Proskauer

Personal Planning Strategies

January 2021

Consider Reviewing and Updating Previously Executed LLC Agreements and Partnership Agreements

After the flurry of estate planning activity at the end of 2020, particularly the transfer of entity interests, such as limited partnerships and limited liability companies, we want to revisit the issues raised by the Tax Court's decision in *Estate of Powell v. Commissioner*. In this decision, the Tax Court agreed with the IRS that a donor's retention of certain powers over distributions in a limited partnership agreement (including the right to vote in favor of dissolution) were sufficient to make the entirety of the limited partnership includable in the donor's estate, notwithstanding the donor's prior gift of an interest in the limited partnership.

While the case involved aggressive death bed planning, including a host of "bad facts," clients should consider reviewing their existing family limited partnership agreement and family LLC agreements, especially where they may have transferred interests in those partnerships or LLCs to descendants, other family members or trusts for the benefit of either.

If you would like to discuss your prior planning and options to minimize your risks of estate tax inclusion post-*Powell*, please do not hesitate to call us so that we can review your documents and discuss options for revisions to these agreements.

Estate, Gift and GST Tax Update: What This Means for Your Current Will, Revocable Trust and Estate Plan

The estate and gift tax regimes have been permanent and unified since the passage of The American Taxpayer Relief Act of 2012 (the "2012 Act"). In 2017, the Tax Cuts and Jobs Act (the "2017 Act") significantly increased the estate, gift and generation-skipping transfer ("GST") tax exemptions, which are scheduled to continue to be increased for inflation through December 31, 2025.

Tax Exemption Inflation Increases for 2021

For 2021 the increases under the 2017 Act are as follows:

- In 2021, there is an $11,700,000 federal estate tax exemption and a 40% top federal estate tax rate.
- In 2021, there is an $11,700,000 GST tax exemption and a 40% top federal GST tax rate.
- In 2021, the lifetime gift tax exemption is $11,700,000 and a 40% top federal gift tax rate.
- In 2021, the annual gift tax exclusion is $15,000.

Note that the increased exemption is scheduled to sunset on December 31, 2025. Under final regulations issued by the IRS and Treasury, it was clarified that the government will not claw back amounts given away between 2018 and 2025 with respect to someone who dies in 2026 or beyond when the gift and estate tax exemptions are set to return to a $5 million exemption, indexed for inflation, which applied under the 2012 Act.

Under current law, these increased exemptions under the 2017 Act create opportunities to make larger lifetime gifts, to leverage more assets through a variety of estate planning techniques (such as a sale to a grantor trust) and to shift income-producing assets to individuals such as children or grandchildren who may be in lower income tax brackets and/or reside in states with a low income tax rate or no state income tax.

In particular, those who used substantially all of their exemptions prior to 2018 should consider making additional lifetime gifts to utilize the increased exemptions before they sunset at the end of 2025.

In light of the results of the 2020 federal elections, there is a possibility that the 2017 Act will be amended or repealed prior to 2025. Such an amendment, repeal or other change in the law could be effective as of January 1, 2021 (or some other time in 2021).

Accordingly, those who have not already utilized the increased exemption but are considering doing so in 2021 should call us to discuss the options for making gifts in 2021 while accounting for the possibility that the law and available exemption may change at any time.

How do these changes affect your existing Proskauer estate planning documents?

Our estate planning documents are drafted to be flexible and, in general, their overall structure remains unaffected by the increased exemption amounts. Still, there may be instances where you will want to update your documents.

It should be noted that while the estate tax exemption is portable among spouses at death, the GST tax exemption is not portable. Also, most states that have separate state estate tax regimes (such as Connecticut, Massachusetts and New York) do not permit portability. This creates an extra level of complication. Use of other estate planning options, such as bypass trusts at the first death of a married couple, may be most useful where these limits on portability are applicable.

Additionally, if you are a married couple and live in a state with a state estate tax (or own real property in a state with a state estate tax, such as Connecticut, Massachusetts or New York), there may be provisions that should be added to your documents which could save state estate taxes at the death of the first spouse.

Please do not hesitate to call us so that we can review your documents and make sure that they are up to date and reflect your current wishes.

Gift Tax Update

Exploit the Gift Tax Annual Exclusion Amount

In 2021, the gift tax annual exclusion amount per donee will remain $15,000 for gifts made by an individual and $30,000 for gifts made by a married couple who agree to "split" their gifts.

There is plenty of time to take advantage of your remaining 2021 gift tax exclusion amount, being $15,000 for gifts made by an individual and $30,000 for gifts made by a married couple who agree to "split" their gifts, but in all cases, you should ensure that gifts are "completed" before December 31, 2021.

In lieu of cash gifts, consider gifting securities or interests in privately held companies or other family-owned entities. The assets that you give away now may be worth significantly less than they once were, and their value hopefully will increase in the future. So the $30,000 gift that your spouse and you make in 2021 may have a built-in discount that the Internal Revenue Service cannot reasonably question. That discount will inure to the benefit of your beneficiaries if the value of those assets rises.

Your annual exclusion gifts may be made directly to your beneficiaries or to trusts that you establish for their benefit. It is important to note, however, that gifts to trusts will not qualify for the gift tax annual exclusion unless the beneficiaries have certain limited rights to the gifted assets (commonly known as "Crummey" withdrawal powers). If you have created a trust that contains beneficiary withdrawal powers, it is essential that your Trustees send Crummey letters to the beneficiaries whenever you (or anyone else) make a trust contribution.

If you have created an insurance trust, remember that any amounts contributed to the trust to pay insurance premiums are considered additions to the trust. As a result, the Trustees should send Crummey letters to the beneficiaries to notify them of their withdrawal rights over these contributions. Without these letters, transfers to the trust will not qualify for the gift tax annual exclusion.

2020 Gift Tax Returns

Gift tax returns for gifts that you made in 2020 are due on April 15, 2021. You can extend the due date to October 15, 2021 on a timely filed request for an automatic extension of time to file your 2020 income tax return, which also extends the time to file your gift tax return. If you created a trust in 2020, you should direct your accountant to elect to have your GST tax exemption either allocated or not allocated, as the case may be, to contributions to that trust. It is critical that you not overlook that step, which must be taken even if your gifts do not exceed the annual gift tax exclusion and would, therefore, not otherwise require the filing of a gift tax return. You should call one of our attorneys if you have any questions about your GST tax exemption allocation.

New Jersey Estate Tax Was Eliminated on January 1, 2018

On January 1, 2018, the New Jersey State estate tax was eliminated altogether.

New Jersey passed a law in fall of 2017 which significantly altered its estate tax for the apparent purpose of preventing the exodus of wealthy individuals. The law increased the New Jersey estate tax exemption, which was previously $675,000 per person, to $2,000,000 per person as of January 1, 2017. There is no New Jersey estate tax for New Jersey residents dying after January 1, 2018.

It is important to note that New Jersey's inheritance tax has not been repealed by this law. Inheritances to spouses, children and grandchildren are not subject to New Jersey's inheritance tax. But the New Jersey inheritance tax is levied on inheritances passing to siblings, nieces, nephews and other unrelated individuals so bequests to certain beneficiaries may still be subject to inheritance tax despite the changes to New Jersey's estate tax.

If you wish to discuss any aspect of the 2018 law as it relates to your estate planning, please contact one of the lawyers in the Private Client Services Department at Proskauer.

New York Raises Basic Exclusion Amount to $5,930,000

As of January 1, 2021, the amount of property that will be able to pass free of New York State estate tax will rise to $5,930,000. Almost seven years ago, the New York State legislature passed, and New York Governor Andrew M. Cuomo signed, the Executive Budget for 2014-2015, which significantly altered New York's estate tax. The changes to the New York estate tax were made for the ostensible purpose of preventing the exodus of wealthy individuals from New York to more tax-favored jurisdictions, but the law will likely not have the desired effect.

The law increased the New York basic exclusion amount, which was previously $1 million per person. This increase was gradually made through January 1, 2019, after which the New York basic exclusion amount is equal to the federal exemption amount under The American Taxpayer Relief Act of 2012 (the "2012 Act").

One of the most significant provisions in the law, however, is that no New York basic exclusion amount will be available for estates valued at more than 105% of the New York basic exclusion amount. In other words, New York estate tax will be imposed on the entire estate if the estate exceeds the exemption amount. Due to adjustments to the bracket structure in the new law, those estates that are valued at more than 105% of the New York basic exclusion amount will pay the same tax as they would have under the prior law.

For example, assume a person dies as a New York domiciliary on May 1, 2021, with an estate valued at $6.3 million and when the New York basic exclusion amount will be $5,930,000. Because the value of the estate exceeds 105% of the then available New York basic exclusion amount ($5,930,000 x 105% = $6,226,500), the estate will be subject to New York estate tax on the entire $6.3 million. The New York State estate tax bill will be $548,400, which is the same as the amount that would have been due under the old law. In contrast, if an individual had died with an estate valued at $5.8 million, her estate would owe no New York estate tax under the new law because the New York basic exclusion amount will be applied to her estate. Under the old law, however, the decedent's estate would still have owed $486,800 in New York estate tax.

A significant change in New York law involves certain gifts made during a decedent's lifetime. New York has no gift tax. Prior to 2014, lifetime gifts were not subject to gift tax or included in the New York gross estate. Under the new law, gifts made within three years of a decedent's death were added back, increasing the New York gross estate, and thus potentially being subject to New York estate tax at a maximum rate of 16%. This was scheduled to sunset in 2019, but it was extended through 2026 as part of the New York Fiscal Year 2020 Budget.

However, the add back does not include gifts made (a) before April 1, 2014, (b) between January 1, 2019 and January 15, 2019, (c) on or after January 1, 2026, or (d) gifts made during a time when the decedent was not a resident of New York State. Moreover, since New York does not have a gift tax, it is usually more beneficial for New Yorkers to give away assets during their lifetimes in order to potentially avoid New York estate tax attributable to those assets at their deaths.

These changes in New York law present further estate planning opportunities using bypass trusts to set aside New York's basic exclusion amount ($5,930,000 after January 1, 2021 and before January 1, 2022 for New York State estate tax purposes). The proper disposition of the basic exclusion amount is the cornerstone of estate planning for married couples. Significant tax savings can be achieved if the basic exclusion amount is set aside at the death of the first spouse, therefore "bypassing" estate taxation at death to the surviving spouse. In addition, any growth that occurs in the trust also escapes estate taxation at the death of the surviving spouse. As New York's basic exclusion amount rises, the potential tax benefits from employing bypass trusts increase as well.

If you wish to discuss any aspect of the new law as it relates to your estate planning, please contact one of the lawyers in the Private Client Services Department at Proskauer.

Connecticut Estate Planning Update

Connecticut Raises Basic Exclusion Amount Passing Free From Estate and Gift Tax to $7,100,000 in 2021

As of January 1, 2021, the Connecticut basic exclusion amount increased to $7,100,000 per person (up from $5,100,000 per person in 2020). The Connecticut basic exclusion amount is set to increase to $9,100,000 starting in 2022. Starting in 2023, the Connecticut basic exclusion amount is set to equal the federal exemption amount

In lieu of cash gifts, consider gifting securities or interests in privately held companies or other family-owned entities. The assets that you give away now may be worth significantly less than they once were, and their value hopefully will increase in the future. So the $30,000 gift that your spouse and you make in 2021 may have a built-in discount that the Internal Revenue Service cannot reasonably question. That discount will inure to the benefit of your beneficiaries if the value of those assets rises.

Time Period	Connecticut Basic Exclusion Amount From Estate and Gift Tax
Prior to January 1, 2018	$2,000,000
January 1, 2018 to December 31, 2018	$2,600,000
January 1, 2019 to December 31, 2019	$3,600,000
January 1, 2020 to December 31, 2020	$5,100,000
January 1, 2021 to December 31, 2021	$7,100,000
January 1, 2022 to December 31, 2022	$9,100,000
2023 and beyond	Equal to the federal exemption amount

The increased Connecticut basic exclusion amount increases the potential tax benefits from employing bypass trusts in estate plans. The proper disposition of the basic exclusion amount is the cornerstone of estate planning for married couples. Significant tax savings can be achieved if the basic exclusion amount is set aside at the death of the first spouse, therefore "bypassing" estate taxation at death to the surviving spouse. In addition, any growth that occurs in the trust also escapes estate taxation at the death of the surviving spouse.

The increased Connecticut basic exclusion amount also provides additional opportunities for lifetime gifting. In light of the uncertainty of the future of the federal exemption amount under the new administration, there could be benefits to using the increased Connecticut basic exclusion amount prior to death.

If you wish to discuss the increased Connecticut basic exclusion amount as it relates to your estate planning, please contact one of the lawyers in the Private Client Services Department at Proskauer.

California's Proposition 19

Proposition 19 was passed in the November election. It makes a number of changes to California law that impact the ability of parents to transfer real property to children without that property being reassessed for property tax purposes. The law applies to transfers of real property after February 15, 2021.

Existing Law Pre-Prop 19

Before Prop 19 takes effect, parents were allowed to transfer real estate in two circumstances to children (including trusts for their benefit) without the transfer being deemed a "change in ownership" for property tax purposes. That means that the transfer could take effect with the transferee child keeping the transferee parent's property tax base. In English, that means property taxes would remain unchanged.

Those two circumstances were:

1. Any transfer of a principal residence to children (or trusts for their benefit) was completely exempt from property tax reassessment (the "Principal Residence Exception"). Children did not have to reside in the residence after the transfer for this exception to apply.

2. Any transfer of up to $1,000,000 of assessed value of other property to children (or trusts for their benefit) was also exempt from property tax reassessment (the "Other Property Exception").

The exceptions were only available for transfers of real property, not for interests in entities owning real property. For that reason, some parents kept properties outside of entities so that these exceptions would be available to them.

Prop 19 Changes

Proposition 19 eliminates the Other Property Exception in its entirety.

The Principal Residence Exception is limited in two ways:

1. Children must reside in the principal residence after the transfer in order to be eligible for the exception.
2. If the increase in value of the principal residence at the time of transfer is less than $1,000,000 more than its assessed value, so long as the children reside in the residence after the transfer there is no property tax reassessment. However, if the increase in value of the principal residence at the time of the transfer is greater than $1,000,000 more than the assessed value, the property is reassessed at its fair value minus $1,000,000 (so long as the children reside there after the transfer). (The $1,000,000 amount is adjusted by inflation according to the statute each year.)

If you would like to make a transfer that takes advantage of the existing rules before Proposition 19 takes effect, you should do so before February 16, 2021.

Related Professionals

- **Albert W. Gortz**
- **Nathaniel W. Birdsall**
  Partner
- **Stephanie E. Heilborn**
  Partner
- **Henry J. Leibowitz**
  Partner
- **Jay D. Waxenberg**
  Partner