Use It or Lose It? – Estate Planning Considerations Before the November 2020 Election

Estate Planning, Regardless of Net Worth

Although the primary audience for this article is high net worth individuals (individuals whose estates are in excess of the estate/gift tax exemption amount) who may take advantage of large gifting strategies, **estate planning is not just for the uber wealthy**. Estate planning encompasses a wide variety of areas including tax planning, creditor protection, asset management, charitable planning, and long-term care planning.

There is no one-size-fits-all strategy to address all estate planning goals and objectives – regardless of which political party stays in power or takes control in November. Some estate planning techniques may take time to implement, so do not wait until November 2020 to consider making changes to your estate plan.

As you anticipate the upcoming election and consider your own personal situation, it is important to determine the action steps that you can take now to put yourself and your loved ones in a better overall situation.

Current Tax Landscape

Now may be an advantageous time to make gifts to children and grandchildren to reduce estate tax exposure. The current federal estate and gift tax exemptions (amounts individuals can transfer free of estate and gift tax over the course of his or her lifetime or at death) are $11.58 million per person ($23.16 million per married couple). These exemptions are the highest they have been since the modern estate tax was implemented in 1916. Transfers during lifetime or at death in excess of the above exemption amounts are currently taxed at a rate of 40%.

Past May Soon Be Prologue

Although the current exemption amounts were never intended to be permanent (exemption amounts are currently scheduled to be cut almost in half to about $6 million in 2026), immense budgetary pressure at the federal level (exacerbated by the COVID-19 crisis) could result in new legislation that reduces these amounts much sooner than 2026. The upcoming November election has further drawn the attention of tax commentators to the risk that our current high estate and gift tax exemptions may be heading to the chopping block. Recent polls indicate that former Vice President Joe Biden has a double-digit lead over President Donald Trump. Likewise, a number of Senate seats may turn blue, resulting in the Democrats having a majority in both chambers of Congress. A shift of only three Senate seats from Republicans to Democrats could give the Democrats control of the Senate.

Former Vice President Joe Biden's recently released economic plan calls for the "wealthiest Americans [to] shoulder more of the tax burden," including raising federal estate taxes "back to the historical norm." Although he has not specified what numbers he has in mind, the exemptions going forward could be significantly lower than they are under current law.

Here's a quick look at how the numbers have changed over the last 20 years. In 2001, the estate and gift tax exemptions were $675,000, with a top marginal tax rate of 55% on transfers in excess of $675,000. In 2012, although the estate tax exemption was $5.12 million per person (gift tax exemption was only $1 million), the $5.12 million estate tax exemption was set to decrease to $1 million per taxpayer until Congress passed last-minute legislation to keep the current exemption in place. In 2014, the Obama administration proposed reducing the estate tax exemption amount to $3.5 million.

A change to the exemption amounts enacted by a new president and Congress could be effective as soon as January 1, 2021, if Congress passes legislation having retroactive effect. Barring a repeal of the estate tax permanently, most tax commentators believe that the current exemption amounts are the best we are going to see.

Why Strategic Gifting May Matter Now and Far Into the Future

Although taxpayers cannot control the tax climate at the date of their death, strategic gifting prior to a change in the law could have a significant positive effect on the overall tax liability faced by a wealthy taxpayer's family. Gifting assets outright or in trust now, while the exemption levels are still at their historic high, essentially allows taxpayers to "lock in" these high exemption amounts. Sophisticated estate planning techniques may also allow taxpayers to leverage this exemption using valuation discounts and other planning strategies, which may be especially effective in the current environment of low interest rates and falling asset values.

Consider a SLAT

While there are a number of possible techniques individuals concerned about the above risk may implement in 2020, a popular technique among our clients is the Spousal Lifetime Access Trust (SLAT). A SLAT is an irrevocable trust that allows a married person to give assets as a gift to his or her spouse and/or descendants, and they may receive distributions of income and principal from those assets, typically at the discretion of the trustee. This strategy removes the assets from the grantor's estate while still affording access through the spouse as long as the parties are married and the spouse is living. The potential access may make the spouses more comfortable with making a large gift and utilizing the current exemption before a potential future decrease in the exemption amount.

If you would like to make changes to your estate plan or are concerned about the impact the November 2020 election may have on your estate plan, please contact David Hunter or another member of our Estate Planning team.

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