

Florida Bar Tax Section

AN OVERVIEW OF FEDERAL TRANSFER TAXES

Presented by:

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ABOUT THE PRESENTER

TASO MILONAS is a Florida Bar Board Certified Tax Lawyer. He received his LL.M. in Taxation from the University of Florida College of Law and J.D. from Stetson University College of Law. Taso practices principally in the areas of tax and estate planning for high net worth individuals and their businesses, estate administration and trusts & estates litigation. He currently serves on the Executive Council of the Florida Bar Tax Section and as Assistant Director of its Federal Tax Division. Taso has continuously received an AV® Martindale-Hubbell peer review rating, 10/10 Avvo Rating and is listed in *Florida Super Lawyers*. Taso is a frequent lecturer on taxes, estate planning and estate administration.



CHAPTER 11: ESTATE TAX, §§2001 to 2210

Subchapter A, Estates of Citizens or Residents

Part I (Tax Imposed)

§2001(a) imposes a tax “on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States”

§2001(b) provides for the computation of tax based on the value of the taxable estate and “adjusted taxable gifts” (post-1976 gifts), less certain adjustments for taxes payable for post-1976 gifts

§2001(c) contains the rate table used for computing the estate tax and is based on a sliding scale from 18% to 40% (same table used for computation of gift tax)

§2002 provides that the estate tax “shall be paid by the executor”

Note: In Florida, we typically refer to the administrator of the estate as the “personal representative”, but they are one and the same for these purposes

see also §2203 definition of “executor” for tax purposes

Subchapter A, Part II (Credits Against Tax)

(remember, a “credit” is a dollar-for-dollar offset against tax)

§2010 provides a credit against the tax imposed by §2001 for the estate of every decedent equal to the “applicable credit amount”

The “applicable credit amount” is generally equal to: (i) the “applicable exclusion amount” (\$5M, indexed for inflation, which was \$5.45M as of 12/31/2016), plus, in the case of a surviving spouse, (ii) the “deceased spousal unused exclusion amount” (“DSUEA” – this is the “portability” amount sometimes referred to in estate planning)

DSUEA for a surviving spouse is not automatic; an estate tax return must have been filed and an election made on the return of the deceased spouse

§2011 [repealed]

§2012 provides a credit against the estate tax for prior gift taxes paid

§2013 provides a credit for estate taxes paid on transfers to the decedent from any person who died up to 10 years before or 2 years after the decedent (“prior transfer tax credit”)

Subchapter A, Part III (Gross Estate)

(helpful hint: review Federal Estate Tax Return, Form 706)

§2031 defines the value of the “gross estate” of a decedent to include the value as of date of death of “all property, real or personal, tangible or intangible, wherever situated” (pretty much any interest at death in any property, anywhere ...)

Note: the definition of “gross estate” is much more expansive than the value of a decedent’s “probate estate” (inventory value) for estate administration purposes

§2032 allows the executor to elect to value assets up to 6 months after death (as opposed to date of death), if such later value will decrease the size of the gross estate (often referred to as the “alternate valuation date”)

§2032A allows the executor to elect to value certain farm and business real estate at other than date of death value, provided the total reduction in the value of the estate does not exceed \$750,000, as adjusted for cost-of-living

§2033 provides the gross estate shall include the value of all property in which decedent had an interest

§2034 provides the gross estate shall include the value of all property in which the decedent’s surviving spouse has a dower or curtesy (or similar) interest

Gross Estate (continued)

§2035 provides for the inclusion in the value of the gross estate of certain gifts made within 3 years of death (so-called “contemplation of death” rule)

§2036 provides for the inclusion in the value of the gross estate of any property the decedent previously transferred for less than full and adequate consideration, but retained a life estate in the transferred property

§2037 provides for the inclusion in the value of the gross estate of certain property transfers taking effect at death

§2038 provides for the inclusion in the value of the gross estate of any property that was subject to a power to “alter, amend, revoke or terminate” exercisable by the decedent alone or with another person within 3 years of the decedent’s death (e.g., assets in a revocable trust)

§2039 provides for the inclusion in the value of the gross estate of any annuities on the life of the decedent

§2040 generally provides for the inclusion in the value of the gross estate of property owned jointly by the decedent and another person; certain rules apply depending on whether the other party contributed and/or if the property was jointly-owned with a spouse

Gross Estate (continued)

§2041 provides for the inclusion in the value of the gross estate of property over which the decedent held or relinquished at the time of death a “general power of appointment”, defined as any power that is exercisable “in favor of the decedent, his estate, his creditors, or the creditors of his estate”

§2042 provides for the inclusion in the value of the gross estate of life insurance proceeds on the decedent’s life payable to the decedent’s estate or in which the decedent possessed an “incident of ownership” at death

§2043 provides for the inclusion in the value of the gross estate of any excess value over consideration received of property transferred at less than full & adequate consideration in a transfer described in §§2035, 2026, 2037, 2038, or 2041

§2044 provides for the inclusion in the value of the gross estate of certain property for which a marital deduction was previously allowed for estate or gift tax purposes (“QTIP” property)

§2045 provides an expansive definition of transfers subject to inclusion under §§2034 through 2042

§2046 references §2518 for provisions relating to a “qualified disclaimer”

Subchapter A, Part IV (Taxable Estate)

(these are “deductions” from the gross estate, again look at Form 706)

§2051 defines the value of the “taxable estate” as the value of the gross estate, less the deductions provided in this part

§2052 [repealed]

§2053 lists certain expenses, indebtedness & taxes deductible from the value of the gross estate

§2054 allows certain losses to be deducted from the value of the gross estate

§2055 allows qualifying charitable bequests to be deducted from the value of the gross estate

§2056 allows property transferred to or for the benefit of a surviving spouse to be deducted from the value of the gross estate (“marital deduction”)

§2056A allows a marital deduction for certain transfers through a “qualified domestic trust” (“QDOT”); this only comes into play if surviving spouse non-US citizen (i.e. Resident Alien or Non-Resident Alien)

Subchapter B, Estates of Nonresidents Not Citizens

§2101 imposes a tax on the transfer of the taxable estate of every decedent nonresident who is not a citizen of the United States

§2102 provides certain credits against the tax imposed above

§2103 defines the gross estate of such a decedent as the value of property situated in the United States

§2104 provides what property is deemed within the United States

§2105 provides what property is deemed property without the United States

§2106 defines taxable estate of such a decedent

§2107 imposes an estate tax on certain expatriates

§2108 delineates circumstances under which pre-1967 estate tax provisions apply

Subchapter C, Miscellaneous

§2201 provides special rules for combat-zone related deaths, death of astronauts, etc.

§2202 [repealed]

§2203 defines "executor"

§2204 provides for the discharge of fiduciary from personal liability

§2205 provides for reimbursement out of the estate for taxes paid by any person other than the executor

§2206 provides liability of life insurance beneficiaries for their portion of estate tax

§2207 provides liability for estate tax for a recipient of property over which decedent had power of appointment

§2207A provides a right of recovery against former marital deduction property

§2207B provides a right of recovery where decedent had a retained interest

CHAPTER 12: GIFT TAX, §§2501 to 2524

Subchapter A, Determination of Tax Liability

§2501 imposes a tax every calendar year “on the transfer of property by gift during such calendar year by any individual resident or nonresident”.

§2502 provides for the tax to be at the highest marginal rate on “taxable gifts” (as defined in §2503) by using a formula that takes into account prior taxable gifts

The donor making the gift is liable for the any tax due

§2503 defines “taxable gifts” as generally total gifts made during the year, less certain deductions provided in Subchapter C

There are some important exclusions:

- There is an annual exclusion of \$10,000 per donee for “present interest” gifts, indexed for cost-of-living (currently \$14,000);
- Certain gifts made for the benefit of a minor (under age 21) are excluded; and
- Certain transfers for educational or medical expenses are excluded

§2504 provides how taxable gifts for preceding calendar periods are computed

§2505 allows a credit against gift tax based on the §2010(c) unified credit amount

Subchapter B, Transfers

§2511 defines the broad scope of transfers in general

§2512 generally provides a gift will be valued as of the date of gift

§2513 allows gifts by a husband and wife to a third party to be treated as being made $\frac{1}{2}$ by each spouse if both spouses consent (so-called “split gifts”)

§2514 provides the exercise or release of a general power of appointment will be treated as a gift; provided, however, the lapse of a power will not be treated as a gift unless it exceeds the greater of \$5,000 or 5% of the value of the assets subject to the power (“5 x 5” power)

§2515 provides for an increase in the amount of the gift in the cases of a “direct skip” for GST tax purposes (covered later)

§2515A [repealed]

§2516 generally provides that transfers incident to divorce are treated as non-taxable gifts between the spouses

§2517 [repealed]

CHAPTER 13: TAX ON GENERATION-SKIPPING TRANSFERS, §§2601 to 2664 ("GST TAX")

Subchapter A, Tax Imposed

(caution: this is a definition-heavy area, the IRS at their best, lol)

§2601 imposes a tax on every "generation-skipping transfer" (as defined in Subchapter B)

§2602 provides the amount of tax is equal to the "taxable amount" (as defined in Subchapter C) x the "applicable rate" (as defined in Subchapter E)

§2603 provides the liability for the tax shall be on the transferee (taxable distributions), transferor (direct skips) or trustee (taxable termination), depending on the type of transfer

§2604 [repealed]

Subchapter C, Taxable Amount
(second round of definitions...)

§2621 defines the taxable amount in case of a taxable termination

§2622 defines the taxable amount in case of a taxable distribution

§2623 defines the taxable amount in case of a direct skip

§2624 generally provides that property shall be valued at the time of the generation-skipping transfer

Subchapter D, GST Exemption
(third round of definitions)

§2631 allows allocation of a “GST exemption” for purposes of determining inclusion ration (see Subchapter E below) equal to the basic §2010 exclusion (\$5.45 million as of 12/31/2016)

§2632 provides special rules for the time and manner of how the GST exemption is allocated

Subchapter E, Applicable Rate; Inclusion Ratio
(fourth round of definitions...when will it end?)

§2641 defines “applicable rate” as the “maximum Federal estate tax rate” (currently 40%) x the “inclusion ratio” with respect to the transfer

§2642 defines “inclusion ratio” as “1 over...the applicable fraction”, the proceeds to define what the “applicable fraction” is depending on the type of transfer made

Subchapter F, Other Definitions & Special Rules
(fifth and final round of definitions...and some special rules!)

§2651 defines “generation assignment”

§2652 defines “transferor”, “trust”, “trustee”, “interest in property”, and “executor”

§2653 provides special rules for the tax treatment of multiple skips

§2654 provides special rules relating to “basis”, “separate trusts”, “disclaimers” and “limitation of personal liability” for a trustee

CHAPTER 14: SPECIAL VALUATION RULES, §§2701 to 2704

§2701 provides special valuation rules in the case of transfers of certain interests in corporations or partnerships by generally disregarding the value of any retained interest in the property, including, but not limited to, distribution rights, liquidation rights, puts, calls or conversion rights (aimed at curbing perceived abuses in transfers of family business interests)

§2702 provides special valuation rules in the case of transfers of interests in trusts by generally disregarding the value of any interest retained by the transferor (same goal as above)

§2703 disregards certain rights and restrictions on transferred property, such as options and restrictions typically contained in buy-sell agreements (e.g., restrictions that would otherwise depress value of interest being transferred), unless it is a “bona fide business arrangement” that is “not a device” used to transfer property to a decedent’s family for less than full and adequate consideration, and comparable to other arrangements entered into at “arm’s length”

§2704 provides for the treatment of certain lapsing rights and restrictions by generally disregarding the value of any retained interest

CHAPTER 15: GIFTS & BEQUESTS FROM EXPATRIOTS

§2801 generally imposes a tax on any US citizen or resident who receives a gift or bequest during any calendar year from a “covered expatriate” (as defined in §28771(g)(1))

The tax is equal to the product of: the highest rate of tax contained in the table in §2001(c) (currently 40%) x the value of the gift or bequest

The tax is to be paid by the recipient

An amount equal to the annual exclusion amount under §2503(b) (currently \$14,000/yr) shall be excluded from the value of any such gift or bequest

Any gift or bequest to a spouse or charity for which a deduction would otherwise be allowed under §§2055, 2056, 2522, or 2523 is excluded

QUESTION & ANSWER

ADDITIONAL RESOURCES

Internal Revenue Code

<https://www.law.cornell.edu/uscode/text/26>

IRS Forms (e.g., Forms 706, 709 & 1041)

<https://www.irs.gov/forms-pubs>

Tax Law Certification (general information)

<https://www.floridabar.org/DIVCOM/PI/CertSect.nsf/9736b6935363096385256fd4005e5cea/c72a88ce92d2d9df85256fd4005c0ef9!OpenDocument>

Tax Law Certification Exam Specifications

(Note: Federal Transfer Tax is a Subspecialty Topic worth approximately 30% of total exam)

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