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Strategic Estate Planning Before 2026 BEA Change Can Protect Taxpayer Assets from Gift and Estate Tax

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In 2017, Congress enacted the Tax Cuts and Jobs Act (TCJA), which doubled the estate and gift tax exemption. Due to congressional cost requirements, this increase is set to expire on Jan. 1, 2026, reverting to pre-TCJA levels, indexed for inflation.

The Internal Revenue Code sets forth how much taxpayers may transfer during their lifetime or at death without incurring federal gift or estate taxes. This threshold is known as the Basic Exclusion Amount (BEA). Gifts to non-spouse donees reduce a taxpayer's available BEA, while any remaining BEA at death can shield assets from estate taxes. Transfers exceeding the BEA are subject to gift or estate taxes, with rates ranging from 18% to 40%.

The tax laws also allow taxpayers an annual gift tax exclusion of $18,000, which is the amount that can be given each year, per donee, without reducing their available BEA. The TCJA doubled the BEA from $5 million to $10 million (or $10 million to $20 million for married couples), adjusted for inflation, for the years 2018 through 2025. For 2024, the BEA is $13.61 million for individuals and $27.22 million for married couples.

Additionally, the government imposes a generation-skipping transfer tax (GST Tax) on transfers of property that skip a generation, designed to prevent avoidance of estate taxes by transferring assets directly to individuals who are a generation below their children. The GST Tax exemption is equal to the BEA and was similarly increased for the years 2018 through 2025.

In 2019, the U.S. Treasury issued Treasury Decision 9884, clarifying that taxpayers making gifts between 2018 and 2025 can choose between the BEA at the time of the gift or at death, whichever is higher. In other words, the government cannot claw back the bonus exemption that taxpayers used prior to Jan. 1, 2026.

For New York residents, gifting is further incentivized as New York has no gift tax and gifts made more than three years before death are not includible in the taxable estate. Thus, taxpayers must consider whether to take advantage of the bonus exemption.

Determining whether gifting today is beneficial requires careful consideration of broader financial objectives. For instance, young taxpayers should ensure that gifting does not deplete their assets. Similarly, retirees must strike a balance between strategic gifting and securing sufficient resources for retirement. In any case, to benefit from the increased BEA, the gifted amounts must exceed the anticipated reduced BEA of $5 million, indexed for inflation, and possibly up to the current BEA before the increased threshold expires. For example, a gift made before 2026 of $13 million will not be subject to gift or estate tax. If, on the other hand, the gift is made after 2026 when the BEA is estimated to be around $6 million, $7 million of the $13 million gift could be subject to estate tax when the donor dies.

Since transfers to spouses are exempt from estate or gift taxes by the unlimited marital deduction, the BEA can be used for transfers to other beneficiaries. For instance, taxpayers can make gifts to a Credit Shelter Trust or Spousal Lifetime Access Trust, which can provide income and, if desired, principal to the surviving spouse, as well as discretionary distributions to children.

Alternatively, income can be provided to the spouse during their lifetime, with the remaining assets passing to the children after the spouse's death. This ensures that the transferred amount goes to their beneficiaries free of estate or gift taxes.

Other estate planning alternatives include:

• **Dynasty Trusts.** These trusts are designed to last for many years and facilitate estate and gift tax-free transfers of wealth. Dynasty Trusts are established for the benefit of a taxpayer's descendants and take advantage of the BEA and/or GST Tax exclusion amount. Assets in Dynasty Trusts are removed from the taxpayer's estate for estate tax purposes, allowing successive generations to inherit funds free of estate taxes. Dynasty Trusts are unavailable in New York due to the Rule Against Perpetuities, but are allowed in other states, such as New Jersey, Delaware, South Dakota, and Alaska.

• **Grantor Retained Annuity Trust (GRAT).** Taxpayers can make a gift to a GRAT and receive a fixed income payment annually for a term of years. After the term ends, any remaining property in the GRAT can be distributed to other beneficiaries, such as children. For gift tax purposes, the value of the gift is calculated by subtracting the fixed payments from the transferred property's total value, reducing the value of the gift, possibly to zero, and any appreciation in the gifted assets goes to the beneficiaries free of estate and gift tax.

• **Charitable Lead Trust (CLT) or a Charitable Remainder Trust (CRT).** These trusts allow taxpayers to support charitable causes while receiving a tax deduction. In a CLT, assets are transferred to the trust, which makes payments of income to charitable beneficiaries for a specified term, after which remaining assets are distributed to non-charitable beneficiaries. In a CRT, income is first paid to non-charitable beneficiaries for a set term, with the remaining assets distributed to charities after the term ends. The income disbursed can be a fixed amount or a percentage of the trust's assets. With a CLT, the taxpayer receives a charitable income tax deduction for the present value of the income going to charity. Similarly, with a CRT, the taxpayer receives a charitable income tax deduction for the value of the remainder interest going to charity. Assets in a CLT or CRT are also removed from the taxpayer's estate for estate tax purposes.

Conclusion

As the expiration of the increased BEA approaches, it is important to consider strategic estate planning opportunities now. The BEA will decrease significantly in 2026, making it more challenging for taxpayers to protect assets from gift and estate taxes. Given the time-consuming nature of estate planning, taxpayers should work with an estate planning attorney to take advantage of the current planning opportunities.

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