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ESTATE PLANNING NEWSLETTER

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Reauthorization and Job Creation Act of 2010 (the “2010 Tax Act”). The purpose of this Estate Planning Alert is to briefly highlight the provisions of the 2010 Tax Act which impact the federal estate, gift and generation-skipping transfer taxes. At the outset, it is important to note that the various exclusions and rates discussed below are only applicable for calendar years 2011 and 2012.

Estate and Gift Tax Applicable Exclusion Amounts

The 2010 Tax Act sets the amount (referred to as the “applicable exclusion amount”) an individual may pass at death or give away during his or her lifetime free from federal estate tax and federal gift tax at \$5,000,000 (\$10,000,000 for married couples), indexed for inflation. Keep in mind that the use of the applicable exclusion amount to shelter lifetime gifts from federal gift tax correspondingly reduces the amount which an individual may give away at death free from federal estate tax. In other words, you can use the gift tax exemption during life, but you will have less exemption left to protect transfers at death.

Portability of Applicable Exclusion Amount

For married couples, under the 2010 Tax Act, the unused applicable exclusion amount of the first spouse to die may be added to the applicable exclusion amount of the surviving spouse, thereby allowing the surviving spouse to leave up to \$10,000,000 to his or her beneficiaries free from federal estate tax and gift tax. In order for the surviving spouse to utilize the unused applicable exclusion amount of the first spouse to die, the personal representative of the estate of the first spouse to die *must* file a federal estate tax return (even if such a return otherwise would be unnecessary) and make the appropriate election. The surviving spouse may use the unused applicable exclusion amount of the “last such deceased spouse”, meaning that if the surviving spouse remarries and the new spouse subsequently dies, the portability of the applicable exclusion amount of the prior deceased spouse is terminated. Portability does not apply to the exemption from the generation-skipping transfer tax.

Generation-Skipping Transfer Tax Exemption

The generation-skipping transfer tax (the “GST tax”) is a flat tax on the value of property transferred to grandchildren (or lower generations) or to persons 37 ½ years younger than the transferor (called “skip persons”). Under the 2010 Tax Act, each individual may transfer \$5,000,000 in assets during his or her lifetime or at death to skip persons without the imposition of the GST tax.

Lower Estate, Gift and GST Tax Rates

For decedents who die in 2011 and 2012, and individuals who make lifetime gifts during that same period, the maximum estate tax, gift tax and GST tax rate is 35%. This is the lowest transfer tax rate we have ever seen permitting a window of opportunity for our high net worth clients.

Decedents Who Died in 2010

Under prior law, the federal estate tax and the GST tax were suspended for calendar year 2010, and replaced by a modified carry over basis regime. The 2010 Tax Act retroactively reinstates the estate tax and GST tax, with the increased exclusion amount and a 35% estate tax rate, for individuals who died or made gifts in 2010. However, the personal representative of the estate of a decedent who died in 2010 may elect out of reinstatement and instead opt to transfer the estate free of estate tax, but subject to the modified carry over basis regime. In addition, the GST tax rate for any generation-skipping transfers made in calendar year 2010 is zero. The deadline for making a qualified disclaimer in the case of a decedent who died between January 1, 2010 and December 16, 2010 (the day before enactment of the 2010 Tax Act) is September 17, 2011, but note that the 2010 Tax Act is federal legislation and qualified disclaimers must comply with applicable state law. The estate of a decedent who died between January 1, 2010 and December 16, 2010 has until September 17, 2011 to file the federal estate tax return for the decedent.

Sunset in 2013

On January 1, 2013, the 2010 Tax Act sunsets and the laws governing the federal estate tax, gift tax and GST tax revert to where they were in 2001, meaning maximum tax rates of 55%, a \$1,000,000 applicable exclusion amount, and a \$1,000,000 GST exemption indexed for inflation. We can only hope that between now and 2013, Congress and the President will provide some certainty to this area of the tax law.

Current Recommendations

We believe that all estate plans, especially those which contain specific planning for estate and GST taxes, should be reviewed to make sure that unintended consequences are avoided. We are pleased to review your estate plan and, when necessary, recommend changes. However, to avoid incurring legal fees without your approval, we will only review your estate plan upon your request.

The 2010 Tax Act offers planning opportunities for those who would like to make large gifts to family members and friends. In addition, it does not contain any provisions impacting the use of grantor retained annuity trusts (GRATs) or curtailing valuation discount planning. Thus, if you are interested in any of these techniques, please feel free to contact us.