Recent Developments in Estate Planning

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I. Any Legislative Developments?

A. Federal estate and gift tax exemption is $11.4 million [$11.58 million]—for now. The Tax Cuts and Jobs Act of 2017, signed by President Trump on December 22, 2017, doubled the estate, gift and generation-skipping transfer tax exemption, by increasing the exemption from its $5 million base to $10 million—$11.4 million in 2019, resulting from CPI adjustments. Rev. Proc. 2019-44, 2019-47 IRB 1, announced that the exemption will be $11.58 in 2020. Effectively, this means $23.16 million in exemptions for spouses.

1. **Higher exemption will "sunset" at the end of 2025**. Thanks to the Senate's Budget Reconciliation Act, the higher exemption will continue through 2025. Effective January 1, 2026, the exemption will revert to the former base level of $5 million (plus CPI adjustments) unless Congress extends the higher exemption.

2. **… if not sooner**. The exemption may drop sooner than 2026, depending on the outcome of the 2020 election. In December 2018, Sen. Elizabeth Warren (D. Mass.) introduced a bill that would lower the exemption to $3.5 million. On January 31, 2019, Senator Bernie Sanders introduced the "**For the 99.8 Percent Act**," which would (i) reduce the estate tax exemption to $3.5 million (its level in 2009) and the gift tax exemption to $1 million (neither would be subject to inflation adjustments), (ii) increase the estate and gift tax rates, (iii) virtually eliminate minority and other valuation discounts for interests in entities that are not actively traded (iv) reduce the per-donee gift tax exclusion to $10,000, (v) essentially limit the per-donee gift tax exclusion to gifts of cash and marketable securities, (vi) impose a per-***donor*** gift tax exclusion limit of $20,000, and (vii) crimp the use of GRATs (grantor retained annuity trusts) and long-term generation-skipping trusts.

3. **EPAAAR Act of 2021?** If (1) either Elizabeth Warren or Bernie Sanders is elected president, (2) Democrats take control of both the House of Representatives and the Senate, (3) Congress enacts the "Wealth Tax" (which kicks in at $50 million under Warren's proposal and $32 million under Sanders' proposal), and (4) the statute is not struck down as an unconstitutional direct tax, the statute is likely to be referred to by its acronym, the EPAAAR Act of 2021—the Estate Planning Attorneys, Accountants and Appraisers' Relief Act of 2021. Attorneys, accountants and appraisers will be busy as never before, working with (and billing) their "ultra-millionaire" clients ***on an annual basis***.

    a. For those of you whose memories go as far back as the Tax Reform Act of 1976, which replaced the "new basis at death" rule with a "carryover basis" rule, compliance with the Wealth Tax is almost certain to make attempted compliance with "carryover basis" look like child's play.

    b. Projected revenues for the Wealth Tax may have been understated, as the projections did not include increased income taxes to be paid by the wealthys' professional advisers.

II. Private Letter Rulings

A. Recent developments involving private letter rulings—why aren't there any? I mean, PLRs involving estate and gift tax issues?

1. **PLRs are frightfully expensive.** The standard fee for a private letter ruling is $30,000 (Rev. Proc. 2019-1, IRB 2019-1), to which must be added the professional fees involved in preparing the ruling request.

2. **So many estates are "off the table" as far as transfer taxes are concerned,** thanks to the $11.4 million [$11.58 million] exemption. This is also why we don't see very many Tax Court cases involving estate and gift tax issues—unless the gifts were made or the decedent died before 2011.

3. **The Service has supplanted the need for letter rulings on several frequently encountered issues**—which is good news as well as good policy. Some examples:

   a. **Qualified plans and IRAs: Waiver of 60-day rollover requirement**. A rollover (*e.g.*, an IRA-to-IRA rollover) generally must be completed no later than 60 days following the day on which the distributee receives the distribution. This led to swaths of letter ruling requests for an extension of the 60-day rule based on a variety of excuses—until the Service published Rev. Proc. 2016-47, IRB 2016-37. The Revenue Procedure provides for a self-certification procedure (subject to verification on audit) that may be used to claim an extension. Plan administrators and IRA custodians and trustees can rely on the self-certification, which must satisfy one of eleven listed conditions, including financial institution error, misplaced and uncashed checks, distributions deposited in a non-IRA account, severe damage to taxpayer's residence, a death in the family, serious illness of taxpayer or family member, and postal error.

      (1) Contribution to the plan or IRA must be made "as soon as practicable," a requirement that is deemed to be satisfied if the contribution is made within 30 days after the reason for the delay no longer prevents the taxpayer from making the contribution. The Revenue Procedure includes a model "Certification of Late Rollover Contribution" form.

   b. **Extension of time to elect portability of deceased spouse's DSUE**. Rev. Proc. 2017-34, IRB 2017-26, noted that "the considerable number of ruling requests for an extension of time to elect portability … indicates a need for continuing relief…. Further, the considerable number of ruling requests received has placed a significant burden on the Service." Under Rev. Proc. 2017-34, an extension is automatically granted without the need for a private letter ruling if a Form 706 is filed "the later of January 2, 2018, or the second anniversary of the decedent's date of death."

      (1) The few recent PLRs dealing with estate tax or gift tax issues that I found were Ltr. Ruls. 201852018, 201923014, 201921008 and 201902027. In all of these rulings, Service granted an extension to file a return making a late portability election of the deceased spouse's unused exemption (DSUE) amount. The PLRs list the date of the letters requesting an extension, all of which were dated in June or July 2018. My surmise is that the decedent had died in 2016 or 2017, and that the attorneys or CPAs representing those estates didn't get wind of Rev. Proc. 2017-34 until after the January 2, 2018 deadline for filing a late return had passed.

      (2) If failure to make the DSUE election is not discovered until after the surviving spouse's death and two years have elapsed since the death of the first spouse, the two-year window for filing a late return will be of no help. The lesson here: At a certain economic level, it is *essential* that the DSUE issue be discussed with the