September 21, 2010

2010 Estate Tax Planning Strategies—Once-in-a-Lifetime Opportunities vs. Potential Traps for the Unwary

2010 Gift, Estate and Generation-Skipping Transfer Tax Laws

As of the date of this Advisory, Congress has yet to make any changes to the 2010 gift, estate or generation-skipping transfer (GST) tax laws. While it is possible that future legislation may retroactively eliminate certain benefits of gifting in 2010, there are still planning opportunities now that have never before been available and may never return.

Lifetime Gifts

For 2010, the gift tax exemption is $1,000,000 and the gift tax rate is 35%—the lowest rate since the 1930s. (In 2009 the maximum gift tax rate was 45% and the rate is scheduled to increase to 55% in 2011.) There have been various legislative proposals to change the law in 2011 and future years that would set the maximum gift tax rate at anywhere between 35% and 55% or higher. Accordingly, in certain situations it may be advantageous to consider making large taxable gifts in 2010 and paying a 35% gift tax because it is unlikely that any future rates will be lower.

Lifetime Gifts to Grandchildren

For 2010, there is also no GST tax; therefore, grandparents can make unlimited outright gifts to grandchildren (or to lower generations) without the imposition of any GST tax (although such gifts would be subject to the gift tax as described above). In 2009 the maximum amount that a grandparent could give to grandchildren without incurring a GST tax was $3,500,000, and any excess amounts would have been subject to a gift tax of 45% plus a GST tax of 45%. In 2011, the maximum combined amount that a grandparent can give to grandchildren is scheduled to decrease to approximately $1,350,000, and the maximum GST tax rate is scheduled to increase to 55%. (There have been various legislative proposals to change the law in 2011 and future years that would set the maximum amount that a grandparent could give to grandchildren during lifetime and at death at anywhere between $3,500,000 and $10,0000,000, and set the maximum GST tax rate at anywhere between 35% and 55% or higher).

Accordingly, in certain situations it may be advantageous for grandparents to consider making large taxable gifts to their grandchildren (or to lower generations) in 2010 and paying only a 35% gift tax, because in the future similar gifts may be subject to both a gift tax and the GST tax.

Distributions to Grandchildren from GST Non-Exempt Trusts

For 2010, distributions from irrevocable trusts that are not exempt from GST (GST Non-Exempt Trusts) to a grandchild of the creator of the trust will not be subject to a GST tax. However, in 2011 and in future years, similar distributions from a GST Non-Exempt Trust to a grandchild will be subject to a GST tax.

Accordingly, in certain situations it may be advantageous to consider distributing assets from a GST Non-Exempt Trust this year to the grandchildren of the creator of the trust because such assets may in the future be subject to a GST tax upon the death of the parents of such grandchildren.

Risks Associated with 2010 Strategies

As previously stated, it is unclear whether Congress will (or can) implement legislation that retroactively eliminates or reduces the potential benefits described above. In addition, lifetime gifting strategies require the payment of a gift tax (i.e., by April 15, 2011), which tax payment may be postponed until the death of the donor, although it is unknown what the transfer tax rate will be at that time.

Other Legislative Proposals

On the other end of the political spectrum, recent legislative proposals have addressed perceived estate and gift tax abuses by calling for limits on valuation discounts and the requirement of a minimum term (e.g., 10 years) for grantor retained annuity trusts (GRATs). Accordingly, clients who are thinking about implementing planning strategies that use these types of techniques should act sooner rather than later.

Contact Us

For more information, please contact one of the Katten Muchin Rosenman LLP attorneys listed below:

CHARLOTTE

A. Victor Wray, Charlotte Chair	704.444.2020	victor.wray@kattenlaw.com
Diane E. Blackburn, Associate	704.344.3153	diane.blackburn@kattenlaw.com
William E. Underwood, Jr., Of Counsel	704.444.2010	bill.underwood@kattenlaw.com

CHICAGO

Michael O. Hartz, Chicago Chair	312.902.5279	michael.hartz@kattenlaw.com
David M. Allen, Associate	312.902.5260	david.allen@kattenlaw.com
Alan M. Berry, Of Counsel	312.902.5202	alan.berry@kattenlaw.com
Victor H. Bezman, Partner	312.902.5204	victor.bezman@kattenlaw.com
Samuel M. Dotzler, Associate	312.902.5249	samuel.dotzler@kattenlaw.com
Anthony L. Engel, Associate	312.902.5316	anthony.engel@kattenlaw.com
Juli D. Gilliam, Associate	312.902.5328	juli.gilliam@kattenlaw.com
Jonathan Graber, Partner	312.902.5317	jonathan.graber@kattenlaw.com
Stuart E. Grass, Partner	312.902.5276	stuart.grass@kattenlaw.com
Charles Harris, Partner	312.902.5213	charles.harris@kattenlaw.com
Melvin L. Katten, Of Counsel	312.902.5226	melvin.katten@kattenlaw.com
Tye J. Klooster, Associate	312.902.5449	tye.klooster@kattenlaw.com
Emily M. Litznerski, Associate	312.902.5299	emily.litznerski@kattenlaw.com
Allan B. Muchin, Of Counsel	312.902.5238	allan.muchin@kattenlaw.com
Kelli Chase Plotz, Associate	312.902.5347	kelli.plotz@kattenlaw.com
Philip J. Tortorich, Partner	312.902.5643	philip.tortorich@kattenlaw.com
Neil H. Weinberg, Partner	312.902.5646	neil.weinberg@kattenlaw.com

LOS ANGELES

Abby L. T. Feinman, West Coast Co-Chair	310.788.4722	abby.feinman@kattenlaw.com
Carol A. Johnston, West Coast Co-Chair	310.788.4505	carol.johnston@kattenlaw.com
Amy I. Dunphy, Associate	310.788.4554	amy.dunphy@kattenlaw.com
Heather Van Vactor, Associate	310.788.4531	heather.vanvactor@kattenlaw.com
Boryana V. Zeitz, Associate	310.788.4548	boryana.zeitz@kattenlaw.com

NEW YORK

Joshua S. Rubenstein, National Chair	212.940.7150	joshua.rubenstein@kattenlaw.com
Ronni G. Davidowitz, New York Chair	212.940.7197	ronni.davidowitz@kattenlaw.com
Mal L. Barasch, Counsel	212.940.8801	mal.barasch@kattenlaw.com
Lawrence B. Buttenwieser, Counsel	212.940.8560	lawrence.buttenwieser@kattenlaw.com
Neil V. Carbone, Partner	212.940.6786	neil.carbone@kattenlaw.com
Allison S. Clayton, Associate	212.940.6533	allison.clayton@kattenlaw.com
Alexandra Copell, Associate	212.940.8588	alexandra.copell@kattenlaw.com
Marla G. Franzese, Counsel	212.940.8865	marla.franzese@kattenlaw.com
Robert E. Friedman, Counsel	212.940.8744	robert.friedman@kattenlaw.com
Jacqueline Garrod, Associate	212.940.6661	jacqueline.garrod@kattenlaw.com
David Goldstein, Associate	212.940.6740	david.goldstein@kattenlaw.com
Lauren M. Goodman, Associate	212.940.6344	lauren.goodman@kattenlaw.com
Jasmine M. Hanif, Partner	212.940.6491	jasmine.hanif@kattenlaw.com
Milton J. Kain, Counsel	212.940.8750	milton.kain@kattenlaw.com
Theresa A. Kraker, Associate	212.940.6678	theresa.kraker@kattenlaw.com
Dana B. Levine, Special Counsel	212.940.6668	dana.levine@kattenlaw.com
Patience J. O'Neil, Special Counsel	212.940.3888	patience.oneil@kattenlaw.com
Marianna Schwartsman, Associate	212.940.8581	marianna.schwartsman@kattenlaw.com
Beth Tractenberg, Partner	212.940.8538	beth.tractenberg@kattenlaw.com
Kathryn von Matthiessen, Partner	212.940.6631	kathryn.vonmatthiessen@kattenlaw.com