

Can the Wealth Tax Effectively Serve as a Backstop to Estate and Gift Taxes?

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Date : May 25, 2020

Jason Oh & Eric Zolt, *Wealth Tax Design: Lessons from Estate Tax Avoidance*, available at [SSRN](#).

Wealth tax, sometimes confused with estate tax, does not currently exist in the United States but has been proposed by a few political candidates. A wealth tax, if implemented, would be imposed on the wealthiest households based on all property owned including personal property, business interests and capital property with unrealized appreciation. This tax would be an annual tax, unlike the estate tax which is imposed once on the transfer of a taxpayer's assets at death. Proponents offer the wealth tax as another source of revenue and weapon against wealth inequality. Opponents claim a wealth tax would inhibit economic growth and job creation. Professors [Jason Oh](#) and [Eric Zolt](#) address the subject of imposing a wealth tax and explore the ways in which estate tax planning strategies may inform how to structure a wealth tax.

First, Professors Oh and Zolt explore the ways in which charitable contributions—and ultimately charitable deductions—reduce the estate tax liability and could erode a wealth tax base. They explain how, over a representative five-year period, charitable testamentary contribution amounts were ten times greater than the amount of lifetime giving by taxpayers with net estates valued between \$50 to \$100 million. For taxpayers with net estates valued over \$100 million, they contributed 20 times more funds in testamentary charitable contributions than lifetime contributions. These scholars posit a wealth tax would likely cause donors to shift from testamentary charitable bequests to lifetime charitable contributions to avoid or significantly reduce wealth tax liability.

Professors Oh and Zolt explain that if an acceleration of lifetime giving occurs, any potential wealth tax base and aggregate income tax liability will both decrease. Further, the donors may be motivated to make lifetime gifts of income-producing property to charitable organizations to reduce their income tax base. Consequently, the net effect on income tax revenue likely would be negative. While social policy goals generally include charitable giving, they explain how wealthier donors primarily give to charitable organizations in which they may retain the most control. These types of charities tend to be private foundations and donor advised funds, not public charities. They contend transfers to public charities are more desirable because donors have released control of the contributions and facilitate reducing wealth concentration and those organizations generally provide a greater public benefit. Conversely, they argue, contributions to private foundations, donor-advised funds and other organizations that permit donors to retain substantial control as trustees or board members promote wealth concentration.

In order to minimize the impact of the relationship between wealth concentration and private foundations, Professors Oh and Zolt discuss proposals by Emmanuel Saez and Gabriel Zucman. Saez and Zucman have proposed treating transfers to private foundations and donor advised funds as disregarded for the purpose of determining the wealth tax base if the organizations are still under the control of donor's household. Professors Oh and Zolt recognize that taxpayers and advisors may be clever enough to avoid control without really giving up control and question whether the proposals are politically viable. As such, the professors posit, the charitable contribution deduction may be used to effectively nullify wealth tax liability.

Next, Professors Oh and Zolt discuss valuation challenges suggested by critics of wealth taxes. They examine valuation rules under the estate tax and examine how those may translate to a wealth tax. They discuss the generally accepted practice for estate administrators to understate property value to reduce or eliminate estate tax liability. They further describe different types of assets owned by super-wealthy taxpayers, the challenges associated with

determining valuation, and six different valuation discounts that significantly reduce tax liability.

These valuation challenges may carry over to a wealth tax, therefore Professors Oh and Zolt explore the additional administrative challenges complicating a wealth tax. On the positive side, a wealth tax can be imposed annually; imposing it on net estates at \$50 million and above would subject few taxpayers to the tax, and the information gathered annually may carry over to estates for determining estate tax liability. Further, they identify two key factors that would determine the impact valuation may have for wealth tax purposes: flexibility of valuation estimates and the levels to which taxpayers may negotiate valuation discounts. To the extent taxpayers may own property such as securities, which have set market values, they may be incentivized to shift wealth to assets in which valuation may be manipulated to reduce tax liability.

Professors Oh and Zolt then evaluate whether it may be politically viable to disallow permissible valuation discounts for estate taxes for use in wealth taxes. Historically, congressional support for valuation discounts has been consistent, despite the revenue loss over the years. Instead, Professors Oh and Zolt propose imposing a penalty regime to discourage overly aggressive valuations and using an arbitrator to bridge the gap between taxpayer and IRS valuations. These measures, they propose, focus on raising revenue and make it easier for taxpayers to comply.

Next, Professors Oh and Zolt discuss grantor retained annuity trusts (GRATs) and other “freezing” technique instruments that maximize valuation rules and actuarial estimates to transfer future property without paying transfer taxes. Consequently, these instruments artificially reduce the estate tax base. They theorize that a wealth tax imposed on these instruments will capture taxation on previously untaxed property because the value of the retained interests would be included in the wealth tax base.

Further, Professors Oh and Zolt reveal how estate tax avoidance overpredicts wealth tax avoidance. They explain how other scholars use the revenue generated by the estate tax as a measure for whether an estate tax might be successful in raising revenue. They explain these fallacies by revealing how certain techniques used to minimize or avoid estate and gift taxes, by artificially understating the value of transferred interests, will serve to increase the amount of property included in the wealth tax base. As such, a wealth tax could serve as a backstop for the estate and gift tax.

Professors Oh and Zolt also suggest how attribution rules may be useful to discourage related-persons and familial transfers designed to avoid or minimize a wealth tax. For this to work, they propose attributing all family wealth to the wealthiest family members. They acknowledge this proposal has its own set of questions such as determining how the tax burden will be allocated amongst family members and whether private foundations would be jointly and severally liable for a donor’s wealth tax liability. These questions regarding attribution would also apply to self-settled asset protection trusts and whether the tax would be imposed on donor or beneficiaries, who may not be liquid.

Finally, Professors Oh and Zolt propose that valuation, timing and ownership rules should be identical for estate, gift and wealth taxes to minimize opportunities for avoidance and provide consistency between these taxing structures. For example, a married couple with more than \$23 million in estate and gift tax exclusions may transfer property by gift to reduce or eliminate their wealth tax liability. By spreading the gifts amongst various family members, the family wealth may be divided such that none of the family members will be subject to a wealth tax even when imposed on households of at \$50 million and above. If gaps between the tax structures leave opportunities for avoidance, then both revenue raising and reducing wealth inequity goals will be thwarted. Ultimately, Professors Oh and Zolt agree with imposing wealth reducing measures but believe it may be too complicated to implement and too difficult to gain political support.

This is an interesting article that provides information to debate and vet the political and normative viability of a wealth tax. I was particularly fascinated with the comprehensive evaluation of how the wealth tax, if implemented, should be structured in concert with the estate and gift tax. This article is helpful to professors, scholars and politicians to teach, research and continue to debate the issue of wealth taxes.

Phyllis C. Taite, *Can the Wealth Tax Effectively Serve as a Backstop to Estate and Gift Taxes?*, JOTWELL (May 25, 2020) (reviewing Jason Oh, Eric Zolt, *Wealth Tax Design: Lessons from Estate Tax Avoidance*, available at [SSRN](#) (2020)), <http://trustest.jotwell.com/can-the-wealth-tax-effectively-serve-as-a-backstop-to-estate-and-gift-taxes>.