

TRANSFER TAX PROVISION OF TAX RELIEF ACT OF 2010

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On December 17, 2010, President Obama signed the “Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010” (“TRA 2010”) which includes improvements and changes in estate, gift, and generation-skipping transfer (“GST”) taxes (the “Transfer Taxes”). Because of these changes in the Transfer Tax laws, we recommend that all our clients review their estate plans and consider whether their personal and tax planning goals are now being met.

Transfer Tax Changes

Significant Transfer Tax changes in TRA 2010 are effective for the years 2011 and 2012, although there are some complicated transition rules for gifts made and decedent’s dying in 2010. The most important provisions related to estate planning are summarized below.

1. **Tax Rates.** The estate and gift taxes are reunified for 2011 and 2012 with an exemption of \$5,000,000, indexed for inflation beginning in 2012, and a tax rate of 35%. This exemption and tax rate both apply to the GST tax.

2. **Portability.** For decedents dying in 2011 and 2012, an executor may transfer any unused estate tax exemption to the surviving spouse. This must be done on a timely filed estate tax return.

3. **Extension of Prior Transfer Tax Laws.** Except for specific changes, the Transfer Tax laws and related planning in effect in 2009 will continue to be effective, at least during 2011 and 2012.

4. **Sunset Provision.** If additional legislation is not enacted by January 1, 2013, then the 2001 Transfer Tax provisions will again become effective, including an estate tax exemption of only \$1,000,000 and a tax rate of 55%.

Selecting the Right Estate Plan for You

Because of Transfer Tax uncertainty after 2012, selecting the right plan may be more difficult than ever. In considering estate planning changes, it is important to clearly identify goals and then consider how to best accomplish them.

For example, for deaths during 2011 and 2012, it will not be necessary for married couples to use a credit shelter trust solely for the purpose of utilizing the estate tax exemption of both spouses. However, we anticipate that many couples will continue to use these trusts rather than relying solely on portability if their goals include (i) assuring the use of both exemptions beyond 2012 if portability is not extended, (ii) assuring the use of both exemptions even with portability since the unused exclusion will be lost if the surviving spouse remarries and survives his or her next spouse, (iii) protecting future appreciation of assets from Transfer Tax, (iv) maximizing generation-skipping planning since portability

does not apply to the GST tax exemption, (v) asset protection, (vi) professional management of assets, and (vii) restricting the transfer of assets by the surviving spouse.

An excellent and flexible alternative to creating a credit shelter trust on the first death, in appropriate circumstances, is a disclaimer will or trust agreement. This typically involves an outright bequest of most or all of a decedent's estate to the surviving spouse who is given an option to disclaim part or all of the estate into a credit shelter trust. The surviving spouse then can take a "second look" and implement the tax planning which works best at the time.

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