



This periodic publication highlights developments and trends in trusts and estates from a practical viewpoint based on IPB's experience. This issue focuses on legislative and regulatory developments. Our goal is to share our insights with wealth and philanthropy advisors, corporate fiduciaries, accountants and other advisors in a way that is accessible and actionable. We welcome feedback and additions to our mailing list ([ipb@ipbtax.com](mailto:ipb@ipbtax.com)).

## **STATE ESTATE TAX AND OPPORTUNITIES FOR PLANNING**

By Linda Kotis

The District of Columbia recently lowered its estate tax exemption to \$4 million, effective for a decedent whose death occurs on or after January 1, 2021. *See* "District of Columbia Changes to Estate Tax Exemption and Notarization" in this newsletter. Twelve states also impose an estate tax, with exemptions that vary widely, for example, from a low of \$1 million in Massachusetts to a high of \$7.1 million in Connecticut. Several states have exemptions in the \$5 million plus range, such as \$5.49 million in Hawaii, \$5.87 million in Maine, and \$5.93 million in New York. For a resident of such a state, or a non-resident who owns real property in such a jurisdiction, there may be a hefty state estate tax liability, in addition to federal estate tax, when the decedent's estate exceeds the state threshold. For example, suppose a decedent domiciled in Maryland died in 2021, leaving an \$18 million estate. This amount exceeds both the federal estate tax exemption, currently at \$11.7 million, and the Maryland estate tax exemption, at \$5 million. If no estate planning had been done, her estate could be subject to as much as \$2.08 million in Maryland estate tax, in addition to \$1.644 million in federal estate tax.

There are several ways to avoid or reduce the effect of state estate tax. One strategy for married couples is to have the first spouse leave the entire estate in a marital trust to the surviving spouse. On the death of the first spouse, the decedent's estate would pass free of estate tax, due to the unlimited marital deduction. The trust agreement could provide on the surviving spouse's death that the amount in excess of the state estate tax exemption is left to charity. Or a surviving spouse living in a state with an estate tax at the time of the first spouse's death could choose to move to a state with no estate tax following the first death, and his estate would not be subject to state estate tax. The idea of changing domicile has certainly gained more traction due to the pandemic. Some individuals now working remotely have decided to relocate since their jobs may be done from any location. Factors influencing their choices include states with lower income tax rates. Jurisdictions with no state estate tax should also be a consideration. Finally, "Lifetime Gifts to Minimize State Death Taxes" in this newsletter discusses how making lifetime gifts can reduce the effect of state estate tax.

Opportunities abound to reduce state estate tax liability. Residents of states with such taxes should revisit their estate plans to review their goals and take advantage of strategies to create potential tax savings both now and in the future.

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## DISTRICT OF COLUMBIA CHANGES TO ESTATE TAX EXEMPTION AND NOTARIZATION

By Kenneth Jefferson

Like the rest of the nation, the District of Columbia (“D.C.”) has been grappling with the effects of the COVID-19 pandemic, which has presented not only health concerns but also economic concerns for individuals, private and public companies, and local governments and municipalities alike. Below is a brief discussion on some of the changes that have occurred in D.C. in response to the challenges presented by the pandemic.

Reduction in Estate Tax Exemption. Perhaps as a way to counteract the effects of the economic downturn caused by the pandemic and with budgetary concerns at the forefront, D.C. passed the Estate Tax Adjustment Amendment Act of 2020 in August of last year.<sup>1</sup> The legislation impacts estates of decedents dying after December 31, 2020, and will reduce the exemption available in D.C. from \$5,762,400, the applicable exemption in 2020 (i.e., \$5,600,000 increased annually for cost of living adjustments beginning after December 31, 2018) to \$4,000,000 – a reduction of roughly \$1,760,000.<sup>2</sup> The tax rates, however, remain unchanged. Nonetheless, expansion of the breadth of taxpayers impacted will generate an increase in collections.

Remote Notarization. With health concerns heightened, client interest and demand for estate planning greatly increased over the past year. However, in some cases, it proved impossible to validly execute such primary documents as Wills, Revocable Trusts, and Durable General Powers of Attorney without violating stay-at-home mandates, especially for documents requiring notarization. To be clear, D.C. only requires notarization for the valid execution of Durable General Powers of Attorney.<sup>3</sup> So, in D.C., Wills and trusts (where there is no real property being transferred) may be validly executed without notarization.<sup>4</sup> A simple fix here which some practitioners observed was to simply remove the notary block from such documents. But, for a Will to be self-proving, or in the event real property is being transferred, notarization is still required.<sup>5</sup>

To address the concerns about notarization, like several other jurisdictions across the country, DC passed emergency legislation<sup>6</sup> permitting the use of remote online notarization to facilitate the continuance of vital estate planning services without endangering residents’ health or jeopardizing the validity of documents. The temporary authorization to use remote online notarization in D.C. was issued on July 7, 2020 and is set to last through May 21, 2021.

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<sup>1</sup> <https://www.actec.org/resources/state-death-tax-chart/>

<sup>2</sup> <https://code.dccouncil.us/dc/council/code/sections/47-3701.html>

<sup>3</sup> D.C. Code § 21-2101(b)

<sup>4</sup> D.C. Code §§ 18-103; 19-1304.02; & 21-2205

<sup>5</sup> For a more in-depth discussion regarding alternatives to in-person notarization, see “Alternative to In-Person Notarization” at <https://www.ipbtax.com/assets/htmldocuments/06232020%20June%202020%20TdE%20Newsletter.pdf>

<sup>6</sup> [https://lims.dccouncil.us/downloads/LIMS/45021/Signed\\_Act/B23-0758-Signed\\_Act.pdf](https://lims.dccouncil.us/downloads/LIMS/45021/Signed_Act/B23-0758-Signed_Act.pdf)

## FEDERAL LEGISLATIVE UPDATE AND OUTLOOK FOR 2021

By Hank Gutman

President Biden signed the “American Rescue Plan Act of 2021” on March 11. It did not contain any of his campaign proposals relating to high income and high net worth individuals. Now the Treasury Department is preparing a formal version of the tax proposals that the President will present to the Congress. That document (previously known as the “Green Book”) will likely contain refinements of the campaign proposals and perhaps some “new starters.” It is expected to be released sometime in April. The Joint Committee on Taxation may also prepare an analysis of the proposals.

The Outlook for Legislation. If the “regular order” were followed, the House Ways and Means and Senate Finance Committees would hold hearings on the President’s proposals and thereafter the Committees would consider the contents of a “stand alone” tax bill. Under that scenario a tax bill would move through the Congress independent of other legislation and subject to the normal procedural rules. However, that is not likely to happen. Given the constraints imposed by the Congressional Budget Act and the Senate filibuster rules the “reconciliation” process that was just used to pass the American Rescue Plan is the only viable path to get the tax proposals considered. However, the reconciliation process may be used only once in a budget period. Consequently, it will be available for only one more piece of legislation for the remainder of this Congressional session.

It is not likely that the reconciliation process would be used for stand-alone tax legislation. The President has other legislative proposals that have a higher priority and to which Congress will now likely turn. Infrastructure legislation is one. Additional economic stimulus could be another. However, it is likely that any additional Presidential legislative priority will carry a significant revenue cost and it is in that context — as revenue offsets — that the tax proposals will come into play. We will just have to watch and wait.

Retroactivity. Both Treasury Secretary Yellin and Acting Assistant Secretary for Tax Policy Mazur have indicated that tax changes will not be proposed with retroactive effect. Retroactivity, however, can have a number of different definitions. I will assume that retroactivity refers to legislation that is effective before the earlier of date of committee action or introduction of the bill. It is unlikely that income tax rate changes would be made retroactive, due principally to the computational complications, particularly tracking when income is received and deductible expenses incurred, that arise if a date other than the beginning of a calendar year is selected. However, those computational complications do not arise in the transfer tax. It does not complicate tax administration to make such changes effective upon the earlier of date of committee action or the introduction of legislation. This is an issue that will have to be carefully monitored.

Personnel. The President has just nominated Professor Lily Batchelder of NYU to be Treasury Assistant Secretary for Tax Policy, the highest tax position in the Administration. Lily is highly regarded and exceptionally well qualified. After a start at Skadden she served as Majority Chief Tax Counsel for Senate Finance Committee from 2010 to 2014. From 2014 to 2015 she served as Deputy Director of the National Economic Council and Deputy Assistant to President Obama. Her scholarship has focused principally on individual income and wealth tax issues and she has proposed a comprehensive inheritance tax to replace the current transfer tax system.

Another personnel matter to note is the appointment of Elizabeth Warren to the Finance Committee, after which she promptly introduced legislation to implement a wealth tax. Her tax positions regarding the use of the tax system to address wealth and income inequality were made clear in her Presidential campaign.

## LIFETIME GIFTS TO MINIMIZE STATE DEATH TAXES

By Kasey Place

Planning in recent months has centered around gifts to lock in today's unified credit exemption amount before it is cut in half after 2025 (or sooner if Congress acts). However, lifetime gifts can make good sense for a variety of reasons, even when a reduction in the exemption amount is not looming. One of those reasons is to save state estate taxes. As described "State Estate Tax and Opportunities for Planning," the District of Columbia and twelve states impose an estate tax. Six states impose an inheritance tax. With proper planning, it is possible to reduce or even avoid such taxes.

Although many states impose an estate tax, only Connecticut imposes a gift tax. This creates a planning opportunity, as gifted amounts will escape taxation altogether in most jurisdictions. Often times the gifts will be made when death is near, and it is clear the donor no longer needs the assets. However, one must be aware of state-level claw back rules when making such death bed gifts. Maine, for example, imposes estate tax on gifts made within one year of death. 36 M.R.S. § 4102(1). New York and Minnesota impose estate tax on gifts made within three years of death. NY Tax § 954(a)(3); Minn. Stat. § 291.016, Subd. 2(3).

Another planning technique may be available to wealthy individuals domiciled in a jurisdiction without an estate tax, but who own assets in a state with an estate tax. In general, individuals domiciled out of state are only subject to estate tax on real and tangible personal property located in state. In other words, states do not typically tax non-domiciliaries' intangible personal property. As a result, individuals can sometimes avoid the tax by contributing real or tangible personal property to a partnership, limited liability company or other entity and thereby converting it to intangible personal property.

Proceed with caution, however, as states are wise to this approach and some have enacted rules to close the loophole. Connecticut, for example, recently passed legislation that causes pass-through entities holding Connecticut personal use real estate or tangible personal property to be subject to estate tax. Conn. Gen. Stat. § 12-391(e)(2)(B). Maine similarly imposes estate tax on Maine real estate and tangible personal property held in a pass-through entity, if such real estate or tangible personal property is used for personal, as opposed to business, purposes. 36 M.R.S. § 4064. New York will tax New York real property held in a limited liability company, if such limited liability company has only a single owner and is disregarded for income tax purposes. *See* TSB-A-16(3)M, a 2016 advisory opinion from the NY State Department of Taxation.

With rates as high as 20 percent, the state estate tax savings that can be achieved through lifetime gifts and other planning techniques are not insignificant and merit consideration independent of pending changes to the federal exemption amount.

## IPB IN THE NEWS ...

- ◆ *"Wrapping Your 2020 Gift Tax Returns with a Tidy Bow - A Refresher of Best Practices & How to Avoid IRS Audit in 2021 Filings"*  
Presenter: Kenneth Jefferson and Chelsea McGrath of Venable, ABA's Monthly Committee Conference Call Series (March 17, 2021)
- ◆ *"The Blessings and Burdens of Drafting for and Administering Estates with Charitable Benefits,"* Presenters: Kasey Place and Linda Kotis, *DC Bar Communities* (February 25, 2021)
- ◆ IPB Hosts Webinar, *"The Tax Outlook for High Net Worth Individuals in 2021,"* Led by: Hank Gutman (January 29, 2021)
- ◆ *"Planning to SECURE Charitable Gifts: How the SECURE Act Supports Donations of Retirement Assets"* Presenters: Linda Kotis with Judith Barnhard (Councilor Buchanan Mitchell), GWSCPA Nonprofit Symposium 2020 (December 14, 2020)

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