Private Client Advisory

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

DECEMBER 23, 2010

Good News on Federal Estate and Gift Tax Front

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010 (the “Act”). Included in the Act are (1) favorable but temporary federal estate, gift, and generation skipping transfer (GST) tax provisions that will provide significant planning opportunities in 2011 and 2012, and (2) clarification of 2010 transfer tax uncertainties, which provide limited 2010 planning opportunities.

Favorable 2011 and 2012 Provisions

Estate and GST Taxes

The Act sets the 2011 and 2012 estate and GST tax exemptions at $5 million (indexed for inflation beginning in 2012) and provides for a 35% tax rate. This is more favorable than the $3.5 million exemption and 45% rate applicable in 2009.

Gift Tax

The Act also sets the 2011 and 2012 gift tax exemption at $5 million (also indexed for inflation) and provides for a 35% tax rate. The $5 million exemption is *much more favorable* than the $1 million gift tax exemption in effect from 2002 through 2010 and provides *significant gift planning opportunities* beginning next year.

Portability Between Spouses

A never-before-seen provision may allow spouses, in certain cases, to effectively share their estate and gift (but not GST) tax exemptions.

2010 Clarifications (and Opportunities!)

The Act clarified uncertainties about whether the one-year repeal of the estate tax in 2010 would be retroactively changed, whether the reduction of the gift tax rate in 2010 from 45% to 35% would retroactively change, and how the repeal of the GST tax in 2010 would be coordinated with the re-introduction of the tax in 2011.

Estate Tax

Estates of 2010 decedents will be subject to estate taxes with a $5 million exemption and 35% rate, unless they affirmatively elect not to be subject to federal estate tax but instead to be subject to the carryover basis regime for income tax purposes. If carryover basis is elected, the estate is allowed $1.3 million of basis to allocate among assets, plus an additional $3 million for assets passing to a surviving spouse.

Gift Tax

The Act confirms that the gift tax rate for 2010 will be 35%. The extension of that rate through 2012, coupled with the increase in the gift tax exemption beginning in 2011, suggests that clients who were contemplating substantial 2010 year-end taxable gifts may be best advised to postpone those gifts until 2011. Making $13,000 per donee annual exclusion gifts remains a solid planning technique in 2010 and beyond.

GST Tax

The Act provides for a 0% GST tax rate in 2010 along with a $5 million exemption, which is more favorable than the 35% rate that will apply in 2011. *For transfers that would only be subject to the GST tax (and not the gift or estate taxes), such as distributions to skip beneficiaries from trusts funded at the termination of successful Grantor Retained Annuity Trusts or other previously-created trusts that are not GST exempt, there is a limited and potentially significant opportunity to make such transfers on a tax-free basis before year-end.*

Future Uncertainties

While the Act presents favorable opportunities for wealth transfer, they are limited in duration. Without further legislative action, they will all expire at the end of 2012 and we will be once again faced with the return of the 2001 transfer tax system (with a $1 million exemption and a 55% top tax rate) beginning January 1, 2013.

If you are interested in discussing the 2010 planning techniques, please give us a call so that we may determine how they may apply in your situation. Otherwise, we look forward to speaking with you in the new year to discuss how we can utilize the remaining provisions of the Act to help you and your family achieve your estate planning objectives.

* * *

Click here to view Mintz Levin's Private Client attorneys.