On The Horizon: The 2010 Tax Relief Act ushers in temporary estate-planning opportunities

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Did you know that in 2011, individuals can give away more money tax-free than any other time since 1932?

This is a result of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "2010 Tax Relief Act"), which was signed into law by President Obama on Dec. 17, 2010.

The 2010 Tax Relief Act ushered in a slew of temporary changes to the estate, gift and generation-skipping transfer (GST) federal tax laws.

Before the new law, there was no estate tax for 2010, but some beneficiaries could have faced higher taxes because there were less favorable income tax basis rules. Also, under the prior law, estate and other transfer taxes were scheduled to rise substantially for post-2010 transfers.

As a result of the new law, beginning in 2011, the gift tax exemption amount will be $5 million per person ($10 million per couple). This means an individual can give away up to $5 million during his or her lifetime tax-free (assuming no prior taxable gifts were made). Lifetime gifts above the $5 million exemption amount will be taxed at a top rate of 35 percent.

This was not the case in recent years. For example, in 2010, the top gift tax rate was 35 percent, and the gift tax exemption amount was $1 million. The 2010 Tax Relief Act resulted in the reunification of the gift and estate tax. This provided for an overall $5 million exemption beginning in 2011 – a fivefold increase of the gift tax exemption amount of recent years!

The higher exemption amount paves the way for individuals to make lifetime gifts at a more aggressive pace. This can be done in addition to other traditional estate-planning tools such as the utilization of annual exclusion gifts. An annual exclusion gift permits a donor to give up to $13,000 per donee each year free of gift tax.

Gifting opportunities may be fleeting, as the harsher rules that existed in previous years are slated to return in 2013 when the 2010 Tax Relief Act sunsets.

Is "use it or lose it" a thing of the past? For now.

Another significant feature of the 2010 Tax Relief Act is the introduction of the concept of portability. The concept of portability permits the estate of a second spouse to die to take advantage of the unused $5 million tax exemption of his or her predeceased spouse if the predeceased spouse dies after Dec. 31, 2010 and before Jan. 1, 2013.

Under prior law, the exemption of the first spouse to die would be lost if not used.

Essentially, the surviving spouse can use the unused exemption of the first spouse in addition to his or her own $5 million exemption for taxable transfers made during life or death.

Because the gift and estate tax have been reunified for 2011 and 2012, the surviving spouse's exemption may be applied to any transfer during life or death. However, in order for the surviving spouse to use the decedent's unused exemption, the executor of the predeceased spouse's estate must make an affirmative election on a timely filed estate tax return, even if an estate tax return would not otherwise need to be filed.

Notably, due to its lack of permanency, and because there is no clear indication of what Congress will do when the 2010 Tax Relief Act sunsets, estate-planning opportunities based on portability may be limited at this point.

In addition to the gift tax relief and portability features discussed in this article, other changes ushered in by the 2010 Tax Relief Act include a reduction in GST taxes for 2011 and 2012, and the preservation of the 2010 estate tax repeal with the ability to opt out of the repeal in favor of more favorable modified carryover basis rules. These are just a few of the changes implemented by the act.

The 2010 Tax Relief Act contains significant estate and gift tax relief provisions that can assist families wishing to engage in multi-generational transfers of current wealth and future appreciation on transferred assets. Notwithstanding, it is important to note that the estate and

gift tax relief provisions of the new law are temporary. It is important to consult with your legal and financial professionals when considering estate-planning opportunities.

This article is not intended as an exhaustive discussion of the points raised herein, nor is it intended as a substitute for legal advice or opinion, which can only be rendered when applied to specific fact situations.

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