

## **Things I Think About When I Think About Transfer Tax Changes**

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*If you have a coherent narrative, you tell an engaging story. If you lack a coherent narrative and only have datapoints, you use them scattershot to make a cool looking graph. Unless you are a lawyer, in which case you just make a list.*

*-- Proverb of Unknown Origin*

1. The President, Majority Leader, Speaker of the House, and other congressional leadership are on record as supporting estate tax repeal.
2. If the Senate majority does with 52 votes everything those who fund it want, why would those funders be excited about a big push to secure 60 votes in 2018?
3. What does the average real estate developer know about tax law? Like-kind exchanges surely. What else? The step-up in basis at death, because real estate developers regularly have assets with a fair market value higher than basis (and debt collateralized by the fair market value).
4. We are 40 years away from the traditional “deal” where an estate is subject to estate tax but heirs receive new basis. Today all but 0.2% of estates pay no estate tax but everyone gets new basis. Protecting the 99.8% from tax would seem to be key. Accordingly, ensuring that estates have sufficient assets either to be \$1 less than taxable, or to have sufficient assets to use *pixie dust* basis, will be key.
5. A capital gains tax at death is a “death tax,” same as the estate tax is, just with different rates, and perhaps different rules. In order to avoid a tax increase for the 99.8%, either some estates will have to be exempt or *pixie dust* basis will have to be given (as was done in 2001) to be allocated by personal representatives. (Exactly which is meant by the Trump proposal is uncertain.) That creates complexity. Complexity is added by the need to tax assets that are not owned by individuals who die (e.g. by trusts).
6. Carryover basis either must apply only to certain large estates or must come with *pixie dust* basis to be allocated by personal representatives. Carryover basis is much simpler than a capital gains tax at death.
7. Eliminating the estate tax and giving new basis to heirs is not very expensive -- \$25 billion a year. It is simple. Were that to occur, the key planning question would be whether section 1014 is retained in its current form or would some more limited form of “ownership” be required to obtain new basis.
8. If tax reform is its own stand-alone thing, tax increases and reductions balance out differently than if tax reform needs to raise money for infrastructure or some other spending. Even a change that is not very expensive could be too expensive.

9. The presence of any sort of death tax suggests that minimizing asset values in estates is valuable, at least down to the maximum allowed before there is tax. Gifts, freezing, discounts, retain value.

10. Carryover basis accelerates income tax planning in ways that do not occur today. Accountants have an advantage in that many clients look first to accountants for sophisticated income tax savings ideas. Partnership planning (if anything like the current regime remains) would be key.

11. If a gift tax remains then much planning will occur to avoid it because older generations continue to live longer while younger generations are no less eager to acquire an inheritance. Further, moving assets around to minimize income taxes, to the extent possible, and to obtain new basis at death, will be valuable. If a gift tax does not remain then either there will be enormous planning opportunities moving assets to the lowest income tax payer, or the income tax will be modified to try to prevent such asset shifts with (we hope) planning on that front too. Arguably, to protect the income tax, the gift tax exemption ought be decoupled and reduced, perhaps substantially.

12. On February 22 a suggestion was made to the author by a highly placed influencer of discussion that perhaps the death tax could not be repealed (“although I’d like to”) but the exemption increased. (The author declined to delve into the fascinating issue of whether by exemption “applicable exclusion amount” was intended.) Suppose the amount before which there would be no estate tax were increased to \$25 million. What does that do to estate planning? If a goal were to prevent the funding of large private foundations such an approach might be a step in that direction. What would happen to the gift tax? If a unified system were retained then gifts to achieve new basis and income tax savings would be desirable.