

ESTATE PLANNING AND TAX ALERT

HAPPY?? NEW YEAR(S)!
FEDERAL ESTATE AND GENERATION SKIPPING TAXES
"GONE TODAY" - 2010 REPEAL
"HERE (AGAIN)TOMORROW" - 2011 OR EARLIER

- As 2009 came to a close, Congress acted on healthcare reform leaving no time to extend the Federal Estate Tax and Generation Skipping Tax, meaning both are repealed for 2010.
- There will be no Federal Estate or Generation Skipping Taxes for someone who dies in 2010. However, the "stepped up basis rule" - whereby the income tax basis of inherited property is redetermined at fair market value as of the date of death - has been replaced by a complex system of "carryover basis," putting a premium on good historical records of what you paid to purchase your assets. State death taxes, if any in your state, may still apply.
- Unless Congress acts in 2010, both of these taxes are scheduled to reappear in 2011 with a Federal Estate Tax exemption of only \$1 million and a top tax rate of 55%. This is the way it was back in 2001!
- There is great uncertainty as to whether and how these taxes will be reinstated: will Congress act, and when; the tax rates (45% maximum?) and exemption (\$3.5 million?); and whether the reinstatement will (and Constitutionally can) be made retroactive to January 1, 2010.
- The Gift Tax has not been repealed, but the tax rate was reduced from 45% to 35% on gifts over your \$1 million lifetime Gift Tax exemption.
- And, the annual exclusion for gifts remains at \$13,000 per donee in 2010.

Possible Planning Opportunities?

- Consider gifts, early in 2010, to children and grandchildren to take advantage (hopefully) of the lower Gift Tax rate and no Generation Skipping Tax.
- Use of a lifetime QTIP Marital Trust to accomplish these gifts may permit flexibility to "wait and see" if and when reinstatement occurs and on what terms.
 - If there is a favorable window for making gifts early in the year, the spouse will have nine months to disclaim his or her interest in this Marital Trust, resulting in a tax favored gift to children, grandchildren, etc; if no favorable window occurs, a QTIP election can be made on the gift tax return, resulting in no immediate taxable gift to the spouse (due to the marital deduction), or, alternatively, the QTIP Trust could be terminated.
- Other opportunities are complicated and, quite frankly, not very clear at this point.

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Planning Concerns or “Kick the Tires”

- The standard planning approach for a married couple has been to create at the first death both a marital gift for the benefit of the surviving spouse, either outright or in trust, and a trust, often known as the “Bypass,” “B,” “Credit shelter” or “Family” Trust, to be funded with the Federal Estate Tax exemption, i.e., \$3.5 million in 2009.
- To optimize the tax effectiveness of this standard planning, a formula clause has typically been used, which refers to technical tax concepts and definitions now repealed. Thus, there is a possibility that the marital gift could be zero with everything passing to the Family Trust (or vice versa), although State law may protect a certain amount for the surviving spouse.
- If your current Family Trust provides for someone other than, or in addition to, the surviving spouse as a beneficiary, you should review your documents with us because your surviving spouse might have his or her interest reduced, or might be unintentionally excluded as a beneficiary.
 - For individuals whose wealth exceeds twice the 2009 exemption, i.e., in excess of \$7,000,000, the Family Trust often includes or is set aside for children.
 - In a second marriage, the Family Trust is often set aside for the benefit of children from a first marriage.
- A valid retroactive reinstatement of the Estate Tax would eliminate this concern, however, we do not know what will actually happen or when.

Planning Recommendations

- We encourage you to review your documents and asset holdings to properly plan for an untimely death in 2010, to determine if unintended consequences may result, and to plan for the new carryover basis rules.
- Please contact your Eckert Seamans lawyer or one of our trust and estate lawyers, listed below, to review your documents and situation.

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