Proskauer

Personal Planning Strategies

November 2023

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 is scheduled to continue to be increased for inflation through December 31, 2025 (only two years away). And despite various proposals to lower the estate, gift and GST tax exemptions, none of them were enacted and thus the exemptions will increase for inflation in 2024 as set forth below.

Tax Exemption Inflation Increases for 2024

For 2024, the increases under the 2017 Act are as follows:

- In 2024, there is a $13,610,000 federal estate tax exemption and a 40% top federal estate tax rate. This is a $690,000 increase from the prior year.
- In 2024, there is a $13,610,000 GST tax exemption and a 40% top federal GST tax rate.
- In 2024, there is a $13,610,000 lifetime gift tax exemption and a 40% top federal gift tax rate.
- In 2024, the annual gift tax exclusion amount increases by $1,000 to $18,000.

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 low income tax rates or no state income tax.

In particular, individuals who used substantially all of their exemptions should consider making additional lifetime gifts to take advantage of the increased exemption amounts before they sunset at the end of 2025.

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 account for 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 of their state estate tax exemption amount. This creates an extra level of complication. Use of estate planning vehicles, 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 incorporated in your estate planning 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 2024, the gift tax annual exclusion amount per donee will increase to $18,000 for gifts made by an individual and $36,000 for gifts made by a married couple who agree to “split” their gifts.

There is plenty of time to take advantage of your remaining 2023 gift tax exclusion amount of $17,000 for gifts made by an individual and $34,000 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, 2023.

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 currently be depressed in value. The $34,000 gift that your spouse and you make in 2023 (and the $36,000 gift that your spouse and you make in 2024) 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 appreciate.

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. For a more detailed explanation of Crummey withdrawal powers, please see Crummey Withdrawal Notices – Recommended Practices at Personal Planning Strategies - Insights - Proskauer Rose LLP.

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.

2023 Gift Tax Returns

Gift tax returns for gifts that you made in 2023 are due on April 15, 2024. You can extend the due date to October 15, 2024 on a timely filed request for an automatic extension of time to file your 2023 income tax return, which also extends the time to file your gift tax return. If you created a trust in 2023, 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 York Estate Planning Update

New York Basic Exclusion Amount to Increase in 2024

As of January 1, 2024, the amount of property that will be able to pass free of New York State estate tax will increase to approximately $6,711,600 (New York has not yet released its adjusted estate tax exemption for 2024).

New York State enacted legislation significantly altering New York's estate tax. The law increased the New York basic exclusion amount, which was previously $1 million per individual. This increase was gradually made through January 1, 2019, after which the New York basic exclusion amount corresponded to the federal exemption amount under The American Taxpayer Relief Act of 2012 (the "2012 Act"), but without regard to the Tax Cuts and Jobs Act of 2017. That essentially means that the New York State estate tax exemption is approximately equal to half of the federal estate tax exemption.

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, 2024, with an estate valued at $7.1 million and when the New York basic exclusion amount will be approximately $6,711,600. Because the value of the estate exceeds 105% of the then available New York basic exclusion amount ($6,711,600 x 105% = $7,047,180), the estate will be subject to New York estate tax on the entire $7.1 million. The New York State estate tax liability will be $650,800, 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 $6.7 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 have paid $599,600 in New York estate tax.

While New York has no gift tax, gifts in excess of annual exclusion gifts made within three years of an individual's death are included in the gross estate and subject to New York estate tax. The gift add back does not include gifts made (a) three years prior to date of death, (b) on or after January 1, 2026, or (c) 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 York residents to gift assets during their lifetimes in order to potentially avoid New York estate tax attributable to those assets at their deaths.

The changes in New York law present further estate planning opportunities using bypass trusts to set aside New York's basic exclusion amount (approximately $6,711,600 after January 1, 2024 and before January 1, 2025 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, thereby "bypassing" estate taxation at the death to the surviving spouse. In addition, any appreciation of assets 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 Match Federal Estate and Gift Tax Exemption Amount

As of January 1, 2023, the Connecticut basic exclusion amount was raised to equal the federal estate and gift tax exemption amount (the “federal exemption”).

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
January 1, 2023 and beyond	Equal to the federal exemption

In the last decade, the Connecticut basic exclusion amount lagged far behind the federal exemption. The difference was amplified by the passing of the Tax Cut and Jobs Act in 2017 which significantly increased the federal exemption. The Connecticut basic exclusion amount is now tied to the federal exemption.

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, especially for those who were previously unable to utilize the full federal exemption due to the lower Connecticut basic exclusion amount. Note that the increased federal exemption under the Tax Cuts and Jobs Act is set to sunset on December 31, 2025, at which time the federal exemption (and thus, the Connecticut basic exclusion amount) will revert to $5,000,000, as adjusted for inflation. In light of this, there are 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.

Massachusetts Estate Planning Update

Massachusetts Doubles Estate Tax Exemption to $2 Million Retroactive to Decedents Dying on or After January 1, 2023

Massachusetts Governor Maura Healey signed new legislation titled “An Act to Improve the Commonwealth’s Competitiveness, Affordability, and Equity” (the “Act”) into law on October 4, 2023, that retroactively increases the Massachusetts estate tax exemption from $1 million to $2 million for individuals dying on or after January 1, 2023.

While still significantly lower than the federal estate tax exemption (currently, $12.92 million, but is scheduled to decrease without further legislative action on January 1, 2026), the Act provides some relief for the estates of Massachusetts residents and for non-residents with real estate or tangible personal property located in Massachusetts at the time of their death.

Notably, the Act eliminates what some refer to as the “cliff effect” previously applicable to decedents with taxable estates in excess of $1 million. Previously, if a decedent died with a taxable estate in excess of $1 million, the entire taxable estate was subject to the Massachusetts estate tax, rather than just the dollar in excess of the $1 million exemption. This prior scheme resulted in a taxable estate of $1 million paying no Massachusetts estate tax, while a taxable estate of $1,100,000 would be subject to a Massachusetts estate tax of $38,800 (a 38.8% marginal tax rate on the excess $100,000). The Act now provides for a true exemption, establishing a $99,600 credit against the tax, making the first $2 million of a taxable estate exempt from Massachusetts estate tax regardless of the total

value of the taxable estate, *and* only the amount over $2 million will be subject to Massachusetts estate tax starting at a rate of 7.2% and maxing out at a rate of 16%.

For those Massachusetts decedents owning real or tangible personal property outside of the Commonwealth at the time of their death, the Act (finally) codifies how to account for such property in determining the Massachusetts estate tax. Previously, practitioners heavily relied on Massachusetts case law (specifically, the Massachusetts Probate and Family Court case, *Dassori v. Commissioner of Revenue)* and cited such when filing a Massachusetts estate tax return. Now, practitioners can rejoice as the Act specifically provides that a taxable estate of a Massachusetts resident owning real or tangible personal property outside of the Commonwealth will have its Massachusetts estate tax reduced proportionately by the portion of the decedent's overall estate made up of the out-of-state real or tangible personal property.

It is important to note, that while the federal estate tax exemption is adjusted annually for inflation (until its scheduled sunset date of January 1, 2026), the Act does not provide for similar treatment of the new increased $2 million Massachusetts estate tax exemption. Further, unlike the ability to “port” a decedent’s unused federal estate tax exemption to the surviving spouse, the Massachusetts estate tax exemption is not “portable” and if not used at the decedent’s death, the remaining amount, if any, is lost.

Finally, the Act became effective as of January 1, 2023, and applies to decedents having died on or after January 1, 2023. For those estates having already filed an estate tax return before October 4, 2023 when the Act was signed into law, executors should speak with an attorney about obtaining a refund and/or amending the previously filed return. Similarly, for estates that have yet to file a Massachusetts estate tax return, executors should consider filing an extension while the Massachusetts Department of Revenue works on revising its forms and issuing guidance.

If you wish to discuss the increased Massachusetts estate tax exemption as it related to your estate planning, please contact one of the lawyers in the Private Client Services Department at Proskauer.

New Jersey Estate Planning Update

New Jersey Estate Tax Was Eliminated on January 1, 2018

On January 1, 2018, the New Jersey State estate tax was eliminated altogether for the apparent purpose of preventing the exodus of wealthy individuals from the State.

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.

Make Sure That You Take Your IRA Required Minimum Distributions by December 31, 2023

If you are the owner of a traditional IRA, you must begin to receive required minimum distributions (“RMDs”) from your IRA and, subject to narrow exceptions, other retirement plans, by April 1 of the year after the year in which you turn 73 (your required beginning date). Previously, the starting age was 70 ½ and then was raised to 72. You must receive those distributions by December 31 of each year. If you are the current beneficiary of an inherited IRA from someone who died before 2020, you must take RMDs by December 31 of each year regardless of your age. The RMDs must be separately calculated for each retirement account that you own, and you, not the financial institution at which your account is held, are ultimately responsible for making the correct calculations. Please consult us if you need assistance with your RMDs.

If you are the current beneficiary of an inherited IRA from someone who died in 2020 or after, the SECURE Act changed the RMD distribution rules. If the decedent died before his or her required beginning date then you must receive distributions under the 10-year rule. The 10-year rule requires that the full distribution of your IRA must be made by December 31 of the year containing the 10th anniversary of the decedent’s death but you are not required to take RMDs each year. But if the decedent died after his or her required beginning date then you must take RMDs each year following the year of the date of death and the full balance of the IRA must be distributed by December 31 of the year containing the 10th anniversary of the decedent’s death. Additionally there are some narrow exceptions to these rules. If you wish to discuss any aspect of how the RMD rules changed as a result of the SECURE Act, please contact one of the lawyers in the Private Client Services Department at Proskauer.

Understanding the Inflation Adjustments to the Estate, Gift and Generation-Skipping Transfer Exemption Amounts

The gift and estate tax basic exclusion amount (the “BEA”) is the amount that a person can give or bequeath to other people without triggering gift tax during life or estate tax upon death. Since 2018, the BEA has been equal to $10,000,000 adjusted for inflation since 2010. This year, it is $12,920,000 per person. But due to the inflation adjustment built into the formula for determining the BEA in any given year, the size of the BEA will increase considerably on January 1 of each of the next two years. The Internal Revenue Service has not yet announced the BEA for 2024, but it is expected to be $13,610,000 — a $690,000 increase. It is too soon to estimate the 2025 inflation adjustment with precision, but it will likely be around $400,000, which will bring the BEA to about $14,000,000 per person, more than $1,000,000 higher than it is today. The exemption from generation-skipping transfer tax – the tax that applies to transfers where the transferee is at least two generations below the transferor – will increase by the same amount.

High-net-worth individuals stand to benefit from these inflation adjustments. Those who have used up all or a substantial portion of their current gift tax exclusion amounts will be able to move additional assets out of their estates ahead of the scheduled 50% reduction in the BEA on January 1, 2026. Individuals with a large amount of unused exclusion soon will have even more. For individuals with estates that are close to, or just above, the current exclusion level, these inflation adjustments may mean the difference between a significant estate tax liability and none at all.

It is possible for high-net-worth individuals to take advantage of the looming inflation adjustments even before they take effect. For example, imagine that John has used up $12,800,000 of gift tax exclusion by making a large gift in 2022. John would like to take advantage of depressed stock market valuations by transferring stock to his children now, before the market recovers. A grantor retained annuity trust (“GRAT”) (this article and our podcast address GRATs in greater detail) would be an attractive option for someone like John. But, given the coming inflation adjustments, John might consider two other options. First, he can wait until January, when the 2024 inflation adjustment takes effect, and simply gift $810,000 of stock to his children (or a trust for their benefit) and then make an additional gift in January 2025 when the 2025 inflation adjustment takes effect. Or, he can loan $1,200,000 of stock to an intentionally defective grantor trust for his children’s benefit, knowing that he will likely have sufficient exclusion to forgive the loan in the not-too-distant future.

The coming inflation adjustments will also affect the size of the gift tax's annual exclusion amount, which is the amount that an individual can gift to another individual without incurring any gift tax or consuming any lifetime gift tax exemption in a particular year. In 2023, the annual exclusion amount is $17,000 per donor (or $34,000 for a married couple), but it will increase to $18,000 per donor (or $36,000 for a married couple) in 2024, and will likely increase further to $19,000 per donor (or $38,000 for a married couple) in 2025.

Related Professionals

- **Albert W. Gortz**
- **David Pratt**
  Partner
- **Mitchell M. Gaswirth**
  Partner
- **Andrew M. Katzenstein**
  Partner
- **Nathaniel W. Birdsall**
  Partner
- **Stephanie E. Heilborn**
  Partner
- **Henry J. Leibowitz**
  Partner
- **Caroline Q. Robbins**
  Partner
- **Jay D. Waxenberg**
  Partner
- **Ephrat S. Orgel**
  Special Trusts and Estates Counsel
- **Dara B. Howard**
  Associate