

NEWS ALERT

TRUSTS & ESTATES



IRS Elves in Santa's Washington DC Workshop Create Holiday Gift for the Wealthy *IRS Opens Door to Black Friday (and Beyond) Savings on Gift and Estate Tax*

By Richard A. Marone | November 28, 2018

Just in time for the holidays, the IRS has released Proposed Regulations that reassure the wealthy that they will continue to benefit from historically large lifetime gift tax exemptions.

The Tax Cuts and Jobs Act¹, or "TCJA," temporarily increased the amount of the "Basic Exclusion Amount," or "BEA," available to offset lifetime taxable gifts and the estate tax on larger estates. We often refer to the BEA as the "lifetime exemption" because it is available to offset both federal gift tax and, to the extent not used against gift tax, the federal estate tax at death.

Prior to the TCJA, the amount of the BEA was \$5 million, which adjusted for inflation was \$5.49 million on December 31, 2017. The TCJA temporarily doubled the BEA beginning January 1, 2018 to an inflation adjusted \$11.18 million². However, this doubling will automatically expire on December 31, 2025, and for 2026 the BEA will revert to whatever \$5 million adjusted for inflation from 2011 will turn out to be.

Until the Proposed Regulations were released, some planners were concerned that substantial gifts made while exemptions were doubled might cause adverse results. Would a donor have to pay gift tax after 2025 on the amount previously sheltered by the doubled BEA? When the donor died, would her estate pay tax on the amount of prior gifts that were sheltered by the doubled BEA when made?³

The IRS recently issued a Notice⁴ in which it stated that it would officially publish proposed regulations in the November 23, 2018 (Black Friday!) Federal Register. These regulations, when finalized, will confirm that donors and decedent's estates will not be whipsawed by the reversion of the BEA after 2025 to its regular inflation adjusted amount. The Notice eliminates the whipsaw concern with respect to gifts made after a reduction in the BEA that follow earlier gifts made utilizing a higher BEA. Under the IRS's interpretation of how gift tax is computed, gift tax computations under current regulations would not eliminate the benefit of the doubled BEA after its reversion in 2026. Then, in Proposed Regulation [REG-106706-18], the IRS proposed to amend the Regulations under §2010 of the Internal Revenue Code to clarify that the estate tax computation should utilize the higher of the BEA used to shelter prior gifts, or the BEA available at death.

¹ Public Law 115-97, 131, Stat. 2504 (2017),

² In 2019 the BEA adjusted for inflation will be \$11.4 million.

³ The concern arises because the gift and estate tax are cumulative. The amount of current gift tax is computed by taking past taxable gifts into account. The amount of estate tax is computed by taking all lifetime taxable gifts into account.

⁴ Internal Revenue Bulletin IR-2018-229, November 20, 2018.

The Proposed Regulations set forth an example to clarify, summarized here:

Individual A, who was unmarried, made taxable gifts of \$9 million, all sheltered by the doubled BEA. A dies after 2025 when the BEA has reverted to \$5 million adjusted for inflation. In computing A's estate tax, which incorporates A's prior gifts and the computation of hypothetical gift tax on those gifts, A's estate will utilize \$9 million instead of the inflation adjusted \$5 million. Therefore, A's estate will not owe estate tax on the amounts of his prior gifts that were not subject to gift tax because of the doubled BEA.⁵

This is good news if you are fortunate to have significant wealth or you advise those who do.

It is important to keep track of the impact of large gifts on state gift and estate taxes. Connecticut has a gift tax with a lower, but increasing, exemption. A large federally tax-free gift may require the payment of Connecticut gift tax until the Connecticut exemption catches up with the federal BEA in 2023. New York has no gift tax, and starting in 2019 will not add lifetime gifts into its estate tax computation. Massachusetts has no gift tax, but does add lifetime gifts into its estate tax computation. This could result in a higher rate of tax on Massachusetts estates. See our prior analysis of these state exemptions, linked [here](#).

Please contact your Murtha Cullina estate planning attorney to discuss whether utilizing the doubled BEA before it goes away would be appropriate for you.

⁵ All of A's estate at death potentially will be subject to estate tax, but that estate tax will not include tax on the prior gifts that were made tax-free.

Richard A. Marone, Chair
860.240.6026
rmarone@murthalaw.com

Marcel J. Bernier
860.240.6087
mbernier@murthalaw.com

Alfred R. Casella
860.240.6048
acasella@murthalaw.com

Patrick D. Coughlin
203.653.5409
pcoughlin@murthalaw.com

George A. Dagon, Jr.
860.240.6039
gdagon@murthalaw.com

Christopher S. Fox
617.457.4082
cfox@murthalaw.com

Shera G. Golder
860.240.6188
sgolder@murthalaw.com

Robert A. Heinimann, Jr.
203.772.7781
rheinimann@murthalaw.com

Natale A. Messina
860.240.6027
nmessina@murthalaw.com

Lisa Newfield
203.772.7768
lnewfield@murthalaw.com

Lisa P. Staron
860.240.6175
lstaron@murthalaw.com

Suzanne Brown Walsh
860.240.6041
swalsh@murthalaw.com

Donna M. White
617.457.4133
dwhite@murthalaw.com

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