LEGAL UPDATE

Estate, Gift and Generation-Skipping Transfer Tax Law Changes due to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010

On December 17, 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "Act") which, in part, reenacts the estate tax and provides estate, gift and generation-skipping transfer ("GST") tax exemptions and rates. However, the Act is only a temporary measure, and in 2013, the estate and gift tax levels from 2001 are scheduled to be reinstated (which is a $1.0 million exemption, and a 55% tax rate for estates/gifts that exceed the exemption).

The Act grants estates a $5.0 million exemption for property subject to estate tax in 2011 and 2012. In addition, the Act introduces the concept of "exemption portability" between spouses – if one spouse does not use all of his or her exemption upon his or her death, it may be used by the estate of the surviving spouse, effectively creating a $10.0 million exemption for a married couple. Estates with property subject to estate tax that exceed these exemption amounts will be taxed at a new 35% tax rate.

The gift tax exemption has also increased to $5.0 million for gifts made in 2011 and 2012, and the tax rate on gifts in excess of that amount is 35%.

In addition, the Act makes a number of changes to the GST tax, which is an additional tax imposed on gifts/bequests to grandchildren and great-grandchildren. GST tax is now aligned with estate and gift tax laws, and in 2011 and 2012, the GST exemption is increased to $5.0 million, with a tax rate of 35% for gifts/bequests that exceed this amount. In 2013, the GST tax, like estate and gift taxes, will revert to a $1.0 million exemption and a 55% tax rate.

Finally, the estates of those who died in 2010 faced uncertainty prior to the passage of the Act. A 2001 law repealed the estate tax for persons dying in 2010, and also imposed a "carryover" basis rule that required beneficiaries to use the decedent's tax basis for inherited property, which could have created a greater tax burden than would have been imposed by an estate tax. Before 2010, that property would have received a "step-up" in basis as of the date of death to fair market value. In addition, there was a risk that the estate tax would be retroactively reinstated to January 1, 2010 so many executors were unsure how to completely administer estates last year.

The Act eliminates the uncertainty for estates of those who died 2010. It repealed the imposition of the carryover basis and reinstated the estate tax for 2010, but with the $5.0 million exemption and 35% tax rate. However, the Act also provided that 2010 estates can also elect out of the estate tax, provided that they accept the carryover basis rule. Due to these recent changes, the Act extends the filing and payment date for any tax due for 2010 estates, which is typically due nine months after the date of death, to September 17, 2011.

Congress will likely revisit the estate, gift and GST taxes sometime in 2012, but we cannot predict what action it will take at that time. Therefore, if an individual is likely to die in 2011 or 2012, his or her estate plan should be reviewed to determine whether it takes full advantage of the $5.0 million exemption, and any portability of that exemption. For those of us who intend to live to 2013 and beyond, the temporary nature of these tax law changes means they cannot be relied upon for long-term estate planning purposes.

Please feel free to contact me if you would like to discuss your estate planning options or if you have any questions regarding this recent legislation.

Respectfully,

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