New Proposed Regulations: Anti-Clawback Rule Exception

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New Proposed Regulations: Anti-Clawback Rule Exception

Jonathan G. Blattmachr, Esq.

Professor Mitchell Gans

Martin M. Shenkman, Esq.

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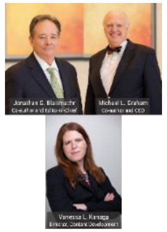

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  - Nichole King, Trust Officer
  - Phone: 702.462.6677
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A Note on Terminology

- The terminology for this topic is confusing. While some terms are obvious to practitioners, bear with us for a brief definition of key terms to hopefully demystify the discussions following for some of us:
- Exemption - $5M inflation adjusted exemption.
- Bonus Exemption - $10M inflation adjusted exemption enacted in 2017 as part of the Tax Cut and Jobs Act ("TCJA") that sunsets after 2025.
- Clawback – if a gift is made when the exemption is $10M using up $10M of exemption and the donor dies 2026 or later when the exemption is $5M the excess exemption used at the time of the gift is clawed-back as only the lower date of death exemption is available.
- Anti-Clawback Regulations – Regs issued in 2019 providing, based on the authority in the TCJA, that generally, gifts made when the exemption is $10M will protect that exemption and the higher of the exemption at gift or death will be available.
- Proposed Regulations – Proposed Regs (not the force of law) issued in April 2022 that provide exceptions to the anti-clawback Regs, i.e., that the anti-clawback rule will not be available and the lower exemption at death will instead only be available. That means, for effected transactions, that the planning intended to safeguard the Bonus Exemption will not succeed.
- Exceptions to the Exceptions – the Proposed Regs provide several exceptions to the exceptions provided in the Proposed Regs that result in the higher exemption at the time of the gift being safeguarded for the taxpayer.

Introduction to Recently Issued Proposed Regulations Providing Exceptions to the Final Anti-Clawback Regs

- The Treasury recently issued Proposed Regulation Section 20.2010-1(c)(3), that would, if adopted in final form, change rules that are critical to some of the estate tax planning done in recent years to secure the increased but temporary increase (bonus) in the estate and gift tax exemption equivalent simply referred to as the “exemption” or “exclusion” in this article.
- The Proposed Regulation is not as harsh as some had feared. Taxpayers who made gifts to spousal lifetime access trusts (“SLATs”), or self–settled domestic asset protection trusts (“DAPTs”) that were structured to be completed gift trusts and use the temporary enhanced exemption should not be prevented by the Proposed Regulations from having secured the temporary or bonus exemption amounts (assuming other aspects of the planning are respected). Those common planning techniques appear not to have not been attacked in the Proposed Regulation.
- The Proposed Regulation, however, provides complex rules that will change the anticipated results of several estate tax planning arrangements that had been intended to use exemption.
- Practitioners need to understand what transactions the Proposed Regs may cause to fail to have preserved bonus depreciation.
- Since the Regs are “proposed” changes before they are finalized may occur.

TCJA Authorized Regs to Address Clawback

- The Republicans were mindful , when the exclusion was increased in 2017, that if the Democrats succeeded in later changing the estate tax law, they could change the result for taxpayers planning in reliance on the Tax Cuts and Jobs Act ("TCJA") so that effectively the doubled exclusion amounts could be recaptured or "clawed back."
- That would undermine the benefits provided by the TCJA for planning that was completed prior to the reduction already built into the law (by which the exemption after 2025 would be reduced to $5 million, inflation adjusted) or new legislation reducing the exemption.
- To protect against that type of later change, the Republicans would have liked to have included anti-clawback provisions in the TCJA but they could not do so because doing that would have violated the so-called Byrd Rule (which is a Senate procedural rule requiring that any provision that reduces taxes must be eliminated within ten years unless at least 60 Senators vote otherwise).
- Therefore, the TCJA included Code Sections 2001(g)(2) and 2010(c)(6). For that anti-clawback concept to be implemented, the TCJA provided broad authority to the Treasury to issue regulations to address changes in the exclusion, since the drafters did not make it more specific.
- Code Section 2001(g)(2) provides: "*Modifications to estate tax payable to reflect different basic exclusion amounts The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this section with respect to any difference between—(A) the basic exclusion amount under [Code] section 2010(c)(3) applicable at the time of the decedent's death, and (B) the basic exclusion amount under such section applicable with respect to any gifts made by the decedent*."

Statutory Regulations

- The TCJA added IRC § 2001(g)(2) which specifically grants Treasury the authority to prescribe statutory regulations to accommodate different basic exclusion amounts.

- In 2019, Treasury published the “Clawback” regulations which created a special rule to preserve credit used on lifetime gifts to the extent it exceeds the available credit at death.

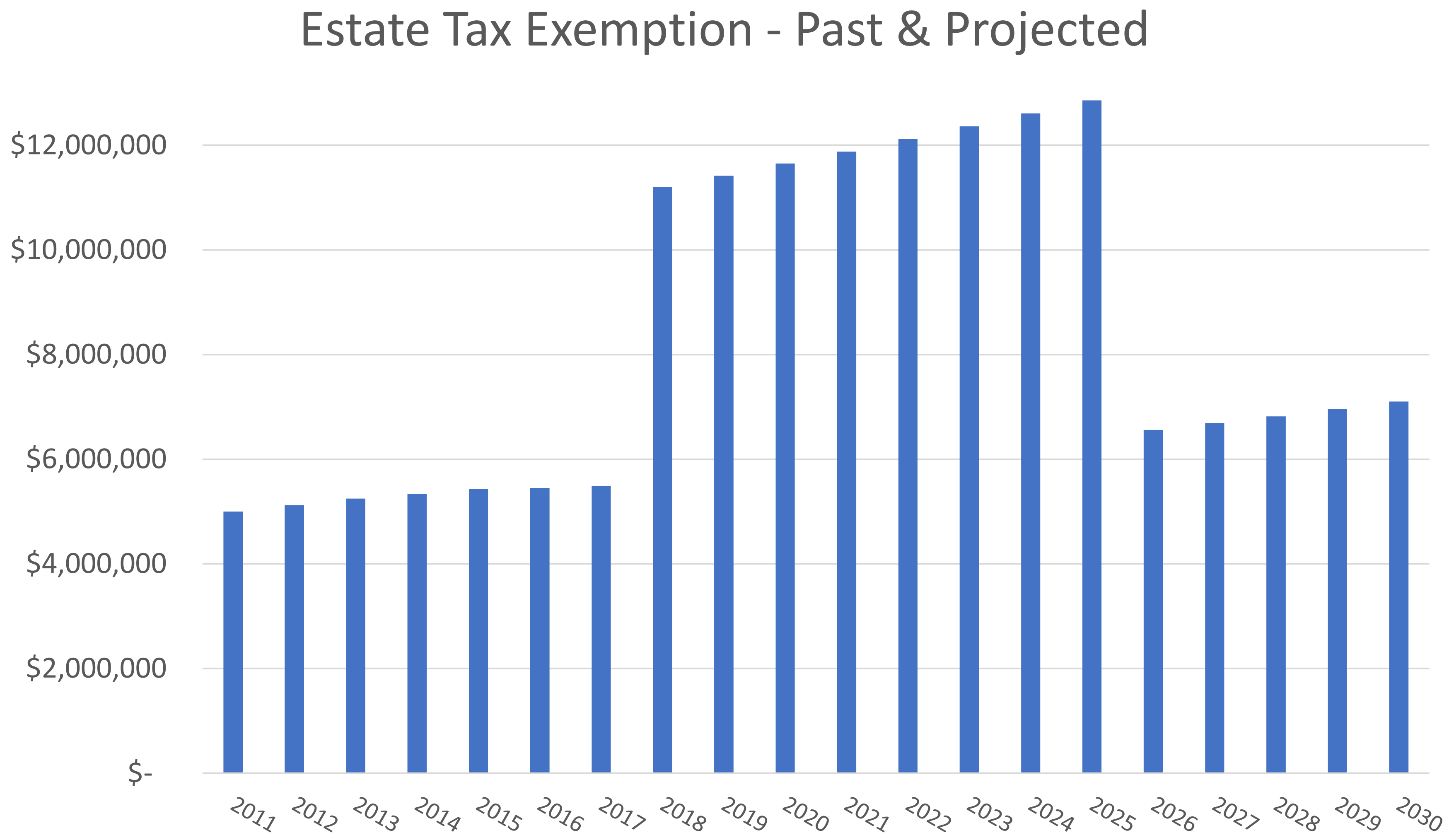
“Clawback” Planning – Basic Concepts

Estate, Gift & GST Taxes

- **The TJCA doubled the Basic Exclusion Amount (BEA) and GST exemption** ($10,000,000 in 2011 dollars)
- **The "double exemption" sunsets December 31, 2025** (it will revert to $5,000,000 in 2011 dollars adjusted for inflation; the service estimates $6,800,000 in the latest regulations)

26 USC § 2010, TCJA §11061

Estate, Gift & GST Taxes



Estate, Gift & GST Taxes

Change Coming?

- **2018** – First year estate tax exemption "doubled."
- **2020-2022** – Various Dem estate tax changes proposed that spurred significant estate planning by taxpayers trying to preserve exemption, discounts, grantor trusts and more. But it is the planning to preserve the bonus exemption that is the focus of these materials.
- **2026** – Double estate tax exemption scheduled to "sunset" by statute on 12-31-2025; possibly an ideal time to make other changes.

PORTABILITY & “CLAWBACK”

Portability Basics

Portability allows the executor to either utilize the decedent's estate tax exclusion amount ($10M inflation adjusted to $12,060,000 in 2022) or to transfer it to the decedent's surviving spouse.

*However, the new law does not allow the decedent to transfer his/her unused GST tax exemption to the surviving spouse.

See 26 USC 2010(c)(4).

Portability Basics

Basic Exclusion Amount (BEA)

- Prior to 2011, the basic exclusion amount was referred to as the “applicable exclusion amount”
- In simple terms, the BEA is the minimum estate tax exclusion amount allowed for a single decedent
- Like the prior “applicable exclusion amount”, the BEA is reduced by prior taxable gifts

IRC § 2010(c)(3)

Portability Basics

<u>Deceased Spousal Unused Exclusion Amount (DSUE)</u>

DSUE is the unused estate tax exclusion that the deceased spouse transfers (ports) to his/her surviving spouse.

IRC § 2010(c)(4)

Portability Basics

DSUE is limited to the lessor of:

A. The basic exclusion amount (BEA):

____

$12.06 M in 2022

B. The excess of:

(i) the BEA of the last deceased spouse of the surviving spouse over

(ii) The taxable estate of the last deceased spouse

____

Example:

- BEA = $12.06 M
- Deceased's taxable estate = $3.40 M
- $12.06 M – 3.40 M = $8.66 M

Portability Basics

Indexing for Inflation

- The basic exclusion amount (BEA) is indexed for inflation
- DSUE ***is not indexed*** for inflation
- For example, for 2022 deaths a surviving spouse could have the following exclusion amounts:

	BEA	DSUE
2022	$ 12,060,000	$ 12,060,000
2023	$ 12,600,000	$ 12,060,000
2024	$ 13,000,000	$ 12,060,000
2025	$ 13,330,000	$ 12,060,000
2026	$ 6,800,000	$ 12,060,000
2027	$ 6,940,000	$ 12,060,000

Final “Clawback” Regulations

Published: 11/26/2019

Clawback Regulations

- **Decreased Spousal Unused Exclusion (DSUE):** Lessor of the BEA or the unused portion of the deceased spouse’s applicable exclusion amount (AEA) at death
  - A decrease in the BEA after 2025 will reduce the surviving spouse’s AEA to the extent it is based on BEA, but to not the extent it is based on the DSUE amount
  - i.e., portability preserves the “double” exemption

Clawback Regulations

- **Basic Exclusion Amount (BEA) Computations:**
  - Credit may not exceed the amount necessary to reduce the gift tax for that calendar year to zero
  - DSUE is applied to the deceased surviving spouse's gifts before any of the surviving spouse's BEA
  - If the AEA includes DSUE and BEA [AEA = DSUE + BEA], the allowable BEA may not exceed the amount to reduce the tentative gift tax to zero after the application of the DSUE amount

Clawback Regulations

- **What is “Base” BEA and “Increased” BEA:**
  - <u>“Base” BEA</u>
    - ➢ The original 2010 basic exclusion amount
    - ➢ Under current law, inter vivos gifts consume base BEA first
  - <u>“Increased” BEA</u>
    - ➢ The additional BEA provided as part of the TCJA
    - ➢ Under current law, inter vivos gifts consume increased BEA second (i.e., bonus exemption), only after base BEA is exhausted

Clawback Regulations

Generation Skipping Transfer (GST) Tax

From the preamble:

A commenter requested confirmation and examples showing that allocations of the increased GST exemption made during the increased BEA period (whether to transfers made before or during that period) will not be reduced as a result of the sunset of the increased BEA. There is nothing in the statute that would indicate that the sunset of the increased BEA would have any impact on allocations of the GST exemption available during the increased BEA period. However, this request is beyond the scope of this project.

We would like to think the reduction in exemption will not affect prior allocations of GST exemption, but we do not know with certainty. If prior allocated GST exemption is reduced after 2025 consider the impact on trusts which may have inclusion ratios between zero and one, not zero. For skip trusts that could trigger immediate GST tax.

Clawback Regulations

Example 1

- Individual makes cumulative gifts of $9,000,000 – all of which are sheltered from gift tax by the $11,400,000 basic exclusion amount (BEA)
- The BEA at the individual's death is $6,800,000
- The credit against estate tax is calculated based on $9,000,000

$2,400,000 of exemption is lost.

Clawback Regulations

Example 2

- Individual makes cumulative gifts of $4,000,000 – all of which are sheltered from gift tax by the $11,400,000 basic exclusion amount (BEA)
- Adjusted taxable gifts are included in the estate tax computation
- The BEA at the individual's death is $6,800,000
- The credit against estate tax is calculated based on $6,800,000

The "doubled" exemption is lost.

Clawback Regulations

Example 3

- Spouse dies before 2026 and elects portability when the BEA is $11,400,000. The first-to-die spouse made no taxable gifts and did not have a taxable estate
- The surviving spouse makes no taxable gifts and does not remarry prior to dying when the BEA is $6,800,000
- The credit against estate tax is calculated based on $18,200,000 ($11,400,000 + $6,800,000)

The deceased spouse's exemption is preserved, but the surviving spouse's "doubled" exemption is lost.

Clawback Regulations

Example 4

- Spouse dies before 2026 and elects portability when the BEA is $11,400,000; the first-to-die spouse made no taxable gifts and did not have a taxable estate
- The surviving spouse makes taxable gifts of $14,000,000; DSUE is used first
- The surviving spouse does not remarry prior to dying when the BEA is $6,800,000
- The credit against estate tax is calculated based on $18,200,000 ($11,400,000 + $6,800,000); the $14,000,000 gift is included in the estate

The deceased spouse's exemption
is preserved, but the surviving spouse's
"doubled" exemption is lost.

The new Proposed Regulations:

Anti-Clawback Rule Exception

Published April 27, 2022

“Artificial” or “Painless” Gifts Targeted

- This example illustrates the types of “gifts” that the Treasury was particularly concerned about. These were gifts which some have referred to as “artificial” or “painless” in that the taxpayer could retain an interest in or control over the assets involved, lock in exemption (at least that is what some practitioners had hoped), and in short have their tax cake and eat it too.”
- Other such artificial gift transfers may have included funding a grantor retained interest trust (“GRIT”) to a family member so that the gift would be deemed made of the entire amount transferred with no reduction for the interest retained because, under Internal Revenue Code (“Code”) Section 2702 the value of the retained remainder would be valued at zero.
- Similarly, a preferred partnership could be structured that intentionally violated the requirements under Code Section 2701 so that the equity received by the donor in the entity would be valued at zero. The taxpayer could have retained a preferred interest structured so the entire value of the entity would be treated as a gift when certain family members acquired the common interests, thereby securing the use of the gift exemption (and permitting the allocation of GST exemption to the gift). The preferred partnership interest would be included in the taxpayer’s estate but the exemption, it was thought, would be preserved. The recently issued Proposed Regulations target these type of transactions and endeavor to exclude them from the anti-clawback rule.

Overview of Possible Planning Taxpayers May have Used Prior to the New Proposed Regulations

- 1% gift of a QTIP income interest by surviving spouse triggering gift of entire corpus of the QTIP under 2519
- Enforceable promissory note
- Defective or “busted” §2701 partnership freeze
- Completed gift with §2036 inclusion
- Similar strategies which “burn” exemption

§ 2001 - Imposition and rate of tax

(b) COMPUTATION OF TAX

The tax imposed by this section shall be the amount equal to the excess (if any) of—

(1) a tentative tax computed under subsection (c) on the sum of—

(A) the amount of the taxable estate, and

(B) the amount of the adjusted taxable gifts, over

(2) the aggregate amount of tax which would have been payable under chapter 12 with respect to gifts made by the decedent after December 31, 1976, if the modifications described in subsection (g) had been applicable at the time of such gifts.

For purposes of paragraph (1)(B), the term "adjusted taxable gifts" means the total amount of the taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1976, other than gifts which are includible in the gross estate of the decedent.

§20.2010-1 Unified Credit Against the Estate Tax Exceptions to the Anti-Clawback Rule

(c)(3) Exception to the special rule—

(i) Transfers to which the special rule does not apply. Except as provided in paragraph (c)(3)(ii) of this section, the special rule of paragraph (c) of this section does not apply to transfers includible in the gross estate, or treated as includible in the gross estate for purposes of section 2001(b), including without limitation the following transfers:

(A) Transfers includible in the gross estate pursuant to section 2035, 2036, 2037, 2038, or 2042, regardless of whether all or any part of the transfer was deductible pursuant to section 2522 or 2523;

(B) Transfers made by enforceable promise to the extent they remain unsatisfied as of the date of death;

(C) Transfers described in §25.2701-5(a)(4) or §25.2702-6(a)(1) of this chapter; and

(D) Transfers that would have been described in paragraph (c)(3)(i)(A), (B), or (C) of this section but for the transfer, relinquishment, or elimination of an interest, power, or property, effectuated within 18 months of the date of the decedent's death by the decedent alone, by the decedent in conjunction with any other person, or by any other person.

§20.2010-1 Unified Credit Against the Estate Tax Exceptions to the Exceptions (so Anti-Clawback Applies)

(c)(3) Exception to the special rule—

(ii) Transfers to which the special rule does not apply. Notwithstanding paragraph (c)(3)(i) of this section, the special rule of paragraph (c) of this section applies to the following transfers:

(A) Transfers includible in the gross estate in which the value of the taxable portion of the transfer, determined as of the date of the transfer, was 5 percent or less of the total value of the transfer; and

(B) Transfers, relinquishments, or eliminations described in paragraph (c)(3)(i)(D) of this section effectuated by the termination of the durational period described in the original instrument of transfer by either the mere passage of time or the death of any person

Anti-Clawback Rule Exception – List of Affected Transactions

- The exception applies to certain special rule gifts which aren't necessarily gifts for state law purposes, but are includable in the decedent's gross taxable estate
- Specifically, the anti-clawback rule exception will apply to:
  - Gifts within three years of death – § 2035
  - Life estates – § 2036
  - Certain transfers taking effect at death – § 2037
  - Revocable transfers – § 2038
  - Certain life insurance proceeds – § 2042
  - Gifts made by enforceable promise
  - Freeze partnerships – § 2701
  - GRATs (GRUTs, QPRTs) – § 2702
  - Transfers within 18-months of death that would otherwise be included above

Types of Transfers Attacked by New Prop. Regs.

1. Gifts that are includible in the taxpayer's gross estate Under Code Sections 2035, 2036, 2037, 2038, or 2042. The anti-clawback rule will not apply so that only the exclusion available at the taxpayer's death, not the exclusion that was believed to have been used when the transfer was consummated, will be available.
2. Unsatisfied enforceable promise gifts.
3. Gifts subject to the special Code Sec. 2701 valuation rules. These generally related to the valuation of intra-family transfers of entity equity interests when the parent (senior generation) retains certain preferred rights. If the taxpayer dies holding a Code Section 2701 applicable retained interest, they cannot take advantage of the anti-clawback rule.
4. Transfers like a GRIT where property is pulled back into gross estate under, for example, Code Section 2036. If the taxable portion was 5% or less (see exceptions below) the taxpayer will still be able to take advantage of the general anti-clawback rule to the extent of the gift (but not the whole amount transferred).
5. Certain transfers to GRATs and Qualified Personal Residence Trusts ("QPRTs") under Code Sec. 2702 if either technique used the bonus temporary exclusion amount.
6. The relinquishment or elimination of an interest in any one of the above transactions within 18-months of the decedent's death. Any of the foregoing transfers if the interest that was transferred was relinquished or eliminated within 18 months of death. For example, you created a GRIT with an income interests that lasts for your lifetime. If a third party eliminates your income interest it is not clear that the property would still be included in your estate under Code Section 2035. Generally, Code Section 2035(a) would include in the taxpayer's gross estate the value of the interest if the taxpayer relinquished his or her rights within three-years of death. However, Code Section 2035(a) does not apply if it is eliminated by something other than a voluntary act by the taxpayer. So, some might argue that Code Section 2035 alone is not sufficient to address the above. The Proposed Regulation provides that if you have a Code Section 2701 retained interest, and you transfer or have eliminated it within 18-months of death, you will still not qualify for the benefits of the anti-clawback rules even if the underlying property is not included in your estate.

Anti-Clawback Rule Exceptions to the Exception

- The anti-clawback rule exception won't be applied to certain transfers
  - That is, the 2019 anti-clawback rules will apply to certain transfers that would otherwise be excepted
  - Specifically, transfers which are 5% or less of the value of the transfer
  - And transfers within 18-months of death, which are described in the original interest by death or a certain time period

More on the 18 Month Rule

- The relinquishment or elimination of an interest in any one of the above Exception transactions more than 18 months prior to the decedent's death.
- What if you sell the asset involved for full and adequate consideration within the 18-month period? It would appear that would still be subject to the exception so that the anti-clawback benefit would not apply. This is because the Proposed Regulations capture any transfer, whether by gift or as a full consideration sale.

More on the 18 Month Rule – Relationship to 2035

What is the relationship between the new 18-month rule under the Proposed Regulations and the 3-year inclusion rule under Code Section 2035?

- Code Section 2035 requires that "…*the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent's death*…"
- So, this requires an affirmative "transfer" or "relinquished" by the taxpayer. In contrast, the Proposed Regulation provides: "*the transfer, relinquishment, or elimination of an interest, power, or property, effectuated within 18 months of the date of the decedent's death by the decedent alone, by the decedent in conjunction with any other person, or by any other person*."
- The Proposed Regulation has a shorter time period for inclusion, 18 months versus 3 years.
- But the Prop. Reg is also broader and includes "elimination" and actions by not just the decedent but by the decedent in conjunction with another person or even any other person.
- An involuntary elimination of a retained "string" may defeat the Code Section 2035 inclusion rule but will not defeat the Proposed Regulation exclusion of the transaction from the anti-clawback rule.
- It is uncertain whether, if the taxpayer crafted the documentation that gave the authority to a third party to eliminate the "string," that would signify sufficient control that the action by a third party would be imputed to the taxpayer making that purportedly "independent" action equivalent to the taxpayer themselves effecting the termination?
- This type of issue in the application of Code Section 2035 becomes academic during the 18-month period under the Proposed Regulations.

From the Proposed Regulations – Example 1

- Individual A made a completed gift of A's promissory note in the amount of $9 million.
- The note remained unpaid as of the date of A's death.
- The assets that are to be used to satisfy the note are part of A's gross estate, with the result that the note is treated as includible in the gross estate and is not included in A's adjusted taxable gifts.
- Because the note is treated as includible in the gross estate and does not qualify for the 5 percent de minimis rule, the exception to the special rule applies to the gift of the note.
- The credit to be applied for purposes of computing A's estate tax is based on the $6.8 million basic exclusion amount as of A's date of death.
- The result would be the same if A or a person empowered to act on A's behalf had paid the note within the 18 months prior to the date of A's death.

From the Proposed Regulations – Example 2

- Assume that the facts as Example 1 except that A's promissory note had a value of $2 million and, on the same date that A made the gift of the promissory note, A also made a gift of $9 million in cash.
- The cash gift was paid immediately, whereas the $2 million note remained unpaid as of the date of A's death.
- The assets that are to be used to satisfy the note are part of A's gross estate, with the result that the note is treated as includible in the gross estate and is not included in A's adjusted taxable gifts.
- Because the $2 million note is treated as includible in the gross estate and does not qualify for the 5 percent de minimis rule, the exception to the special rule applies to the gift of the note.
- On the other hand, the $9 million cash gift was paid immediately, and no portion of that gift is includible or treated as includible in the gross estate.
- Because the amount allowable as a credit in computing the gift tax payable on A's $9 million cash gift exceeds the credit based on the $6.8 million basic exclusion amount allowable on A's date of death, the special rule applies.
- The credit to be applied for purposes of computing A's estate tax is based on a basic exclusion amount of $9 million, the amount used to determine the credit allowable in computing the gift tax payable on A's $9 million cash gift.

From the Proposed Regulations – Example 3

- Assume the facts as Example 1 except, A has $2 million of DSUE.
- Assume further that A's promissory note had a value of $2 million on the date of the gift, and that A made a gift of $9 million in cash a few days later.
- The cash gift was paid immediately, whereas the $2 million note remained unpaid as of the date of A's death.
- The assets that are to be used to satisfy the note are part of A's gross estate, with the result that the note is treated as includible in the gross estate and is not included in A's adjusted taxable gifts.
- Because A's DSUE amount was sufficient to shield the gift of the note from gift tax, no basic exclusion amount was applicable to the $2 million gift and the special rule does not apply to that gift.
- On the other hand, the $9 million cash gift was paid immediately, and no portion of that gift is includible or treated as includible in the gross estate.
- Because the amount allowable as a credit in computing the gift tax payable on A's $9 million cash gift exceeds the credit based on the $6.8 million basic exclusion amount allowable on A's date of death, the special rule applies to that gift.
- The credit to be applied for purposes of computing A's estate tax is based on A's $11 million applicable exclusion amount, consisting of the $2 million DSUE amount plus the $9 million amount used to determine the credit allowable in computing the gift tax payable on A's $9 million cash gift.

From the Proposed Regulations – Example 4

- Individual B transferred $9 million to a grantor retained annuity trust (GRAT), retaining a qualified annuity interest valued at $8,550,000.
- The taxable portion of the transfer valued as of the date of the transfer was $450,000.
- B died during the term of the GRAT.
- The entire GRAT corpus is includible in the gross estate.
- Because the value of the taxable portion of the transfer was 5 percent or less of the total value of the transfer determined as of the date of the gift, the 5 percent de minimis rule is met and the exception to the special of this section does not apply to the gift.
- However, because the total of the amounts allowable as a credit in computing the gift tax payable on B's post-1976 gift of $450,000 is less than the credit based on the $6.8 million basic exclusion amount allowable on B's date of death, the special rule does not apply.
- The credit to be applied for purposes of computing B's estate tax is based on the $6.8 million basic exclusion amount as of B's date of death.

From the Proposed Regulations – Example 5

- Assume that the facts as Example 4 except that B's qualified annuity interest is valued at $8 million.
- The taxable portion of the transfer valued as of the date of the transfer was $1 million.
- Because the value of the taxable portion of the transfer was more than 5 percent of the total value of the transfer determined as of the date of the gift, the 5 percent de minimis rule is not met and the exception to the special rule applies.
- The credit to be applied for purposes of computing B's estate tax is based on the $6.8 million basic exclusion amount as of B's date of death.

From the Proposed Regulations – Example 6

- Assume that the facts as Example 4 except that B’s qualified annuity interest is valued at $2 million.
- The taxable portion of the transfer valued as of the date of the transfer was $7 million.
- B survived the term of the GRAT.
- Because B survived the original unaltered term of the GRAT, no part of the value of the assets transferred to the GRAT is includible in B’s gross estate, and the exception to the special rule found in paragraph does not apply.
- Moreover, because the amount allowable as a credit in computing the gift tax payable on B’s $7 million gift exceeds the credit based on the $6.8 million basic exclusion amount allowable on B’s date of death, the special rule applies.
- The credit to be applied for purposes of computing B’s estate tax is based on a basic exclusion amount of $7 million, the amount used to determine the credit allowable in computing the gift tax payable on B’s transfer to the GRAT.

From the Proposed Regulations – Example 7

- Individual C transferred $9 million to a grantor retained income trust (GRIT), retaining an income interest valued at $0.
- The taxable portion of the transfer valued as of the date of the transfer was $9 million.
- C died during the term of the GRIT.
- The entire GRIT corpus is includible in C's gross estate because C retained the right to receive all of the income of the GRIT.
- Because the transferred assets are includible in the gross estate and do not qualify for the 5 percent de minimis rule, the exception to the special rule found applies to the gift.
- The credit to be applied for purposes of computing C’s estate tax is based on the $6.8 million basic exclusion amount as of C’s date of death, subject to the limitation of section 2010(d).

What Should Practitioners Do?

- Professional advisers should use newsletters, email blasts, mailings, footers on bills or other means to communicate to their clients that may have engaged in planning that could be affected by the Proposed Regulation that their planning may have been impacted, and that a meeting with their advisory team to review the implications of the Proposed Regulation is recommended. Clients should be cautioned that the Proposed Regulation does not have the effect of law (yet) and may change before being finalized.

- **Example**: "*Clawback: A Proposed Regulation has been issued that will recapture on death the use of the temporary gift, estate, and GST exclusion. If enacted as proposed, it is possible that many common estate planning transactions that appeared to have safeguarded exclusion will not have done so. This could result in more estate tax even if the taxpayer anticipated that the planning would have safeguarded the high exclusion used. This could affect gifts of an enforceable promise to pay, QTIP disclaimers, certain Code Section 2701 transactions, possibly sale transactions involving the receipt of a note. You should review all planning with your advisory team to see if any further actions might be taken to mitigate this possible result*."

- If estate planners can identify specific clients who completed planning techniques specifically targeted by the Proposed Regulation, consideration should be given to written communications to those clients advising them of the possible implications of the Proposed Regulations.

Conclusion

Additional information

- Jonathan G. Blattmachr jblattmachr@hotmail.com
- Martin M. Shenkman shenkman@shenkmanlaw.com
- Interactive Legal sales@interactivelegal.com
- Peak Trust Company bcintula@peaktrust.com

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