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# T H E M & A Tax Report

THE MONTHLY REVIEW OF TAXES, TRENDS & TECHNIQUES

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*As we go to press, Congress passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, which President Obama signed into law on December 17, 2010. The Act contains sweeping, but temporary, revisions of the estate, gift and generation-skipping transfer (GST) tax. Beginning in 2011, a unified, inflation-adjusted, exemption of \$5 million applies for estate, gift and GST purposes. In addition, executors may elect to allow a surviving spouse to claim the deceased spouse's unused estate tax exemption. The top estate, gift and GST tax rate is 35 percent. Estates of decedents who died during 2010 may elect either to apply the new estate tax rules with a fair-market adjustment in basis or have no estate tax under the carryover basis regime. The tax provisions of the Act are scheduled to expire at the end of 2012.*

## Even M&A Lawyers Need Estate Planning

By Steven E. Hollingworth • Wood & Porter • San Francisco

Virtually no one likes to contemplate his own mortality. Clients tend to say, "if I die" rather than the more accurate "when." A key challenge in the estate planning area is overcoming a client's natural inclination to procrastinate. That's true for business owners of all sizes, and even for their advisors. An additional, unexpected challenge has become procrastination by Congress. In fact, procrastination is an understatement.

Contrary to the expectations of government officials, tax professionals and commentators everywhere, the estate tax was repealed effective January 1, 2010. Repeal was arranged way back in 2001, but it was only temporary, and no one thought it would actually take effect. After all, the estate tax was scheduled to return on December 31, with tax rates of up to 55 percent and an exemption equivalent amount of only \$1 million. Surely no one intended that result, right?

Practitioners waited with bated breath throughout 2010 for Congress to act. Unfortunately, estate tax reform appears to have been low on the

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Congressional priorities list; only in the final weeks of the year did Congress begin addressing the issue seriously. The resulting uncertainty has turned the practice of estate planning into an exercise of crystal-ball gazing. Thankfully, panelists at the 41st Annual Estate Planning Institute, presented by the Practising Law Institute on September 13–14, 2010, provided some useful tips in navigating the uncertain legal waters.

### Gone but Not Forgotten

2010 seems to be the year of the billionaire, observed panelist Sanford J. Schlesinger, naming the passing of John Kluge, Dan Duncan and George Steinbrenner as recent examples. Each has left a substantial estate that is exempt from federal estate tax under current law.

### Dealing with Carryover Basis

Of course, the price for estate tax repeal was carryover basis for all inherited property,

instead of an adjustment to fair market value. Many have complained that carryover basis is unworkable because few taxpayers have maintained adequate records. But the new rules also have some hidden traps.

As Mr. Schlesinger pointed out, Code Sec. 1022(a) provides that basis for property inherited from a decedent who dies in 2010 is the *lesser* of the decedent’s adjusted basis or the fair market value of the property at the date of death. In the current economic environment, it has become (unfortunately) more common to see property that has lost value since its acquisition. Thus appraisals and valuation battles may still be a feature of the carryover basis regime.

Under Code Sec. 1022, each estate has a basis increase of \$1.3 million, plus an additional \$3 million for assets left to a surviving spouse or a qualifying trust for that spouse. The responsibility to allocate this basis increase can place the executor in the uncomfortable position of having to decide which beneficiaries get the tax benefit, and in what proportions. Mr. Schlesinger cautioned that exculpatory clauses might not provide sufficient protection from liability. Don’t forget to send condolences to any newly appointed executor!

### Other Expired Tax Provisions


Carry-over basis tends to attract most of the attention. But practitioners should be aware of other, less discussed, provisions that are set to expire at the end of 2010.

### Changes to GST

Remember when you had to file gift tax returns to affirmatively allocate GST exemption to gifts to trusts? Those days might be returning. The rules automatically allocating GST tax exemption to gifts to “GST Trusts” may soon expire. Some other favorable GST rules may also lapse: the qualified severance rules, the expansion of the pre-deceased ancestor rule to include certain trust beneficiaries and the expanded authority of the IRS to permit late allocations of the GST exemption.

### Estate Tax Deferral Under Code Sec. 6166

Moreover, it may be more difficult for some estates to qualify for estate tax installment payments under Code Sec. 6166. The



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maximum number of partners or shareholders in an eligible partnership or corporation are scheduled to be lowered from 45 to 15. It could be worth following up with clients with closely held business interests, since it is never wise to take deferral of the estate tax for granted.

### **Interpretation of Wills and Trusts**

As many commentators have noted, the repeal of the estate tax injects uncertainty into the interpretation of the tax-driven provisions of many typical wills and trusts. For example, the typical estate plan for a married person attempts to maximize the use of the unified credit by dividing the trust estate into two shares, one equal to the amount of the estate tax exemption equivalent and the remainder to the surviving spouse or a trust for the benefit of the surviving spouse. But now for 2010, there may be some uncertainty as to how the trust should be divided.

Mr. Schlesinger noted that many states (18 as of the date of the seminar) have enacted legislation that attempts to deal with the interpretation of these provisions. But all of the legislative remedies are different, so counsel should review the applicable statutes for guidance.

### **Conclusion**

It is an understatement to say that traditional estate planning techniques have been upended, making the need for updates and rethinking key. This article touches on only a few of the many topics discussed at the 41st Annual PLI Estate Planning Institute. Additional topics include insurance premium financing, asset protection trusts, family limited partnerships, charitable and retirement benefits planning, ethical considerations, trust situs and income taxation, post-mortem elections and planning for domestic partners. Complete video and printed materials are available at [www.pli.edu/product/clenow\\_detail.asp?id=60316](http://www.pli.edu/product/clenow_detail.asp?id=60316).