

Will the New York Estate Tax System Be Turned Upside Down? -- Aspects of Governor Cuomo's Budget Bill That Affect Estate Planning and Trusts



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On January 20, 2014, Governor Cuomo issued the New York State Executive Budget (the "Budget Bill").

The Budget Bill, as subsequently amended, includes the following proposals that pertain to estate planning and trusts:

- A proposal to reform the New York estate tax (i) by raising the New York estate tax exemption from \$ 1 million to \$ 5.25 million, subject to further indexing, and (ii) by reducing the maximum New York estate tax rate from 16% to 10%. Both the increased exemption and the decreased rates would be phased in over four years with the New York estate tax exemption to be approximately equal to the

Federal estate tax exemption, indexed for inflation, beginning in 2019.

- A proposal to reform the New York estate tax by permitting a separate state qualified terminable interest property ("QTIP") election to be made where no federal estate tax return is required to be filed, although a federal estate tax return may in fact have been filed.

- A proposal to eliminate the New York generation-skipping transfer ("GST") tax, which applies to taxable distributions and taxable terminations from a trust to a "skip person" for GST tax purposes.

- A proposal to

provide for an "addback" of taxable gifts under IRC § 2503 that are made on or after April 1, 2014 if the decedent was a resident of New York at the time such gift was made.

- A proposal to subject "incomplete gift nongrantor trusts" ("ING Trusts") to New York income tax by treating such trusts as grantor trusts for New York income tax purposes.

- A proposal to subject to New York income tax on a "throwback tax" basis "accumulation distributions" to New York resident beneficiaries from nongrantor trusts (other than "ING Trusts") that are currently exempt from New York

income tax [A] under the “New York Resident Trust Exception,” or [B] as nonresident trusts that do not have any New York source income. The New York Resident Trust Exception applies to nongrantor trusts for which (1) all of the trustees are domiciled outside of New York State; (2) all real and tangible trust property is located outside of New York State; and (3) all trust income and gains is derived from sources outside of New York State.¹

The cornerstone of the Budget Bill as it affects estate planning and trusts is the Governor’s proposal (i) to increase the New York estate tax exemption to ultimately match the federal estate tax exemption (which is currently \$5.34 million for decedents dying in 2014, subject to further indexing) and (ii) to decrease the top New York estate tax rate from 16% to 10%. Both the increased exemption and the decreased rates would be phased in over four years, with the state estate tax exemption to be approximately equal to the federal estate tax exemption, indexed for inflation, beginning in 2019.

This estate tax proposal is sound tax policy as a way to keep wealthy New Yorkers in the Empire State during their

golden years. As succinctly stated by Governor Cuomo in his State of the State address:

“New York [] is one of only fifteen states [with] an estate tax and our exemption levels are among the lowest and our rates are among the highest. Let’s eliminate the “move to die tax” w[h]ere people literally leave our state, move to another state to do estate planning. We propose raising New York’s state tax threshold and lowering the rate to put it into line with other states.”²

The prevailing sentiment is that the Governor’s proposal to radically change the New York estate tax system has legs to it.

The next question then becomes how to pay for this if the budget overall is to be revenue neutral. I would accordingly expect any legislation increasing the New York estate tax exemption and decreasing the top New York estate tax rate to be coupled with offsetting revenue raisers. As reflected in the Budget Bill, these offsetting revenue raisers could include a “clawback” concept for certain gifts made by New York residents after March 31, 2014. As also reflected in the Budget Bill, we should expect a push in Albany for the imposition of income tax on New York grantors or New

York beneficiaries of certain nongrantor trusts that, under current law, produce income that is outside the New York tax net. The precise parameters of these proposed offsetting revenue raisers are yet to be determined, and a number of professional organizations will be submitting comment letters to help shape these parameters during the coming weeks.

¹ See N.Y. Tax Law § 605(b)(3)(D).

² “Transcript: Governor Cuomo's 2014 State of the State Address,” available at <https://www.governor.ny.gov/pres/s/01092014-transcript-2014-sos>.

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