Proskauer

# Personal Planning Strategies

**November 2024**

## 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 as set forth below.

**Tax Exemption Inflation Increases for 2025**

For 2025 the increases under the 2017 Act are as follows:

- In 2025, there is a $13,990,000 federal estate tax exemption and a 40% top federal estate tax rate. This is a $380,000 increase from the prior year.
- In 2025, there is a $13,990,000 GST tax exemption and a 40% top federal GST tax rate.
- In 2025, there is a $13,990,000 lifetime gift tax exemption and a 40% top federal gift tax rate.
- In 2025, the annual gift tax exclusion amount increases by $1,000 to $19,000.

**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 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 lower 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 maximize the exemption amounts before the higher exemption sunsets 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

**Maximize the Gift Tax Annual Exclusion Amount**

In 2025, the gift tax annual exclusion amount per donee will increase to $19,000 for gifts made by an individual and $38,000 for gifts made by a married couple who agree to "split" their gifts.

There is plenty of time to take advantage of your remaining 2024 gift tax annual exclusion amount of $18,000 for gifts made by an individual and $36,000 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, 2024.

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 $36,000 gift that your spouse and you make in 2024 (and the $38,000 gift that your spouse and you make in 2025) may be eligible for a valuation discount. That discount will inure to the benefit of your beneficiaries if the assets appreciate in value.

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 - December 2018.

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.

**2024 Gift Tax Returns**

Gift tax returns for gifts that you made in 2024 are due on April 15, 2025. You can extend the due date to October 15, 2025 on a timely filed request for an automatic extension of time to file your 2024 income tax return, which also extends the time to file your gift tax return. If you created a trust in 2024, 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 Basic Exclusion Amount to Increase in 2025

As of January 1, 2025, the amount of property that will be able to pass free of New York State estate tax will increase to approximately $7,078,000 (New York has not yet released its adjusted estate tax exemption for 2025).

New York State enacted legislation significantly altering the 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.

New York adds a punitive mechanism for larger estates. One of the most significant provisions in the law 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 New York 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, 2025, with an estate valued at $7.5 million and when the New York basic exclusion amount will be approximately $7,078,000. Because the value of the estate exceeds 105% of the then available New York basic exclusion amount ($7,078,000 x 105% = $7,431,900), the estate will be subject to New York estate tax on the entire $7.5 million. The New York State estate tax liability will be $705,200, 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 $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 $638,000 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 $7,078,000 after January 1, 2025 and before January 1, 2026 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 |

| Time Period | Connecticut Basic Exclusion Amount From Estate and Gift Tax |
|---|---|
| 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 to December 31, 2023 | $12,920,000 |
| January 1, 2024 to December 31, 2024 | $13,610,000 |
| January 1, 2025 to December 31, 2025 | $13,990,000 |
| January 1, 2026 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, which may benefit descendants and future generations.

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 increased 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, 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 decedents 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, 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.

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

# Married Couples Can Have Their Cake and Eat Too! Spousal Lifetime Access Trusts (“SLATS”)

One impediment to the implementation of a dynasty trust (a trust for descendants which can go on for many generations) is the loss of access to the gifted funds. However, for individuals who are married, they may just be able to have their cake and eat it too.

A SLAT is a technique that can be utilized by a married couple who want to fully utilize their enhanced gift tax exemptions ($13,990,000 for each spouse in 2025), but also need (or desire) to retain access to the gifted funds. A SLAT is similar to a dynasty trust, except that the individual creating the SLAT also includes his or her spouse as a beneficiary of the trust. In situations where both spouses are seeking to fully utilize their exemptions, each spouse will create a SLAT (the "donor spouse") for the benefit of the other spouse and their children and more remote descendants. The donor spouse will then gift assets having a value up to his or her remaining exemption amounts to the SLAT. Transfers to the SLATs will be taxable gifts. Each spouse will be required to file a gift tax return to report the gift and to allocate an appropriate amount of GST tax exemption to the transfer. As with the dynasty trust, by allocating GST tax exemption to the full value of the transfers, the assets in the SLATs will pass from generation to generation without the imposition of transfer tax.

By including the spouse as a beneficiary of the SLAT, the beneficiary spouse will have direct access to the SLAT assets (as a beneficiary of the trust) and the donor spouse who made the gift to the trust will retain indirect access to the SLAT assets (as the spouse of a beneficiary). Thus, as long as both spouses are alive and married to each other, the marital unit will have access to all of the assets transferred to both SLATs. However, upon the death of the beneficiary spouse, or upon divorce, access to half of the assets will be lost to the donor surviving spouse because his or her descendants will be the only remaining beneficiaries of the SLAT that he or she created.

If a married couple owns assets in excess of two times the exemption amounts, but one spouse does not have sufficient assets in his or her individual name to fully utilize his or her exemption amounts, assets can be transferred between spouses as necessary to allow for the full utilization of both spouses' exemptions through the creation of two SLATs. This shifting of assets between spouses should not be subject to transfer tax as a result of the unlimited gift tax marital deduction. Although transferring assets between spouses is an effective way to ensure both spouses fully utilize their exemptions, clients may be reluctant to cede any control over the ultimate disposition of their assets by transferring them to a spouse — even if for purposes of implementing a SLAT structure.

SLATs need to be drafted carefully to avoid the so-called "reciprocal trust" doctrine. Under the reciprocal trust doctrine, if the SLATs created by each spouse for the benefit of the other have substantially similar terms, the IRS may argue that the SLATs should be "uncrossed," so that each spouse is deemed to have created a trust for his or her own benefit. If the IRS is successful, the intended planning will be defeated, as each spouse will be treated as having created a self-settled trust, which will be included in their respective estates for estate tax purposes upon death. To help reduce this risk, the SLATs should have — at a minimum — different independent trustees and the dispositive provisions should differ.


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