

## TAX AND TRUSTS & ESTATES UPDATE

January 2018

### [Estate Planning Cautions and Opportunities in the Aftermath of the Tax Cuts and Jobs Act of 2017](#)

The federal estate, gift, and generation-skipping (GST) tax exemption is now approximately \$11 million (the exact amount will be determined by the IRS and published in early 2018) under the Tax Cuts and Jobs Act of 2017 (the "2017 Tax Act") signed into law by President Trump on December 22, 2017. The 2017 Tax Act may significantly impact some existing estate plans, and it also offers some significant transfer tax opportunities for individuals with large estates (keeping in mind, nevertheless, that these more generous exemptions are scheduled to expire on December 31, 2025). Specifically, for individuals (especially married couples) with existing wills or revocable trusts that contain provisions that mandate funding of certain types of trusts by way of a formula tied to the federal or state estate tax exemption amount, their estate plan may no longer operate as intended under this new law. A will or revocable trust that contains references to "credit shelter" "bypass trust," "exemption trust," "applicable credit amount," "marital trust," "spousal trust," "family trust," "marital deduction trust," "A trust /B trust," or "QTIP trust" will likely contain this sort of formula. As a result, individuals whose wills or revocable trusts include these funding formulas should review current estate planning documents in early 2018.

### [Existing Testamentary Plans of Individuals Residing in New Jersey](#)

As we've noted in prior Updates, beginning on January 1, 2018, the New Jersey estate tax is repealed in its entirety (although, the New Jersey inheritance tax, which is levied on property left to non-lineal relatives or unrelated individuals, remains in effect). A New Jersey resident who dies in 2018 with a will or revocable trust that provides for the funding of a trust or bequest equal to the federal exemption will now fund that trust with up to approximately \$11 million, potentially leaving less money than anticipated (or possibly nothing) outright to a surviving spouse, or to a marital trust for a spouse's benefit. Any funding limitation in a will or revocable trust that limited the exemption trust to the New Jersey estate tax exemption would now be an ineffective tool for limiting funding, since the New Jersey estate tax is gone. Moreover, New Jersey couples, or couples who expect to migrate to New Jersey or other states that do not have an estate tax, who have combined assets of less than \$22 million and whose wills or revocable trusts require the full use of the federal estate tax exemption should consider more flexible estate plans than what may currently be in place. These more flexible plans may provide for what are known as "QTIP" or "disclaimer" trusts at the first spouse's death that permit post-mortem adjustments for optimal tax planning.

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### **Existing Testamentary Plans of Individuals Residing in New York**

In addition to concerns similar to those noted above for New Jersey residents, New Yorkers have an additional concern since there is now a very significant mismatch between the federal exemption and the New York exemption (which is presently only \$5,250,000 until January 1, 2019, at which time it will increase to \$5,600,000, rising annually thereafter with inflation based on the law in effect prior to the passage of the 2017 Tax Act). For individuals with documents in place that mandate the full use of the federal exemption, if the first spouse dies prior to updating his or her will to limit the funding of the exemption trust to the New York exemption amount, New York estate taxes will be incurred at the first spouse's death. These taxes can be especially punitive in light of the so called "cliff" whereby a taxable estate exceeding 105% of the New York exemption amount is denied any use of the New York exemption. A more flexible plan that does not mandate the full use of the federal exemption could at the very least delay, and potentially avoid, New York state estate taxes (although full funding of the exemption trust in some cases may be worth the up-front state death tax cost for New York residents).

### **Formula Bequests for Generation-Skipping and Charitable Gifts**

For individuals whose wills or revocable trusts mandated full use of the federal generation-skipping transfer (GST) tax exemption, the increase in that exemption to approximately \$11 million may cause more of their estates to pass down to future generations (grandchildren and more remote descendants) than they intended. In other cases, where full use of GST exemptions is desired, clients may need to re-arrange their assets to allow both spouses to more easily utilize the increased GST exemptions. Either way, plans designed to utilize the GST exemption, should be revisited at this time to see if the amount of the generation-skipping disposition is still appropriate.

Some individuals may also have provisions in their wills or revocable trusts mandating that amounts in excess of the applicable federal estate tax exemption be given to charity (so as to avoid any federal estate tax on the entire estate). With the substantial increase of the federal exemption, these formulas may now leave nothing at all to charity (or too much to the recipient of the federal exemption amount). These plans should be revisited to ensure that the client's charitable goals are still achieved upon death.

### **Planning Opportunities**

Individuals who have already used up their gift tax exemptions will now have the ability to utilize the larger exemption amounts to pass more of their wealth currently without incurring any gift, estate or GST tax. But please bear in mind that the new law sunsets after December 31, 2025 (unless Congress acts in the meantime to extend it). Individuals in New Jersey should also be mindful of the incoming new administration in Trenton, and the possibility that the New Jersey estate tax may be restored in the future. Planning opportunities include the following:

- Individuals who have previously utilized gift and/or generation-skipping exemptions and who still have significant taxable estates notwithstanding increased exemptions should consider aggressive planning to take advantage of the increased gift and generation-skipping exemptions before the scheduled sunset date of these increased exemptions. Ultra-high net worth individuals may consider maximizing these additional benefits through the use of gifts and/or leveraged sales of assets to "grantor trusts" for income tax purposes. Where possible, these transfers may include fractional, non-controlling equity interests where discounts for minority interest and lack of marketability might be applicable. As the details of what assets will be transferred are being worked out, consideration should be given to the loss of an income tax basis step-up of gifted assets. Also, the level of additional gift planning that is appropriate should be looked at on a case by case basis, with various factors being considered, and the flexibility of using a spousal lifetime access trust may provide some additional comfort for those who are considering these larger gifts.
- Continued gift planning (annual gifts, qualified education and medical expenses), use of grantor retained annuity trusts, and charitable planning should continue for those who have estates well in excess of the increased exemptions or those who have concerns that the exemptions will be rolled back.

- With increased GST exemptions, there may be benefits to making existing trusts (that are not currently fully exempt from the GST tax) into completely GST exempt trusts. This could be done by a “late allocation” of GST exemption to an existing trust.
- Families should consider a fresh review of estate plans to see where aggressive planning opportunities are appropriate and where planning can be simplified if unnecessary to secure transfer tax benefits. In all cases flexibility will be key given the possibility that these new rules may not be available forever.

As we turn the page to 2018, all individuals are advised to take a look at their estate plans to see if they are affected in any of the unintended ways noted above.

**WE ARE EXCITED TO SHARE THAT WE HAVE MOVED OUR NEW YORK OFFICE**

Effective January 29<sup>th</sup>, our New York office has moved to:  
1185 Avenue of the Americas  
3rd Floor  
New York, NY 10036

We're located at Sixth Avenue, between 46<sup>th</sup> Street and 47<sup>th</sup> Street. Reception is located on the 3rd floor.

Our telephone number in New York remains the same: 212.763.6464.

We are looking forward to seeing you at our new location in New York.

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