

Client Alert

Using Increased Exemptions While They Remain Available and Other Tax Planning Considerations

August 5, 2019

As a follow-up to our Client Alert on November 26, 2018, the Tax Cuts and Jobs Act (the “2017 Act”), enacted December 2017, doubled the gift/estate and generation-skipping transfer (“GST”) tax exemptions from \$5 million per person, indexed for inflation since 2010, to \$10 million per person, indexed for inflation since 2010. This year, the exemptions are \$11.4 million for an individual or \$22.8 million for a married couple.

Under current law, the gift/estate and GST tax exemptions are scheduled to revert to \$5 million per person, indexed for inflation, beginning on January 1, 2026. But the exemptions could be lowered sooner—perhaps below their pre-2017 Act levels—such as after the November 2020 elections. Moreover, a new Congress could attempt to make lower exemptions retroactive, and the sooner exemptions are used, the less likely any such attempt at retroactivity will be a concern.

If you have not used in full the increased exemptions, we suggest you contact us to discuss how they might best be used. We also should discuss whether there are planning opportunities for the use of exemptions of other family members including children and parents.

Supreme Court Reaffirms Limits on Ability of States to Tax Trust Income

On June 21, the Supreme Court issued its decision in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, a closely watched case on the constitutional limits of states’ ability to tax trust income. The Court unanimously held that North Carolina could not tax the undistributed income of a trust whose only connection to North Carolina was the residence of beneficiaries in the state. Those beneficiaries had no right to compel distributions from the trust and had not received distributions during the years at issue.

The case was a victory for the taxpayer, but its holding is narrow. The Supreme Court reaffirmed that states can tax trust income, provided that constitutional requirements are met, including that a state must have some minimum connection to the trust or the income it seeks to tax. Other than stating that states may tax trust income based on the residence of the trustee, the Supreme Court declined to address exactly what constitutes a minimum connection to a trust with undistributed income.

Increased Transfer Taxes on New York City Residences

New York recently enacted a new “supplemental” residential real estate transfer tax and increased the rates of New York State’s existing real estate transfer tax. Effective July 1, there are four transfer taxes for transfers of residences in New York City: (1) a transfer tax under NY Tax Section 1402 of up to 0.65% (under prior law, that tax was 0.4%), (2) a mansion tax under NY Tax Section 1402-a of 1% on properties worth \$1 million or more (unchanged from prior law), (3) a “supplemental” transfer tax under NY Tax Section 1402-b of up to 2.9% on residential property in New York City only (the top rate applies to properties worth \$25 million or more—there are six other rates that apply to properties worth between \$2 million and \$25 million) and (4) the New York City real property transfer tax under New York City Admin. Code Section 11-2102 of an additional 1.425% on properties worth \$500,000 or more (unchanged from prior law). Thus,

the aggregate transfer tax in New York City is now 5.975% for properties worth \$25 million or more. The Section 1402 transfer tax and the New York City real property transfer tax are payable by the seller while the mansion tax and supplemental transfer tax are payable by the buyer.

New York Not-for-Profit Membership Corporations Now Must Have Three Members

Effective July 1, not-for-profit membership corporations in New York are required to have at least three members, up from one under prior law.

August 2019 Interest Rates

The 7520 rate applicable to GRATs and charitable lead trusts is 2.20% for August 2019—the lowest it has been in more than two years. Similarly, the applicable federal rates (“AFRs”) for intra-family loans for August 2019 are quite low—for example, 1.87%, compounded annually, for a loan with a term that is over three years but not over nine years. If you have investments that are likely to outperform these rates, now is an excellent time to create a GRAT or charitable lead trust, or to make intra-family loans or refinance existing loans, in order to transfer any appreciation in excess of the relevant rate gift tax free.

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Trusts and Estates Group

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