



WHAT WILL HAPPEN TO ESTATE, GIFT AND GENERATION-SKIPPING TRANSFER TAX EXEMPTIONS IN 2021 AND BEYOND?

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With the inauguration of President Joe Biden and a congress narrowly controlled by the Democratic party, many clients and estate planners have begun to worry about what, if anything, will happen to the federal estate, gift and generation-skipping transfer (“GST”) tax exemptions and rates in 2021 and beyond.

Under the Tax Cuts and Jobs Act passed by the Trump administration in 2017, the federal estate, gift and GST tax exemption is \$11,700,000 in 2021. The inflation adjustment increased the exemption from \$11,580,000 in 2020 to \$11,700,000 in 2021.

Many chose to take advantage of these historically high exemptions in 2020, but for those who did not or those who did but are considering using additional exemption due the inflation adjustment, they may wish to consider the following and consult with a Cummings Lockwood LLC estate planning attorney prior to making any gifts in 2021.

The Biden Approach.

As a candidate and President-elect, President Biden proposed lowering the federal estate, gift and GST exemptions back to \$5,000,000 as adjusted for inflation (\$10,000,000 per couple) or potentially even returning the gift tax exemption to \$1,000,000 and the estate tax exemption and GST exemption to \$3,500,000 as the law existed in 2009. The proposed decrease in exemptions might also be coupled with a proposed increase in the estate and gift tax rates from 40% to 45%.

President Biden also has proposed repealing the “stepped-up basis rule” upon death. Under current law when a person dies, appreciated assets that are included in their taxable estate and subject to estate tax receive a new cost basis for capital gain tax purposes equal to the date of death value so that if sold the day after death there will be no capital gains taxes due. Eliminating this “stepped-up basis” rule would be a significant change to the transfer tax system. There is also a suggestion that perhaps all unrealized gains would be taxed at death as if the assets were sold, thus generating capital gains taxes at death in addition to potential estate taxes if the taxable estate exceeds the exemption amounts. It is unclear whether President Biden intends to propose all of these changes or is only considering one or more of them, and it also is unclear whether a credit against the estate tax would be available for capital gains taxes paid at death, if such a deemed recognition regime were implemented.

One thing that President Biden has made clear is that he does not support an annual “wealth” tax that had been proposed and debated by other members of the Democratic party during this election cycle.

Likely Congressional Action.

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Of course, any tax legislation proposed by the President would still require Congressional action to be implemented. With the two Democratic wins in the Georgia Senate runoff elections, the Senate is now divided 50-50 with Vice-President Kamala Harris being the tie breaker. While this means the Democrats control the Senate, they do not have the 60 votes to avoid the filibuster which can be used to delay or block legislation. Although the "Budget Reconciliation" procedure has been used in the past to pass tax legislation by a simple majority, it is not clear that all 50 Democrats would support the President's tax proposals. It seems likely that some compromises will have to be negotiated even to reach a simple majority.

Could Tax Law Changes Be Retroactive?

It is possible any tax law changes enacted in 2021 could be retroactive to January 1st, making large gifts potentially taxable even though no tax was expected to be due when the gift was made. While this is not common, such retroactive application of tax laws have occurred in the past and been held constitutional. Another possibility is that tax legislation could be drafted to be effective as of the date the bill is introduced in Congress even if actually passed into law months later. It is important, therefore, that anyone considering large gifts in 2021 consult with their Cummings Lockwood LLC estate planning attorney or other tax advisor prior to making such gifts.

If you have any questions, please contact your Cummings & Lockwood LLC estate planning attorney.