



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)).

## THE PROSPECTS FOR TAX LEGISLATION

By Hank Gutman

The prospects for the timing and content of tax legislation remain unclear. Outcomes are very much in flux with frequent changes proposed. The following reflects developments as of November 4.

On October 29, the House Rules Committee released a new version of the "Build Back Better Act," H.R. 5376. That version differed significantly from the version approved by the House Budget Committee in September. As noted below, the October 29 version was revised on November 3.

The October 29 version eliminates individual income and capital gains tax rate increases, proposed changes to the grantor trust rules, limits on valuation discounts, the acceleration of a reduction in the gift and estate tax exemption and limits on the deduction of qualified business income for high income individuals. However, it proposes a 5 percent surtax on non-grantor trusts (as well as estates) with adjusted gross income above \$200,000 and an additional 3 percent surtax for income in excess of \$500,000, with a carveout for charitable trusts. The November 3 version of the House bill raises the limitation on state and local tax deductions to \$72,500 through 2031.

The new House bill has yet to be formally approved in committee, a step necessary before it can be considered on the House floor. Further changes may occur and, as noted below, the timing of House consideration is wrapped up in a larger political debate.

Note also that the Senate has yet to release any formal legislative language. Chairman Wyden and various other Democrats have touted an "accrual" tax applicable to unrealized gains of high income individuals. The proposal has not garnered wide acceptance but remains a threat. Other Senators continue to push proposals to tax unrealized gain in property transferred by gift or at death, but these proposals do not appear to have much backing. The point is that no matter what the House passes, the Senate will have a voice and it is not yet clear what will emerge.

Finally, there is the timing issue. The "Build Back Better Act" is one of two important legislative initiatives. The other is the bipartisan "infrastructure" bill. Legislative jockeying between "progressive" and "moderate" Democrats in the House is delaying consideration of both, although that logjam may be broken shortly. In the Senate, Senators Manchin and Sinema continue to negotiate with their colleagues and the White House over the size and content of the spending package in the bill. There has not been much mention of the tax provisions. Taxes will get more attention once the spending side is agreed upon.

In summary, the path forward is murky. At the moment it appears unlikely that legislation will be enacted before Thanksgiving—and some believe that it would be too optimistic to expect enactment by then.

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## HOME SWEET HOME

By Leslie Wood Bradenham

But where is home, exactly? The answer when it comes to a person's taxes is, of course, "it depends." Determining the state or states where an individual will be subject to taxes involves a determination of the individual's "domicile" and "residency." These terms are not synonymous, and while a person can only have one domicile, she can have more than one residence. Indeed, with remote work on the rise, this may often be the case, and the analysis is increasingly complex.

States rarely define domicile by statute. Rather, courts and state taxing authorities generally look to the common law definition, which defines a person's domicile as the place she considers to be her permanent home and the place to which she intends to return whenever she may be absent. This is naturally a very fact-intensive inquiry. Factors commonly considered include the use and maintenance of a residence within the state; ownership of real property within the state; time spent in the state; employment or business activity within the state; family within the state; active involvement with community, religious, or civic activities within the state; use of an address within the state for bills, bank statements, and other important mailings; having a driver's license issued by the state; and being registered to vote in the state. If an individual is domiciled within a state, she will likely be subject to that state's income tax on her worldwide income and, if the state has an estate tax, subject to that state's estate tax on her worldwide assets at death.

When it comes to state taxation of worldwide income, however, domicile does not end the inquiry. Most states impose worldwide income taxation on individuals that fall within a statutory definition of "resident." While state statutes defining "resident" for income taxes vary, most include within their reach both (i) individuals domiciled in the state (a "domicile resident"), and (ii) individuals who, although domiciled in another state, live in the state for a specific number of days or months during the taxable year (a "statutory resident"). For example, in the District of Columbia, Virginia, and New York, an individual will meet the test for statutory residency if she maintains a "place of abode" in the state for "an aggregate of more than 183 days in the taxable year," whether or not she is domiciled within the state. *See* D.C. Code § 47-1801.04(17); Va. Code § 58.1-302; N.Y. Tax Law § 605(b)(1). In Maryland, the determinative time period is "more than six months." *See* Md. Tax Code Section 10-101(k).

In light of the fact-intensive and subjective definition of domicile, coupled with states' encompassing but more expansive definition of residency, it is not uncommon for two states to both claim the right to tax an individual on worldwide income. This might occur if, due to new liberal work-from-home policies, an individual who has no intent to change her permanent home away from state 1 (thus continuing her status as a domicile resident of state 1), spends more than 183 days at her vacation home in state 2 during the taxable year (becoming a statutory resident of state 2). Or, perhaps, an individual attempts a permanent move from state 1 to state 2 but fails to adequately cut ties with her former state (causing both state 1 and state 2 to assert that it is her one true domicile). In today's increasingly mobile society, an understanding of the distinction between domicile and income tax residency, and the applicable definitions, interpretations, and tests for each used by the courts and taxing authorities in the states in which an individual owns property, works, and/or spends significant time, can help avoid these unexpected tax consequences.

## THE CHANGING LANDSCAPE OF INCOME TAX RATES ACROSS THE U.S.

By Chaim Herbstman<sup>1</sup> and Linda Kotis

**Overview:** Many states had budget surpluses after 2020, due to both a vast increase of COVID-related federal funding and higher than expected tax collections. A number of them took advantage of such surpluses to lower their income tax rates. A few states, as well as Washington, D.C., took the opposite route and increased rates over the past year.

**Increased Tax Rates:** New Jersey, New York, and the District of Columbia all implemented increased tax rates. In each jurisdiction, the higher rate will only affect wealthier residents. New Jersey simply applied its highest marginal rate to those earning more than \$1 million, whereas previously the 10.75% rate applied only to income above \$5 million. Although New Jersey's tax increase was enacted in October 2020, it was applied retroactively to tax years beginning on or after January 1, 2020. The state intends to use most of the projected \$390 million in increased revenue to fund rebates for certain lower-income residents.

New York took a more aggressive approach and added two tax brackets applicable to the state's highest earners, taking effect at the start of 2021. Previously, the highest marginal rate of 8.82% began at \$1 million. Now, aside from increasing that rate to 9.65%, a rate of 10.3% will apply to income between \$5 million and \$25 million, and a rate of 10.6% for income above \$25 million. After factoring in local taxes of 3.876%, New York City residents will be paying the highest taxes in the country.

The District of Columbia increased the highest marginal rate on income above \$1 million from 8.95% to 10.25%. Moreover, the District will shake up its bracket structure quite a bit. Currently, those earning between \$60,000 and \$350,000 are taxed at a marginal rate of 8.5%, and those earning between \$350,000 and \$1 million, at a rate of 8.75%. Under the new legislation taking effect for tax years beginning in 2022, income between \$250,000 and \$500,000 will be subject to a marginal rate of 9.25%, income between \$500,000 and \$1 million will be taxed at a rate of 9.75%. The increased revenue is expected to fund higher wages for childcare workers, housing vouchers for homeless individuals, and monthly payments to low-income families qualifying for the Earned Income Tax Credit.

**State Tax Cuts:** At least eleven states have chosen to cut taxes in some form. Arizona will eliminate its bracket system entirely and move to a 2.5% flat tax after 2024, assuming certain revenue triggers are met. However, if the outcome of a challenge to Arizona's Proposition 208 is unsuccessful, individuals with incomes above \$250,000 will pay a marginal rate of 3.5%. Other states, including Idaho, Iowa, Montana, and Ohio will simplify their bracket structures and reduce rates across the board, with the highest earners in Iowa seeing a 2.03% reduction and those in Idaho a more modest reduction of 0.425%. Hoping to align itself with neighboring states, Missouri enacted legislation to gradually reduce the top rate to 4.8% by 2028 if certain revenue triggers are met. Taking a different approach, Wisconsin left the highest marginal rate unchanged, while significantly lowering the tax rate for middle income earners from 6.27% to 5.3% for tax years beginning in 2021. Georgia, leaving its rates and brackets in place, increased the state's standard deduction, giving taxpayers a bit more room before income becomes taxable. Finally, New Hampshire, long known to be a state that did not tax wages, will gradually reduce, and eventually eliminate, taxes on interest and dividends. At last, New Hampshire can now truly be known as a "no income tax" state.

**Implications of Tax Changes:** States determine taxation of a trust based upon different factors, including a Trustee's residence or the place of trust administration. Therefore, state income tax rates may be a factor in Trustee selection or a reason to move the situs of an existing trust. Possible tax code changes to the grantor trust rules (*see link to HG Article*) resulting in inclusion of assets in the grantor's estate may make non-grantor trusts more desirable. Because non-grantor trusts reach the highest bracket at a much lower amount of income than do grantor trusts, choosing a Trustee residing in a lower tax state or moving a trust from a higher tax jurisdiction to a lower tax one may make sense. Combined with proposed changes to federal income brackets, a careful review of state income tax issues is warranted.

With the pandemic normalizing work from home, many individuals have chosen to move, whether it be from city to suburb, or to a different state entirely. Perhaps some will be lured by favorable tax rates, while others choose to relocate for more space or to be nearer to family. In any event, it remains to be seen whether, given new opportunities for mobility, tax rates will directly influence individuals' decisions about where they should live. As always, taxpayers should consult with advisors to understand the implications of tax changes and determine the effects upon their particular situation.

<sup>1</sup>Chaim Herbstman is a candidate for J.D., May 2022, Harvard Law School.

## OUR TEAM WELCOMES NEW MEMBERS

IPB's Estate Planning practice is pleased to announce the addition of wealth planning attorneys Natanya Holland Allan, Leslie Wood Bradenham and associate Andrea C.L. Ricka, to the firm's Estate Planning team in Washington, DC. Natanya, Leslie, and Andrea join us from the law firm Cochran Allan, where they focused on estate planning, estate administration, and charitable giving for a full range of clients, including business owners, corporate executives, private equity partners, professional athletes, public figures, and families with inherited wealth. Natanya also advises private foundations, supporting organizations, and public charities with respect to tax and corporate governance matters. "I have admired the firm's tax and legacy oriented practice for years, and I know that IPB's decades of experience representing the owners of family operating companies with income and transfer tax planning matters marries well with my clients' growing needs. Leslie, Andrea, and I are thrilled to join IPB," said Natanya. We're thrilled to have them as well, and we look forward to them working with you as part of our team.

### IPB TAX, TRUSTS & ESTATES PAST ISSUES

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## IPB IN THE NEWS ...

- ◆ *"IPB Recognized by Law360 for Representation of Women in Our Partnership Ranks,"* September 29, 2021
- ◆ *"New IPB Estate Planning Partners Speak with Law360 About Joining the Firm,"* September 17, 2021
- ◆ *"Update on Ways & Means Committee Review of Biden Tax Proposal,"* Hank Gutman, September 16, 2021
- ◆ *"Chambers 2021 High Net Worth Guide" Recognizes IPB's Estate Planning Practice Along with Partners Carter Hood and Brenda Jackson-Cooper,* July 22, 2021

### Tax, Trusts & Estates Attorneys

We have broad experience with high net worth client matters, family businesses and domestic and international tax issues:

Eric R. Fox • Family Businesses / Wealth Planning  
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 Natanya H. Allan • Estate Planning and Charitable Matters / Wealth Planning  
 Leslie Wood Bradenham • Estate Planning / Federal Transfer Taxation / Estate and Trust Administration  
 Hank L. Gutman • Estate, Gift and Generation-Skipping / Wealth Transfer  
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