

¶115 Estate, Gift, and Generation-Skipping Transfer Tax Exclusions Increased

NEW LAW EXPLAINED

Estate and gift tax exclusion doubled.— The basic exclusion amount for purposes of federal estate and gift taxes will be doubled from \$5 million to \$10 million, before adjustment for inflation, for the estates of decedents dying and gifts made after 2017 and before 2026 (Code Sec. 2001(c)(3), as amended by the Tax Cuts and Jobs Act of 2017. Accordingly, the estate and gift tax basic exclusion amount applicable to the estates of decedents dying and gifts made in 2018 will be \$11.2 million (based on the inflation-adjusted amount of \$5.6 million, as per Rev. Proc. 2017-58). For a married couple using portability, the maximum applicable exclusion amount would be doubled again to \$22.4 million.

EXAMPLE 1

Bruce Payne, a wealthy single individual dies in 2018 leaving a taxable estate of \$10 million. His estate will owe no federal estate taxes. Instead, if he had died in 2017, the estate tax payable would have been \$1,804,000.

EXAMPLE 2

Carol Cologne, a wealthy widow dies in 2018 leaving a taxable estate of \$20 million. Her late husband died earlier in 2018 having used only \$2 million of his available estate tax exclusion amount. Her estate will owe no federal estate tax. However, if the couple had died under the same circumstances in 2017, the estate tax payable would have been \$4,408,000.

COMMENT

Because the doubling of the estate and gift tax exclusion amount will expire for decedents dying and gifts made after December 31, 2025, the next several years present a tremendous opportunity for wealthy individuals and married couples to make large gifts, including those that leverage the amount of the available exclusion, such as those to grantor retained annuity trusts (GRATs).

COMMENT

According to the IRS Statistics of Income tables presenting data on estate tax return data for Filing Year 2016 (*https://www.irs.gov/statistics/soi-tax-stats-estate-tax-filing-year-tables*, see Table 1 showing data from estate tax returns filed in 2016, by tax status and size of gross estate), a total of 5,219 taxable returns were filed contrasted with 7,192 nontaxable returns. Of the taxable returns, 2,402 fell within the \$5 to \$10 million gross estate range, 1,293 in the \$10 to \$20 million range. Only 300 returns were filed with gross estates in excess of \$50 million. These statistics primarily reflect data from the estates of decedents who died in 2015, when the basic exclusion amount was \$5.43 million, but also include some returns for decedents who died in years prior to 2015, as well as a small number of estates with respect to deaths that occurred in 2016. The large increase in the basic exclusion amount after 2017 will no doubt lead to further decreases in the number of taxable estates.

GST tax exemption amount.— Because the exemption from the GST tax is computed by reference to the basic exclusion amount used for estate and gift tax purposes (Code Sec. 2631), the GST exemption



amount for GSTs occurring in 2018 will be \$10 million, before adjustment for inflation. Portability does not apply for purposes of the GST tax.

Corresponding adjustments with respect to prior gifts.— In addition to the increase in the basic exclusion amount, the 2017 Tax Cuts Act modifies the computation of gift tax payable and estate tax payable in cases where gifts have been made in prior years. (Code Sec. 2001(g), as amended by the 2017 Tax Cuts Act). With respect to the computation of gift tax payable, the tax rates in effect at the time of the decedent's death are to be used rather than the rates that were in effect at the time the gifts were made (Code Sec. 2001(g)(1), as amended by the 2017 Tax Cuts Act). And, the Secretary of the Treasury is directed to prescribe regulations clarifying the computation of estate tax payable in situations where the basic exclusion amount was different in the year of the decedent's death as opposed to the year when the prior gifts were made (Code Sec. 2001(g)(2), as amended by the 2017 Tax Cuts Act).

Inflation adjustments going forward.— A separate amendment (Act Sec. 11002 of the 2017 Tax Cuts Act (¶125)) requires that future inflation adjustments mandated throughout the Internal Revenue Code be made using the "Chained" Consumer Price Index for All Urban Consumers (C-CPI-U) rather than the CPI adjustment used under current law. This change, effective generally for tax years beginning after December 31, 2017, will tend to slow down inflation adjustments to provisions throughout the Code, including the estate and gift tax exclusion amounts.

COMMENT

Unless Congress takes action before then, for decedents dying and gifts made after 2025, the basic exclusion amount will revert to \$5 million, as adjusted for inflation under the C-CPI-U because, unlike many other provisions in the 2017 Tax Cuts a Act, the provision governing the inflation adjustment is not subject to sunset.

Effective date. The amendments made by this section are effective for decedents dying and for gifts and generation-skipping transfers made after December 31, 2017 (Act Sec. 11061(c) of the Tax Cuts and Jobs Act.