TAX LAW
AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION

AMERICAN BAR ASSOCIATION Young Lawyers Division

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Trusts and Estates Tax Law Update

By: Griffin H. Bridgers

Griffin H. Bridgers is an attorney with the law firm of Hutchins & Associates LLC in Denver, Colorado, whose practice focuses on tax, estate planning, and business planning for high net worth families and owners of closely-held and family businesses.

The recent passage of the Tax Cuts and Jobs Act of 2017 (P.L. 115-97) (the "Act") has kept many tax attorneys busy since its enactment. While there is much excitement about the income tax savings for individuals and business owners, little attention has been given to the changes which affect estate planning clients. This article provides a brief synopsis of the changes.

Increase in Exclusion Amount

The basic exclusion amount for estate, gift, and generation-skipping transfer tax purposes has doubled from $5,000,000 to $10,000,000. This amount is adjusted for inflation yearly. With inflation adjustments, the basic exclusion amount was set to increase from $5,490,000 in 2017 to $5,600,000 in 2018 prior to the Act. However, the Act also changed the applicable index for inflation adjustments from the CPI to the chained CPI. Therefore, while it originally appeared that the new basic exclusion amount for 2018 was going to be $11,200,000, the change in methodology for inflation adjustments means that the new basic exclusion amount is actually $11,180,000. No further significant changes were made to Subtitle B of the Internal Revenue Code.

The effect of this change is that taxpayers will only incur estate tax to the extent their estate exceeds $11,180,000 (plus any deceased spousal unused exclusion amount available to the taxpayer). Similarly, after taking into account annual exclusions for gift tax purposes, taxpayers will only incur gift tax liability once their cumulative lifetime taxable gifts exceed $11,180,000. Finally, taxpayers can apply up to $11,180,000 of exclusion to generation skipping transfers for purposes of determining the inclusion ratio for such transfers.

Preservation of Basis Step-Up

With the higher basic exclusion amount, tax planning for many families has shifted to emphasize the increase in basis for appreciated assets to the fair market value of such assets at death through IRC Section 1014. While President Trump's initial proposals, and preliminary tax reform negotiations, appeared to target this tax benefit for reduction or elimination, it has been preserved in its entirety under the Act.

Presumably, estate planners will increasingly take steps to maximize this benefit, most commonly by granting a general power of appointment over appreciated trust assets to one or more beneficiaries. Through the basis adjustment available to the assets of a partnership following the death of a partner through IRC Sections 743 and 754, and due to recent Tax Court decisions which include the assets of certain family partnerships in the gross estate of a deceased partner, pass-through entities taxed as partnerships are likely to regain popularity as well as a basis step-up planning technique. This resurgence of family partnerships and family limited liability companies may also be bolstered by the higher estate tax basic exclusion amount and the new income tax deduction for pass-through business entities, discussed as follows.

Interests of Trusts and Estates in Pass-Through Entities

Initial tax reform proposals regarding the deduction for pass-through business income in IRC Section 199A denied this deduction for trusts and estates. However, many practitioners were surprised to find that the Act, in its final form, did not deny this deduction for trusts and estates. Given the compressed income tax brackets for trusts and estates, this deduction will likely be highly beneficial for non-grantor trusts which accumulate income or report significant phantom income from pass-through entities.

Changes to Kiddie Tax

Previously, the income of minor or certain dependent children was subject to income tax at the rates applicable to their parents, after subtracting out standard deductions for earned and unearned income. However, children who were previously subject to the kiddie tax will now be required to pay income tax according to the brackets and rates applicable to trusts and estates. This change will likely affect previous and future transfers of assets for the benefit of minors such as UGMA and UTMA accounts and IRC Section 2503(c) trusts.

Sunset

As attractive as these changes may seem, they are set to sunset effective January 1, 2026 if not sooner repealed or amended by Congress. While this event seems far away, it is important to engage in tax planning that is flexible enough to allow changes in the event this sunset, or later tax reform, results in a dramatic reduction in the estate tax basic exclusion amount or the step-up in income tax basis resulting from the death of the owner of appreciated assets.

The Good and Bad News of the Cryptocurrency Boom

By: Joshua Wu

About the Author: Josh is a partner with Strasburger & Price LLP and works out of the firm's San Antonio and Washington, DC offices. Josh advises large corporations, mid-size businesses, startup companies, and high-net-worth individuals on all aspects of federal tax law.

This article will discuss the impact of certain provisions of the Tax Cuts and Jobs Act on cryptocurrency. The article will also highlight some of the tax compliance issues associated with cryptocurrency.

Back in 2009, Satoshi Nakamoto started a cryptocurrency called Bitcoin. The currency remained largely outside the realm of daily life and received little attention from the Internal Revenue Service ("IRS"). Over time the technology underlying Bitcoin evolved into other cryptocurrencies and applications. Slowly, the idea of cryptocurrency moved into mainstream commerce as businesses began accepting cryptocurrency. Eventually, cryptocurrency caught the attention of investors and a historic increase in cryptocurrency value ensued. As of June 2, 2017 the total value of the Bitcoin supply and circulation was $41 billion.[1] The price of a Bitcoin in September 2017 hit $3,320, rising to $19,211 by December of 2017. Investors have seen massive returns over the last two years which may lead to significant taxable gain.

The IRS has decided to treat cryptocurrency as property, not currency. In Notice 2014-21 the IRS defined cryptocurrency as a "digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value." The IRS stated that in some environments it operates like "real" currency but it does not have legal tender status in any jurisdiction. Despite the resemblance of cryptocurrency to legal tender, buying and selling cryptocurrency as an investment is treated the same as buying and selling stock. For taxpayers spending cryptocurrency online or in stores each purchase may result in taxable gain or loss on the cryptocurrency.

As with other types of property, the holding period for cryptocurrency is important because it determines whether the gain or loss is long-term or short-term. Long-term capital gains, for assets held longer than one year, are taxed at favorable rates (0% to 20%). Short-term capital gains, for assets held for one year or less, are taxed at ordinary income rates. Determining the holding period creates numerous compliance issues for taxpayers.

Imagine a taxpayer who purchased one Bitcoin for $1,000. In the most simplistic scenario, the taxpayer holds the Bitcoin and then sells it for $1,500 one month later. That would create $500 of short-term gain on the date of sale. However, the scenario gets much more complex if instead of buying, holding, and selling, the taxpayer purchases one Bitcoin for $1,000, uses a portion of the Bitcoin to buy a cellphone, to pay a utility bill, to purchase another cryptocurrency like Ethereum, and then sells the remaining amount. Now there are four taxable events all occurring at different times, and the IRS guidance provides that the taxpayer must determine the fair market value of the Bitcoin in U.S. dollars as of the date of each taxable event.

Adding to this complexity is the Tax Cuts and Jobs Act ("TCJA"). For 2018 and forward the TCJA made significant changes to Section 1031 (like-kind exchange). Prior to 2018, certain exchanges of property (real and certain personal) could be made without triggering a taxable event. Since the IRS classified cryptocurrency as property, it was possible that taxpayers exchanging (or trading) one type of cryptocurrency for another could defer tax until a later date. With over 100 types of cryptocurrency, this was a significant benefit. The TCJA closed any possibility of this deferral by changing Section 1031 so that it is limited to real property. One proposed, but not adopted, amendment to the original House version of the TCJA would have created a *de minimis* exemption for cryptocurrency transactions for goods and services below $600. The exemption would have made such small transactions exempt so that taxpayers would not have to track and pay taxes on small gains for purchases.[2]

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[1] 2017 TNT 108-17, Lawmakers Ask IRS to Clarify Tax Treatment of Virtual Currency (June 2, 2017).
[2] Cryptocurrency Tax Fairness Act, H.R. 3708 (115th).

The numerous tax compliance issues with cryptocurrency, combined with securities law and money laundering concerns, result in a complex legal framework for taxpayers attempting to invest and use cryptocurrency in their daily lives. With the IRS guidance from 2014 seeming a bit stale, and given the significant increase in the use of cryptocurrency, I would anticipate additional IRS activity in this area. This is something all practitioners should keep an eye on in 2018.

ABA CONFERENCES >>

2018 ABA Tax Section Mid-Year Meeting in San Diego, California

By: Travis Thompson, Vice Chair ABA YLD Tax Law Committee

On February 8-10, 2018, the ABA Tax Section held its annual Mid-Year Meeting in sunny San Diego, California. The event was held at the Hilton San Diego Bayfront, and it did not disappoint. With spectacular views of San Diego Bay and Coronado Island, the venue set the stage for three days of informative panels and lectures from some of the foremost experts in tax law and policy.

With the recent passing of the 2017 Tax Cuts & Jobs Act, many of the panels focused on educating attendees on the new law and what to expect. There were also a number of panels on cryptocurrencies such as Bitcoin and Litecoin, the world of Blockchain technology, and the taxation of Artificial Intelligence.

This year's event also saw an increase in law student attendance. The ABA Tax Section events are free to all J.D. and LL.M. students and are a great way to meet and network with tax professionals hailing from all regions of the United States. Tax Section Chair Karen Hawkins has made it a priority to promote the ABA Tax Section as an avenue open to all students interested in pursuing a career in tax law.

There was also a certain buzz in the air with President Trump's recent appointment of the ABA Tax Section's own Charles "Chuck" Rettig to be the next Commissioner of the Internal Revenue Service. Mr. Rettig is a Beverly Hills, California lawyer and has practiced with the firm Hochman, Salkin, Rettig, Tosher & Perez for over 35 years. If confirmed by the U.S. Senate, Mr. Rettig would be the 49th IRS Commissioner, the first "tax person" to assume the position since 1997 and only the second confirmed Commissioner to be from California.

The next ABA Tax Section May Meeting will be held from May 10-12, 2018 at the Grand Hyatt in Washington, D.C.

Caroline Ciraolo Gives the Annual E.L. Wiegand Visiting Fellow Lecture at The University of San Francisco School of Law Graduate Tax Program

By: Travis Thompson, Vice Chair ABA YLD Tax Law Committee

On February 16, 2018, The University of San Francisco Graduate Tax Program hosted the second annual E.L. Wiegnad Visiting Lecture presented by Caroline Ciraolo. Ms. Ciraolo was the former Acting Assistant Attorney General of the U.S. Department of Justice's Tax Division and is a partner at Kostelanetz & Fink in Washington D.C. During her tenure with the Justice Department, Ciraolo was actively involved in all aspects of Tax Division operations, and was recognized in January of 2017 by IRS Chief Counsel William Wilkens with the Chief Counsel Award, the highest honor that can be conferred by that office.

Ms. Ciraolo's lecture focused on the new era of global tax enforcement and its impact on taxpayers, their advisors, and third party gatekeepers, including backing and other financial service providers. Countries around the world are calculating their respective tax gaps and increasing their investment in civil tax enforcements as information regarding offshore tax evasion takes center stage with the surge of whistleblowers and data leaks. With the looming threat of discovery, taxpayers are considering voluntary disclosure programs to avoid the increasingly severe consequences of non-compliance, and these submissions provide addition detailed information to government officials.

"We were thrilled to host Ms. Ciraolo for two-days where she spoke with J.D. students, Graduate Tax students, and the San Francisco legal tax community. Ms. Ciraolo made excellent presentations during her visit which enables USF to build our growing regional and national reputation in tax!" said Natascha Fastabend, Associate Director for the Graduate Tax Program for the University of San Francisco School of Law.

The lecture was followed by a wonderful reception where students were able to meet and network with leaders in Bay Area tax and policy community. Ms. Ciraolo will be a likely speaker at ABA Tax Section May Meeting will be held from May 10-12, 2018 at the Grand Hyatt in Washington, D.C.

We hope to see you at one of the upcoming ABA Young Lawyer's Division meetings:

- YLD Spring Conference – May 10 – 12, 2018, Louisville, KY
- ABA Annual Meeting – August 2 – 4, 2018, Chicago, IL
- YLD Fall Conference – October 25 – 27, 2018, Charleston, SC

ABA TAX WEBINARS >>

February 28, 2018	C Corporation or Pass Through? Analyzing the Decision in the Wake of the 2017 Tax Act
March 7, 2018	Nuts & Bolts Collections Workshop: A Guide to Assisting Pro Bono Clients with Collection Matters
March 13, 2018	Mental Health Parity in 2018 – Is Your Plan Ready for a MHPAFA Audit?
March 19, 2018	2018 ABA/IPT Advanced State Income, Sales/Use & Property Tax Seminars
March 20, 2018	Employee Benefit Relief in Times of Natural Disasters and Other Catastrophic Events
March 28, 2018	Tax Reform and Implications for Financial Transactions

ABA INITIATIVES

Home Safe Home

During the 2017-2019 bar years, the ABA YLD is committed to making home a safe place for everyone through its national anti-domestic violence public service project, Home Safe Home.

Growing Lawyers Growing Leaders

Growing Lawyers, Growing Leaders is designed to help young lawyers develop leadership and management skills while mastering the art of developing and nurturing strategic and new business relationships.

Access to Education

The ABA YLD dedicates its resources to underserved and often overlooked communities. To combat the crisis of unequal access to education in these very populations, ABA YLD is investing in education through its 2016-2017 *Access to Education* public service project.

What Do Lawyers Do?

Web-based tool and live programming for undergraduate students, particularly racial and ethnic minorities, that shares nuts and bolts information on the legal profession, steps to take to prepare for law school, and other ways to navigate your way to becoming an attorney.

Young Lawyer Toolkit

Web-based resource center for young lawyers, regardless of practice area. The Toolkit includes five main categories: Diversity & Inclusion; Law Practice Management; Solo Practitioners; Litigation; and Transactional.

TAX DEADLINES >>

- Form 1065, Partnership Return – due by March 15, 2018
- Form 1120S – S Corporation Return – due by March 15, 2018
- Form 1040 – Individual Return – due by April 17, 2018
- FinCEN 114 – FBAR Return – due by April 17, 2018
- Form 1041 – Trust/Estate Return – due by April 17, 2018
- Form 1120 – C Corporation Return – due by May 15, 2018
- Form 990 Series – Return of a Tax Exempt Organization – due by May 15, 2018

101 PRACTICE SERIES ARTICLES

Call for Submissions

The ABA Young Lawyers Division – Taxation Section is currently accepting article submissions for its 101 Practice Series. As stated on the ABA website, the following provides more information on the 101 Practice Series itself and other requirements for submissions:

> The 101 Practice Series is an online resource for new lawyers covering **basic training** in both **substantive** and **practical** aspects of law practice. With over 300 quick tips and tools, this series is an essential resource for lawyers in their first three years of practice and is exclusively available to ABA members. The 101 articles are specifically geared toward the new lawyer. This is not a law review, scholarly journal, or magazine. The resource is designed to deliver specific, practical information in an easy-to-read format that maintains a professional presentation. The writing must be clear and concise, using common words and generally short sentences in short paragraphs to communicate practical information. When feasible, authors should write in the active voice and include tips, lists, bullet points, examples, good quotes, lively writing, and other techniques to facilitate the readers' grasp of information. In general, the practice series follows the *Chicago Manual of Style*, 15th edition, and Webster's 11th edition. Most articles are fewer than 300 words; the longest features are approximately 600 words. A completed single title author form must accompany all submissions.

Authors may write on any tax-related topic. While there is no set deadline for article submissions, articles will be accepted on a rolling basis. We encourage writers to submit their articles as soon as possible. Please visit the ABA website for the list of current 101 Practice Series articles published in the taxation section.

Lastly, please email your article submissions to Asel Mukeyeva (asel.mukeyeva@huschblackwell.com) or Travis Thompson (tthompson@wtjrlaw.com).