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State of the estate tax

By: Claude Solnik November 20, 2017

Mark Meinberg was at a Senate Finance Committee Hearing in Washington, D.C., in 2010 along with various accountants when George Steinbrenner died. The owner of the New York Yankees suffered a heart attack at St. Joseph's Hospital in Tampa, Fla.

The man who acquired the Yankees from CBS for $8.7 million in 1973 and grew its value beyond $3 billion had passed away. But something else had died, at least briefly, before him.

The federal estate tax had sunset, at least temporarily, creating a window when the federal government would not extract money from estates through this tax.

"Everybody was saying that he beat the system," Meinberg, partner in charge of EisnerAmper's Long Island office in Syosset, said. "It depends on how you define beating the system. When you're that wealthy, you have the top accountants, lawyers and financial planners representing you."

The federal estate tax currently kicks in at $5.49 million, while the New York State estate tax takes effect at $5.2 million. Its future is now up in the air as the Senate, House and President seek to revamp the tax code.

Although the federal estate tax has been out of reach and out of mind for many, it has been rising, touching fewer and fewer people.

The federal estate tax rate was $600,000 in 1997, rising to $1 million in 2002, $1.5 million in 2004, $2 million in 2006, $3.5 million in 2009, $5 million in 2010, $5.25 million in 2013 and $5.49 million as of this year.

The House would roughly double the individual estate tax exemption to $10 million and repeal it by 2024, while the Senate would double, but not repeal it. For married couples, the amounts are twice that sum.

"It includes all your assets. Nothing is exempt for estate tax purpose and its fair market value," said Ronald Finkelstein a tax partner in Marcum's Long Island office in Melville and national co-leader of the firm's trusts and estates practice group. "The House and Senate proposals are different. The estate tax only effects the very wealthy. There could be a lot of backlash. There are

RON FINKELSTEIN: Eliminating the estate tax could benefit the very wealthy, but also lead to a backlash.

budget constraints."

The debate over the estate tax has attracted some but, at most, muted attention. At least in New York State, it has been minor compared to the outcry over possibly removing the ability to deduct state and local taxes from one's income taxes.

"It really doesn't hit the average Joe. Maybe that's why people aren't paying attention to it," said Tim McHale, tax partner at Cerini & Associates, in Bohemia. "To me, the estate tax debate has been very quiet compared to everything else. It doesn't affect a lot of people."

One out of 700 deaths result in federal estate tax, as high as 40 percent, although the average tax is 17 percent, while 99.9 percent do not pay any, according to Americansfortaxfairness.org.

"Relative to the entire budget, it doesn't raise that much revenue," said Karen Goldberg, head of the New York office trust and estate practice for EisnerAmper. "I think the exclusion is high enough right now. The estate tax doesn't impact the average wealthy person."

About 8,200 tax returns were filed in 2016 for estates above $5 million, according to the Internal Revenue Service, including 7,053 from $5 million to below $10 million, 2,635 from $10 million to below $20 million, 1,073 from $20 million to below $50 million and 434 over $50 million.

"If we raise the exemption based on 2016 statistics, we're wiping out those 8,200 returns that have to be filed," said Lisa Rispoli, partner in charge of trusts and estates at Grassi & Co. in Jericho. "The tax collected on those returns totals $2.3 billion."

Regardless of what happens, there are ways to leave money to the next generation in trusts and otherwise, reducing value and taxes.

"If one's estate is too large, there are ways to transfer wealth and assets to other generations or trusts or philanthropic trusts," Meinberg said. "There's always been a way to do that."

People can use what Finkelstein called "freeze techniques," transferring assets in a trust so appreciation occurs after a gift is made. And transferring minority interests in a business allows for the valuation to take minority interest and lack of control discounts.

"There are discounts for lack of marketability and minority interest or lack of control," said Ed McWilliams, tax manager also at Cerini & Associates in Bohemia. "It allows you to take something valued at 100. Because it’s not marketable as a business or you don’t have control over it, you can value it as a 60.”

Gifts can be used to move money from the wealthy, in the highest tax brackets, to people in lower income brackets.

And portability rules allow one spouse to use the remaining portion of the other’s allowance, if they haven’t used it. “The balance can go to second to die in addition to their exemption,” McHale added.

Since there is currently no gift tax in New York State, it’s also possible to circumvent the state’s estate tax through gifts. But those gifts include a three-year look-back period for estate taxes.

“They wanted to capture people who were giving away things on their deathbed, so you have a three-year look back,” Goldberg said.

As of 2019, that look back period would no longer apply, essentially letting people give away all their money before dying to avoid the state’s estate tax. But New York could change the rules by that time.

“But if you die before Jan 1. 2019, it will pull in three years prior gifts,” Rispoli said of state estate tax. “If you die after that, they say right now they’re not pulling it in.”

New York State’s estate tax is set to equal the federal version in 2019. But Rispoli said if the federal tax disappears, New York may end up changing that plan. “If there are any federal changes, New York will need to address the law,” she said.

McWilliams said even if the estate tax is eliminated, that doesn’t mean it’s gone for good. “Just because it goes away today doesn’t mean it can’t come back tomorrow,” McWilliams said. “We’re advising our clients. We’ll keep track and be prepared to act when things change. But until things change, they stay the same.”

Goldberg said at least now, the future of the estate tax is in flux, making estate planning a little more complex.

“It’s a work in progress,” Goldberg said.” I’m working with what I have. I don’t think anyone should scramble to do anything, until we know what is actually happening.”