

New York treats Mom as if she were a New York resident, and her taxable estate – the \$5.34 million credit shelter trust for Dad – exceeds New York's \$1 million exclusion, thereby triggering hypothetical New York estate tax of \$431,600. Since Mom's interest in the condo represents 5% of her estate, her New York estate tax is \$21,580 (5% of \$431,600).

The "new" New York estate tax produces a dramatically different result in this example: New York now only taxes non-resident decedents on their New York-situs real and tangible personal property; it also gives residents and non-residents alike the same New York estate tax exclusion, and does not reduce a non-resident decedent's exclusion to reflect the ratio of New York property to the decedent's overall estate. To illustrate:

"New" New York law. Same facts as above, except that Mom dies in April 2014. Her estate owes no New York estate tax, as the disposition to Dad qualifies for the marital deduction, which defers estate tax until Dad's death. Even if Mom were widowed and left the \$800,000 condo to her children, her estate would still not be subject to New York estate tax because her New York taxable estate (the condo) is under the \$2,062,500 New York exclusion in effect at her death. If widowed Mom's condo were worth \$2,062,500 and she left it to her children, her estate would owe no New York estate tax; if her condo were worth \$2,165,625 (5% more than the New York exclusion at her death), her estate would owe \$112,050 in New York estate tax – the same amount that a resident decedent would owe if her taxable estate were over the exclusion amount by 5%.

Comments. This change for non-residents is a big deal – and means that non-resident married couples with New York real or tangible personal property will no longer have the unhappy surprise illustrated above at the first spouse's death. Indeed, regardless of the size of the non-resident's New York estate, if it passes to the surviving spouse in a disposition that qualifies for the marital deduction, no New York estate tax will be payable until the surviving spouse's death (assuming the spouse still owns that New York property at death).¹ But what about once that spouse is widowed – or suppose the New York non-resident is single? Is there a way to reduce the potential New York estate tax on that New York property, assuming its value will likely exceed the New York exclusion in effect at that non-resident's death?

Before addressing that question, let us review a few things:

- The New York estate tax applies to a non-resident's real or tangible personal property that is located in New York; it does not apply to a non-resident's "intangible property."
- "Intangible property" refers to items such as stocks, bonds and interests in entities such as limited liability companies and partnerships; it is deemed to "reside" with its owner.
- The New York State Constitution bars New York from imposing estate tax on a non-resident's intangible property (see Article XVI, § 3).
- A "single member limited liability company" is a limited liability company (LLC) with one member; unless that single member LLC has elected to be treated as a corporation, it is disregarded for income tax purposes, and is effectively treated as "one" with its owner/member.
- A Subchapter S corporation is a "pass-through" entity that passes through its income to shareholders, and is therefore not subject to corporate-level income tax.

¹ Note that, in general, if the non-resident gives away New York real or tangible personal property (or intangible property connected with a New York trade or business) within three years of death, New York will pull that property back into the non-resident decedent's New York estate.