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New York State Makes Estate Tax Changes and Increases Real Property Transfer Tax

The executive budget that was recently passed by the New York State Legislature extends the provision by which gifts made within three years before an individual's death are added to the individual's taxable estate. In addition, the legislation provides that a surviving spouse's taxable estate includes assets in a marital trust for which a Qualified Terminable Interest Property (QTIP) election was made for New York purposes at the first spouse's death, even if no federal QTIP election was made.

The legislation also includes a significant increase in the taxes imposed on sales of New York City real property where the consideration is at least \$2 million. As described below, the rate of tax depends on a number of factors, including the kind of property transferred and the amount of the consideration.

New York estate tax changes

Since 2014, New York law has provided that a decedent's taxable estate is increased by the amount of taxable gifts made during the three-year period ending on the decedent's date of death if the decedent made the gifts while a New York resident (other than gifts of real or tangible personal property located outside New York or gifts made before April 1, 2014). For estates of individuals who are not residents of New York at death, the taxable estate includes such gifts only if they consist of real or tangible personal property located in New York or intangible personal property employed in a business carried on in New York (and only if the gifts were made while a New York resident).

This "gift add-back" provision, by its terms, did not apply to estates of decedents dying on or after Jan. 1, 2019. The new legislation extends the provision so that it applies to estates of decedents dying prior to Jan 1, 2026. There is an exception for gifts made between Jan. 1, 2019, and Jan. 15, 2019, which are not added to the taxable estate. One strategy to avoid New York estate tax has been to make gifts to reduce the amount of the estate to less than the New York exemption amount (currently \$5,740,000). Under the recently extended provision of the tax law, this strategy will not work for New York residents if death occurs within three years of the gift.

In addition, the legislation increases a surviving spouse's taxable estate by the value of marital trust property for which a QTIP election was made for New York estate tax purposes at the first spouse's death, regardless of whether a federal QTIP election was made. (A QTIP election is an election made on an estate tax return that enables assets passing to a trust for the benefit of a surviving spouse to qualify for the marital deduction. The property in the trust is generally subject to estate tax at the surviving spouse's death, effectively resulting in a deferral of estate tax on the trust property.)

This provision was enacted by the Legislature to reverse the result of the *Seiden* case. In *Seiden*, the first spouse's estate was not subject to federal estate tax because he died in 2010, when the federal

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estate tax was not in effect. The estate filed a New York estate tax return and made a QTIP election for a trust for the benefit of the surviving spouse, thereby qualifying the trust for the New York marital deduction. When the surviving spouse subsequently died, the Surrogate's Court held that the QTIP trust property was not subject to New York estate tax because, under New York law, property that is not includible in a decedent's estate for federal estate tax purposes was not subject to New York estate tax and, in fact, the trust property was not includible in the surviving spouse's estate for federal estate tax purposes because no federal QTIP election had been made at the first spouse's death.

As a result of the legislation, if a QTIP election is made for New York estate tax purposes upon the death of the first spouse and no federal QTIP election is made because the first spouse's estate is not required to file a federal estate tax return (for example, if the estate is below the federal filing threshold), the trust property will be subject to New York estate tax upon the death of the surviving spouse. This provision applies to estates of decedents dying on or after April 1, 2019.

Increase in taxes on transfers of real property

The legislation increases the New York State tax on transfers of real property in New York City in two ways.

First, the legislation increases the basic tax on certain real property transfers, which, prior to the legislation, were generally subject to New York State transfer tax

at a 0.4% rate (in addition to New York City transfer tax). Beginning July 1, 2019, for conveyances of residential real property in New York City where the consideration is at least \$3 million, the New York State tax is increased to 0.65%. The same tax rate increase applies to conveyances of nonresidential real property in New York City where the consideration is at least \$2 million. Residential real property includes one-, two- or three-family houses; condominium units; and cooperative apartments. The basic real property transfer tax is payable by the seller.

In addition to the increase in the basic real property transfer tax, the legislation increases the so-called "mansion tax" on certain sales of residential real property. Prior to the legislation, the mansion tax consisted of a 1% tax on conveyances of residential real property where the consideration is at least \$1 million. The legislation increases the mansion tax rate for sales of residential real property in New York City where the consideration is at least \$2 million. The tax rate increases with the amount of the consideration, ranging from 1.25% to 3.9%. The mansion tax is payable by the buyer (but if the buyer fails to timely pay or is exempt from paying the tax, the seller becomes liable for it).

The following table illustrates the tax rate imposed by New York State under the legislation for sales of residential real property in New York City at various levels of consideration.

AMOUNT OF CONSIDERATION	BASIC REAL PROPERTY TRANSFER TAX	MANSION TAX	TOTAL NYS REAL PROPERTY TRANSFER TAX
Less than \$1 million	0.40%	N/A	0.40%
\$1,000,000 - \$1,999,999	0.40%	1.00%	1.40%
\$2,000,000 - \$2,999,999	0.40%	1.25%	1.65%
\$3,000,000 - \$4,999,999	0.65%	1.50%	2.15%
\$5,000,000 - \$9,999,999	0.65%	2.25%	2.90%
\$10,000,000 - \$14,999,999	0.65%	3.25%	3.90%
\$15,000,000 - \$19,999,999	0.65%	3.50%	4.15%
\$20,000,000 - \$24,999,999	0.65%	3.75%	4.40%
At least \$25 million	0.65%	3.90%	4.55%

The increased New York State taxes are separate from, and in addition to, the tax imposed by New York City on these transfers. The New York City transfer tax was not increased. For transfers of residential real property where the consideration is greater than \$500,000, the NYC transfer tax is 1.425%, and where the consideration is \$500,000 or less, the NYC transfer tax is 1%. For transfers of nonresidential real property where the consideration is greater than \$500,000, the NYC transfer tax is 2.625%, and where the consideration is \$500,000 or less, the NYC transfer tax is 1.425%.

The new rates are effective July 1, 2019. However, they do not apply to conveyances made pursuant to a binding written contract entered into on or before April 1, 2019, provided that the date of execution of the contract is confirmed by independent evidence, such as the recording of the contract, payment of a deposit, or other facts and circumstances as determined by New York State.

If you have any questions about the legislative changes discussed in this alert, please contact us.

Related Professionals

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