OBBBA and Future Trust Planning

Background: While the One Big Beautiful Bill Act (OBBBA) increased the applicable exemption amount, adjusted annually for inflation, and made that exemption *permanent,* when it comes to Congress and taxes, is anything really ever *permanent?*

With the increase in each individual's applicable exemption amount ($15.0 million starting in 2026) individuals will continue to use trusts as part of their estate plans, but the emphasis will be even more on income tax planning and positioning assets for a full basis adjustment on an individual's death. Some admittedly unscientific random thoughts on how estate planning might be affected by OBBBA follow.

Joint Trusts: There is a 50% basis adjustment to jointly owned assets on the death of one spouse. If the surviving spouse is likely to sell an asset held in the joint trust, e.g., the husband's UP hunting camp property, it might make more sense for the husband to own that asset outright and transfer the title to the joint trust on death. That way the separately owned asset will receive a 100% basis adjustment to its date-of-death value, so that when the survivor sells the asset there will be virtually no capital gain to recognize. Transfer-on-death and payable-on-death arrangements with the joint trust named as the designated beneficiary can also be used to achieve this 100% basis adjustment. [Now, if only Michigan would adopt the Uniform Transfer on Death Deed Act so it could be used to obtain a 100% basis adjustment to real estate that avoids probate and passes directly to the joint trust!.]

SPATs: There might be a greater use of Special Power of Appointment Trusts (SPATs) to increase flexibility to respond to future changes in circumstances that will benefit a surviving spouse.

SLATs: Spousal Lifetime Access Trusts (SLATs) still make sense, even though the large applicable exemption amount is now *permanent* and adjusted annually to reflect the cost-of-living. A SLAT, which is usually a *grantor* trust [IRC 677] provides creditor protection, while permitting the married couple indirect access to the income the SLAT generates if the spouse is the beneficiary. Perhaps adding children or grandchildren as SLAT discretionary beneficiaries along with the settlor's spouse will enable income splitting and the tax-free gift of income to those descendants.

Non-Grantor Trusts: Non-grantor trusts will become even more popular to shift income away from the settlor to the trust, especially when the non-grantor trust will have access to the $40,000 SALT deduction. A non-grantor trust that holds real estate may now make much more sense than in the past.

Shifting Income: Shifting income from the settlor to a non-grantor trust will enhance the settlor's ability to qualify for some of the new OBBBA income tax deductions and thus avoid the phaseout-limiting provisions associated with those new deductions. A non-grantor trust will be able to take a SALT deduction of up to $40,000 or more, at least for 2025 through 2029. With this enhanced income tax deduction, for those who have created intentionally defective grantor trusts (IDGTs) in the past, they should review their situation to determine whether it would be beneficial to have that trust function as a separate taxpayer for income tax purposes.

Divide Non-grantor Trusts: Similarly, for existing non-grantor trusts, trustees should explore dividing that trust into separate trusts, one for each child, or grandchild, to exploit the $40,000 SALT deduction for each non-grantor trust.

Abandon Credit Shelter Trusts?: With the large *permanent* applicable exemption amount and electing *portability,* estate plans for modestly wealthy married clients might completely abandon the use of a credit shelter (or bypass) trust and leave all the couple's assets outright to the surviving spouse. An outright bequest to the surviving spouse will lead to a second basis adjustment on the death of the surviving spouse.

Avoid Valuation Discounts: With the renewed focus on income tax planning (away from estate tax planning) and an ever-increasing applicable exemption amount each year, many families might now seek to remove, or minimize, valuation discount planning, e.g., family limited liability companies, with the goal to obtain the highest date-of-death values to maximize the basis adjustment on the asset owner's death.

Non-Grantor SLATs: SLATs might now be structured as non-grantor trusts if a beneficiary with an adverse interest, called an *adverse party* to the spouse beneficiary, must consent to distributions from the SLAT to the settlor's spouse. Such a non-grantor trust can thus shift income away from the married couple's estate while exploiting the $40,000 SALT deduction that the non-grantor SLAT can claim.

QTIP Trusts: A QTIP Trust exposes trust assets to a basis adjustment on the death of the beneficiary-spouse. The QTIP trust will qualify for a basis step-up and permits generation skipping transfer tax (GSTT) planning, along with asset protection for the surviving spouse. The GSTT benefit may not be important to modestly wealthy individuals if they view the new *permanent* $15 million exemption as well beyond their, and their children's, reach of wealth accumulation, especially if *portability* is elected on the death of the first spouse to die.

Testamentary General Powers: Existing credit shelter trusts, which will not enjoy a second basis adjustment on the death of the surviving spouse who is the primary beneficiary of that trust, might be decanted, or modified, to give the spouse lifetime beneficiary a testamentary general power of appointment to appoint credit shelter trust assets to the creditors of his/her estate. This restricted (to estate creditors) testamentary power of appointment will be sufficient to include the value of the credit shelter trust assets in the surviving spouse's gross estate at the time of his/her death, which will then cause their basis to be adjusted to date of death values.

Powers of Appointment: Lifetime limited powers of appointment and other trust director (protector) powers make even more sense to build in more flexibility to deal with future law and tax changes. As noted above, nothing is ever *permanent* when it comes to Congress.

Sales to IDGTs: Existing installment note transactions in place between a *grantor* trust and its grantor which was intended to the benefit of the trust and was primarily motivated by estate tax planning, should be revisited. The grantor may now wish to have the loan repaid and the *grantor* trust continued as a non-grantor trust that may spray its income to lower-income bracket beneficiaries and/or charities to reduce the federal income tax obligations of the grantor's entire family and perhaps qualify for some of the new OBBBA deductions.

Conclusion: These are just of a few of the thoughts that come to mind with OBBBA, with a now permanent applicable exclusion amount of $15 million per individual, new income tax deductions that can be phased out if the individual reports too large adjusted gross income, or the desire to shift income using non-grantor trusts for descendants in lower marginal income tax brackets, and a renewed focus on exposing trust assets to a basis step-up on the death of a surviving spouse.

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