

## Alerts and Updates

### FEDERAL ESTATE, GST AND GIFT TAX LAW: CURRENT STATUS AND POSSIBLE RETROACTIVE LEGISLATION

February 5, 2010

Despite legislation proposed by Congress in 2009, which we reported on in our prior [Alerts](#), Congress has nevertheless been unable to prevent the repeal of the federal estate and generation-skipping transfer (GST) taxes. Consequently, the landscape for the federal estate and GST taxes appears markedly different than it was in 2009, and different from how it is likely to be in 2011. Even though Congress did not reach agreement on the federal estate, GST, and gift taxes in 2009, members of Congress have indicated that congressional consideration of such taxes will be a priority in 2010—and that the legislation will have an effective date retroactive to January 1, 2010. Adding to the uncertainty is the extent to which retroactive legislation, if passed by Congress, would be subject to a constitutional challenge.

#### Present Status of Estate, GST and Gift Tax Law

Although it is impossible to predict the nature and extent of Congress' actions in 2010, the summary below details federal estate, GST and gift tax law at present and how the law would exist in 2011 should Congress not enact new legislation.

- For a decedent dying in 2010, the estate has unlimited federal estate and GST tax exemptions. Thus, no estate of a decedent dying in 2010 would pay any federal estate tax, and no person making a generation-skipping transfer in 2010 would pay any federal GST tax. In 2011, however, if Congress does not act, the federal estate and GST tax exemptions will return to \$1 million, the maximum federal estate tax rate will return to 55 percent (subject to a surtax for certain estates), and the maximum GST tax rate will return to 55 percent.
- For an estate of a decedent who dies in 2010, the assets of the estate no longer would receive a full step-up in basis to the date-of-death value of the assets. Instead, these assets would be subject to the "modified carryover basis" rules, under which the basis of the estate's assets would be equal to the lesser of the decedent's adjusted basis in the assets or the fair market value of the assets on the date the decedent died. Although the executor of an estate may, generally, allocate up to \$1.3 million to increase the basis of an estate's assets and \$3 million to increase the basis of estate assets passing to a surviving spouse, these allocation amounts have limited ceilings. Thus, it is possible that the basis of an estate's assets could be *stepped down*. In 2011, the basis step-up rules applicable prior to 2010 will return.

- For 2010 and 2011, the individual lifetime gift-tax exemption remains unchanged at \$1 million. However, for 2010, the maximum federal gift tax rate has decreased to 35 percent. In 2011, the maximum federal gift tax rate will increase to 55 percent.

## Consequences of Congressional Inaction

As a consequence of Congress' inaction thus far on estate tax reform, while the federal estate and GST taxes are repealed during 2010, the estate plans of individuals may no longer fully reflect their intentions. Individuals whose estate plans contain formula-based marital, credit-shelter or GST tax-exemption clauses may unintentionally disinherit spouses or other beneficiaries. For example, an individual's estate plan leaving "that amount which could pass free of the federal estate tax" to the individual's children, and leaving the balance to his or her spouse, may unintentionally disinherit his or her spouse because the amount that could pass free of the federal estate tax to the individual's children would be the individual's entire estate.

Other consequences include the risks assumed by individuals who choose to make generation-skipping transfers in 2010, because the transfers that presently may be made free of federal GST tax may face a tax if Congress reinstates the federal GST tax retroactively. Because the maximum federal gift tax rate has decreased to 35 percent, individuals who make transfers subject to federal gift tax in 2010 may face additional tax if Congress reinstates a higher maximum federal gift-tax rate retroactively.

## Going Forward in 2010 and 2011

Even in the most certain of times, individuals should consider reviewing their estate plans every few years—or sooner—if certain life events, such as the birth or adoption of a child or a change in marital status, occur. However, in the currently unpredictable estate-planning climate, individuals may want to take steps to review and adjust their estate plans to ensure that their plans are up-to-date with both their objectives and current law.

## For Further Information

If you have any questions regarding this *Alert* or would like more information, please contact any of the [attorneys](#) in the [Estates and Asset Planning Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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