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The Tax Cuts and Jobs Act (TCJA)

By Gary Altman

The Tax Cuts and Job Acts of 2017 made significant changes to the IRS tax code. While most people were looking at the reforms to the individual income tax, itemized deductions, childcare tax credit, and more, our job was to pay attention to the estate and gift tax exclusions.

The TCJA increased the estate and gift tax exclusion and generation-skipping transfer tax Exemption (the exemption) to $10 million from $5 million (adjusted for inflation) for decedents dying and gifts made after Dec. 31, 2017, and before Jan. 1, 2026. On January 1st, 2026, the income, estate, gift, and GST tax changes are set to sunset. Therefore, starting on January 1, 2026, the Exemption will be 5 million (with adjustments for inflation).

Under IRS regulations made final in 2019, Individuals who gave away the exemption before 2026 would not be subject to additional estate, gift, or GST taxes when the exemption is reduced for tax years after 2025. Recently, the IRS proposed regulations that will provide exceptions to this 2019 regulation.

2019 Final Regulations

In 2019, the IRS issued final regulations which added a special rule that applies to situations in which the credit against estate tax attributable to the Exemption at the date of death is less than the sum of the credits attributable to the Exemption allowable in computing gift tax payable regarding the decedent's lifetime gifts. The special rule prevents the estate of an individual who has given away their Exemption from being subject to estate tax on completed gifts that, because of the higher Exemption, were free of gift tax when made.

2022 Proposed Regulations

On April 27, the IRS issued proposed regulations that would limit the special rule to completed gifts. Under Proposed Regulation Section 20.2010-1(c)(3), these transfers that are includible in the gross estate would be excluded from the special rule:

- Transfers subject to a retained life estate or subject to other powers or interests under IRC Sections 2035-2038 or IRC Section 2042, whether any part of or the transfer was deductible under IRC Section 2522 or 2523
- Transfers made by an enforceable promise or other amounts duplicated in the transfer tax base, to the extent they remain unsatisfied as of death
- An IRC Section 2701 applicable retained interest under Treasury Regulation Section 25.2701-5(a)(4), such as a freeze partnership, or an inter vivo transfer under Treasury Regulation Section 25.2702-6(a)(1), such as a GRAT or QPRT
- Transfers described in the previous examples but for the transfer, relinquishment, or elimination of interest, power, or property, effectuated within 18 months of the donor's death by the decedent, by the decedent and a third party, or by a third party

The 2022 proposed regulations also clarify that even though the special rule is limited in some instances, it will continue to apply to these transfers:

- Transfers are includible in the gross estate in which the value of the taxable portion of the transfer, determined as of the transfer, was 5% or less of the total value of the transfer
- Transfers, relinquishments, or eliminations described in the last category of transfers listed earlier are effectuated by the termination of the durational period described in the original instrument or transfer by the mere passage of time or the death of any person

Review Estate Planning

We realize this is confusing and complex. Individuals who have used estate planning techniques involving gifts treated as testamentary transfers, such as individuals who have GRATs or QPRTs but who might

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not survive the set term of years or individuals who used a promissory note to give away their Exemption, should have their estate plan reviewed and possibly revise their planning.

While the fate of TCJA provisions scheduled to sunset in 2026 remains uncertain (many proposals in Congress in 2021 tried to accelerate the sunset of the TCJA), these recently proposed changes are likely to be finalized and should be considered meanwhile.

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