (1st Ed. 2005).

177. *See* HAVOCSCOPE GLOBAL BLACK MARKET INFORMATION, http://www.havocscope.com (last visited Oct. 25, 2012).

178. *See id.*

179. *See infra* notes 179–80 and accompanying text.

180. *See Legalizing Marijuana in California Would Sharply Lower the Price of the Drug*, RAND Corp., (July 7, 2010) http://www.rand.org/news/press/2010/07/07.html (showing how the price of marijuana will decrease if it was legalized because of the ease of legal production compared to illegal production).

items are stolen.[181] Stolen artwork, however, is traded in the black market at about five to ten percent of its fair market value.[182]

A. Past Cases and Valuations

The IRS has dealt with issues regarding illegal assets in the past:

> The IRS has taken a hard line that firearms, hard drugs, [and] stolen art are taxable even though there's no legal market for them. When this happens, executors and heirs have to sell legitimate property in order to give the government its tax on the illegal property or else run the risk of being caught in criminal activity lining up illicit buyers.[183]

In a private letter ruling, the IRS established that would use black market prices to value certain assets.[184] The IRS mentioned *Publicker v. Commissioner*, where the Third Circuit stated that just because an item is unique does not mean that it does not have a market.[185] In addition, the IRS mentioned *Jarre v. Commissioner*, where the Tax Court stated "the fact that there may be a limited market does not . . . prevent the . . . property from having substantial value."[186] The fact that the relevant, limited market is an illicit market, or a black market, does not eliminate that market for use in valuation.[187] The black market valued illegal drugs in *Jones v. Commissioner*.[188] The IRS decided that the fair market value of a black market item is "based on the price that a willing buyer would pay in the relevant illicit market."[189]

B. Differentiated with "Canyon"

With the "Canyon" piece, there is no true black market, so the IRS created its own black market with a hypothetical Chinese billionaire that would pay the large price just to try to hide the piece for personal pleasure.[190] Although there is a large black market for stolen, or otherwise illegal, artwork, the black market

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181. *See Black Market*, NEW WORLD ENCYCLOPEDIA http://www.newworldencyclopedia.org/entry/Black_market (last visited Jan. 21, 2013).

182. Collen Curry, *The Most Valuable Works of Stolen Art No One Can Find*, ABC NEWS (Apr. 14, 2012), http://abcnews.go.com/US/worlds-valuable-missing-works-art/story?id=16131807.

183. Patti S. Spencer, *IRS Values Stolen or Illegal Items at Black Market Rate*, LANCASTER ONLINE, http://lancasteronline.com/article/local/607346_IRS-values-stolen-or-illegal-items-at-black-market-rate.html#ixzz270yZQuSq (last updated Mar. 18, 2012).

184. I.R.S. Priv. Ltr. Rul. 9152005 (Aug. 30, 1991).

185. *See id.*; Publicker v. Commissioner, 206 F.2d 250, 253 (3rd Cir. 1953) (discussing the market for jewels).

186. *See* I.R.S. Priv. Ltr. Rul. 9152005; Jarre v. Commissioner, 64 T.C. 183, 190 (1975).

187. *Id.*

188. I.R.S. Priv. Ltr. Rul. 9152005; Jones v. Commissioner, T.C.M (RIA) 1991-28.

189. I.R.S. Priv. Ltr. Rul. 9152005.

190. Janet Novack, *The IRS Invents a Chinese Billionaire*, FORBES MAGAZINE, Mar. 12, 2012, at 24.

for the "Canyon" piece simply does not exist because of government authorities heightened watch on the work, including the IRS, and the severe penalties that will apply to a seller and a buyer.[191] Due to the high publicity of this piece, it is not possible this piece could exchange hands between a buyer and a seller without law enforcement finding out.[192]

When using the black market to value an item, estate planners should still use fair market valuation techniques.[193] Because of that, restrictions on the disposition of the property must be taken into account in valuing the property.[194] Therefore, the legal restrictions from The Bald and Golden Eagle Protection Act and The Migratory Bird Treaty Act of 1918 must decrease even the black market value.[195]

Furthermore, the past cases where the IRS used the black market for valuation involved taxpayers who in some way were breaking the law or attempting to evade some type of government regulation.[196] With the Sonnabend estate, the situation is entirely opposite: Ms. Sonnabend received the proper permission from the authorities to retain possession of the piece by following the rules and obeying the authorities by not attempting to infiltrate the black market with the artwork.[197] The estate has also been entirely cooperative and honest with the IRS and other authorities although disputing the valuation.[198]

VII. PROPOSED SOLUTION

There are many different angles at which to solve this valuation problem. The Sonnabend estate has a limited number of choices, while the IRS has a few more options.[199] In the end, one side will have to give way to the other side to compromise.[200] Also, there are a few ways that estates may avoid this issue in the first place that might have items like "Canyon" in the inventory.[201]

A. Solution for Sonnabend Estate

There are plenty of options that probably come to mind to the average person that just do not seem rational for the family. For one, many people think a good solution would be just to donate the "Canyon" to the museum and take a

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191. *See* Kinsella, *supra* note 7; *see also supra* text accompanying notes 128–36.
192. *See* Novack, *supra* note 189; Kinsella, *supra* note 7; Kimmelman, *supra* note 125.
193. *See supra* text accompanying notes 97–101.
194. *See supra* text accompanying note 99.
195. *See* Cohen, *supra* note 99.
196. *See, e.g.*, Jones v. Commissioner, T.C.M (RIA) 1991-28 (valuing drugs based on the black market rate).
197. *See* Kinsella, *supra* note 7.
198. *See infra* Part VII.
199. *See infra* Part VII.
200. *See infra* Part VII.
201. *See infra* Part VII.

charitable contribution for the estate.[202] This would not be very beneficial in an economic sense, because the estate would still be required to pay the $40.9 million of taxes in order to take the IRS valuation as the deduction.[203] By taking the estate's value of $0, the estate would not be required to pay taxes; but, because the value of the piece is $0, the charitable contribution would also be $0 and no monetary benefit would arise for the estate.[204] However, it could be argued that there is a benefits of settling the estate include: making the whole situation go away, avoiding further attorney fees, and avoiding stress.[205]

Another option is for the estate to just keep the art piece and pay the taxes.[206] After all the publicity this piece has received, the heirs may wish to keep the piece forever as a family heirloom.[207] But $40.9 million in taxes and penalties for an heirloom that can never create income and stays in a museum instead of with the family seems a bit irrational.[208]

Last, some believe that destroying the painting by burning it, or "saw[ing] the eagle off the painting [and] leav[ing] the eagle on the floor," will allow for a new valuation for the estate.[209] This is completely irrational for multiple reasons.[210] First, the valuation of the asset is determined at either the date of death (2007) or the alternate valuation date (six months after death).[211] These dates have long passed and the valuation would not change.[212] Second, members of the art community across the world would frown upon the distribution of such a now popular piece of work.[213]

Finally, this destruction could open the door for severe punishment in many aspects for fraud.[214]

B. Potential Proposal for IRS

The IRS has a large amount of authority in making decisions regarding certain taxes to be imposed.[215] The majority of returns are not even audited.[216] Therefore, there are a number of things that the IRS can let slide.[217]

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202. Cohen, *supra* note 99.
203. *Id.*
204. *Id.*
205. *See id.*
206. Peter J. Reilly, *"Canyon" Controversy – Blame the Advisers Not the IRS*, FORBES (July 24, 2012), http://www.forbes.com/sites/peterjreilly/2012/07/24/canyon-controversy-blame-the-advisers-not-the-irs/.
207. *See id.*
208. *See id.*
209. *Id.*
210. *Id.*
211. Garber, *supra* note 4.
212. *See id.*
213. *See id.*
214. *See id.*
215. *See* I.R.C. §§ 7801, 7803 (2013) (stating that the IRS carries out the responsibility of the Treasury with the help of an appointed commissioner.).
216. *See* Joy Taylor, *IRS Audit Red Flags: The Dirty Dozen*, KIPLINGER (Nov. 2012), http://www.kiplinger.com/article/taxes/T054-C000-S001-irs-audit-red-flags-the-dirty-dozen.html (showing that less than

There are many ways in which Congress has attempted to change the Internal Revenue Code to benefit the taxpayer.[218] One attempted change that generated some publicity during the 2012 Summer Olympics involved Olympic athletes owing the taxes on their winnings in London.[219] Athletes medaling at the games are required to report as income the raw value of the medal received and the amount of prize money awarded by the U.S. Olympic Committee.[220] Because taxing the great athletes that represented our country internationally did not seem fair to Republican Senator Marco Rubio, he introduced a bill to eliminate the taxes on prizes that United States athletes must pay on awards won in Olympic competition.[221] Sen. Rubio believed that the IRC too often punishes success.[222] President Obama and other members of Congress gave the bill a large amount of support, but the general public gave the bill a large amount of criticism.[223] Although the Olympic Tax Elimination Act died in committee and must now be reintroduced in the 113th Congress, the Act shows how our country attempts to relieve some people of taxes that are deemed to be unfair.[224]

The ability to pay doctrine is seen as one of the touchstones of the income tax system.[225] The doctrine means that the IRS will tax an individual based on their ability to pay the tax.[226] There are many situations where the IRS uses the ability to pay doctrine to allow a deferral on taxes.[227] This is most commonly seen by the progressive tax structure of the income tax system.[228]

2% of the returns each year are audited).

217. *See* David Cay Johnston, *IRS Lets Many Slide On Their Taxes*, SUNSENTINEL (Oct. 10, 1999), http://articles.sun-sentinel.com/1999-10-10/news/9910090505_1_tax-collectors-tax-delinquents-irs-tax (explaining how the IRS is too small to get every dime from taxpayers and, as a result, billions of dollars go uncollected each year).

218. *See, e.g.*, American Taxpayer Relief Act of 2012, Pub. L. No. 112240, 126 Stat. 2313 (2013).

219. Sara Dover, *Fla. Sen. Rubio Introduces Bill to Make Olympic Prizes Tax-Exempt*, CBS NEWS (Aug. 2, 2012, 12:43 PM), http://www.cbsnews.com/8301-201_162-57484774/fla-sen-rubio-introduces-bill-to-make-olympic-prizes-tax-exempt/.

220. *See id.* (Gold medal winners receive awards of $25,000; silver medal winders receive awards of $15,000; and bronze medal winners receive awards of $10,000. Medal winners also receive the medals, which are reported at fair market value of the medal: "the value of a gold medal is about $675, silver is worth $385 and a bronze medal is worth under $5.").

221. S. 3471, 112th Cong. (2012); *see id.*

222. *See* Dover, *supra* note 211.

223. *See* Matthew Yglesias, *Olympic Tax Elimination Act Supported By Barack Obama, Marco Rubio*, HUFFINGTON POST (Aug. 8, 2012, 9:00 AM), http://www.huffingtonpost.com/2012/08/08/olympic-medal-tax-break_n_1755344.html.

224. *See* 158 Cong. Rec. S6, 108 (2012) (showing that the bill gained additional sponsors but still has not left the committee).

225. *See, e.g.*, I.R.C. § 1 (2013) (showing the progressive tax structure through the rate tables).

226. *See generally* Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S.D. L. REV. 8, 59 (2001) (explaining how the doctrine is designed so that "those who can afford to pay more in taxes should be forced to pay more).

227. *See* I.R.C. § 1 (2013) (showing the progressive tax structure through the rate tables).

228. *See id.*

The ability to pay doctrine is also seen in Sen. Rubio's argument for eliminating the tax on the prizes of Olympic medal winners.[229] This comes as the medal winners are not only taxed on the monetary prize winnings, but also on the value of the medal itself.[230] Without the monetary winnings, the majority of athletes would be unable to pay the taxes associated with winning the Olympics.[231]

The ability to pay doctrine also arises in the Sonnabend estate situation.[232] Unfortunately for the estate, the ability to pay doctrine can be argued both ways.[233] For one, the estate, based on its entire value, has quite the ability to pay the estate tax on one more piece of art.[234] But looking at the "Canyon" piece individually, it would be irrational for the IRS to expect to receive any taxes with regards to the artwork.[235]

For example, assume that Ilena Sonnabend died with one asset, the "Canyon", and no debt or other obligations.[236] Also, assume that she had a will leaving "Canyon" to her daughter and nothing to her adopted son.[237] Because the piece cannot legally be sold, the executor of her estate would value the estate at $0.[238] The IRS, on the other hand, would want to value the estate at $65 million based on the IRS's hypothetical Chinese billionaire, and the IRS asks for $29 million in taxes, assuming no penalties.[239]

The question then becomes not which side's valuation is correct, but How could the estate possibly pay the taxes on this piece? The typical answer is to sell the assets to raise the money.[240] However, "Canyon" cannot be sold and any attempt to sell it on the black market that the IRS has created will cause multiple criminal issues for many of the people involved.[241] There is too much publicity now regarding this piece to secretly sell it for a large enough sum to pay the hefty tax bill, not to mention the family's desire to comply with the law and IRS.[242]

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229. *See* Dover, *supra* note 211 (The tax applies to "the raw value of the medal itself." The tax code is essentially punishing success.).

230. *Id.*

231. *See id.*

232. *See Pair Inherits $65M Sculpture, But Can't Sell It To Pay $29M Tax Bill*, FOXNEWS.COM (July 24, 2012), http://www.foxnews.com/us/2012/07/24/irs-art-collection-heirs-hope-to-settle-bizarre-tax-dispute-over-canyon-collage/ [hereinafter *Pair Inherits $65M Sculpture*] (showing how although the Sonnabend estate owes over $29 million in taxes, they cannot legally sell the asset to pay the tax).

233. *See* Kinsella, *supra* note 7; *Pair Inherits $65M Sculpture*, *supra* note 224.

234. *See* Kinsella, *supra* note 7 (showing how the Sonnabend estate is valued over $1 billion).

235. *See Pair Inherits $65M Sculpture*, *supra* note 224.

236. *See id.*

237. *See id.*

238. Novack, *supra* note 160.

239. Kinsella, *supra* note 7.

240. Julie Garber, *Where Will the Cash Come From to Pay Your Estate Tax Bill?*, ABOUT.COM, http://wills.about.com/od/understanding estatetaxes/tp/Paying-Estate-Taxes.htm (last visited Jan. 24, 2013) (showing that one option to pay estate taxes is to sell assets).

241. *See supra* Part IV.B.

242. *See The Value of Unsalable Art*, *supra* note 9.

In the hypothetical, the Sonnabend estate does not have the ability to pay the tax, nor does it have any assets to sell to pay the tax.[243] It is unfair to impose such a large amount of tax in a situation where there is no way it can be paid.[244]

The best solution for the IRS in this case, and the hypothetical, is to take the estate's valuation of $0, as that is truly what they could recover from the asset.[245] Although this issue could have been avoided by proper estate planning, the Sonnabend estate, including Ilena during her lifetime, complied with the Fish and Wildlife Service and the IRS fully throughout the entire process, thus doing no wrong.[246] The IRS has received enough tax from this estate that it seems fair to follow the ability to pay doctrine and allow the valuation of $0 of "Canyon."[247]

C. Disposal Before Death

For estates that might end up in the same situation as the Sonnabend estate, an option is to dispose of the item before death, whether by gift or charitable contribution.[248] By proper planning, a gift can avoid many of the taxes that would be imposed on the estate.[249] "By donating [the piece] before death, the value can be captured as a deduction, as opposed to a liability, with no means to recoup the estate taxes."[250] These actions could result in both productivity and profitability.[251]

VIII. CONCLUSION

Although the Sonnabend estate was set for trial in late 2012, the case ultimately settled in December 2012, resulting in the estate's donation of "Canyon" to New York's Museum of Modern Art.[252] In doing so, the estate chose to take their own valuation of $0, therefore receiving a charitable contribution of $0 but avoiding the hefty tax bill.[253] The IRS ultimately dropped its suit against the Sonnabend estate.[254]

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243. *See supra* Part IV.
244. *See supra* Part IV.
245. *See supra* Part IV.
246. *See The Value of Unsalable Art*, *supra* note 9.
247. *See id.*
248. Breus, *supra* note 165.
249. *See id.*
250. *Id.*
251. *Id.*
252. Eric Gibson, *Eric Gibson: The Illegal Eagle and a Baldly Grasping IRS*, WSJ, (Dec. 2, 2012, 6:10 PM) http://online.wsj.com/article/SB10001424127887324705104578151561581708972.html?mod=googlenews_wsj.
253. *Id.*
254. *Id.*

Although the Sonnabend estate gave in before the IRS, it is difficult to tell who the real winner is in this situation.[255] The estate lost a great piece of art in exchange for peace of mind and no more attorney fees.[256] It could also be argued that the IRS lost nearly $40 million in taxes.[257]

Whoever the true winner is, one thing is still clear: there is still an issue with the valuation of illegal assets. The only way to fix this problem is for the IRS to take every situation and evaluate it on a case-by-case basis. In this case, the estate could not gain any income from the property, legally or illegally.[258] The IRS created a Chinese billionaire who purchased the art just for the gamesmanship of attempting to hide it from U.S. authorities to argue its valuation.[259] This is so farfetched that it is difficult to understand. Even so, the Sonnabend estate would not break the law by selling it, as they are law-abiding citizens.[260]

There may be times when it is understandable and fair to use black market prices, but that typically occurs when there really is a black market available.[261] In this case, a black market did not exist because of the heightened security of the piece.[262] Therefore, there could be no black market value and the value should be zero.[263]

255. *Id.*
256. *See id.*
257. *See id.*
258. *See id.*
259. *See id.*
260. *See id.*
261. *See supra* Part IV.
262. *See supra* Part IV.
263. *See supra* Part IV.