

New Rules Affecting Estate and Gift Tax

January 3, 2011

On December 17, President Obama signed into law the *Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010* (the "Act"). This Client Advisory summarizes the major estate, gift and generation-skipping transfer ("GST") tax provisions of the Act.

Changes to Tax Rates and Individual Exemption Amounts

- Effective January 1, 2011, the Act reinstates the Federal estate and Generation Skipping Transfer ("GST") taxes with a per person exemption amount of \$5 million and a top tax rate of 35% (compared to a \$3.5 million exemption and a 45% top tax rate that were in effect in year 2009) for the years 2011 and 2012.
- The Federal gift tax exemption will be "reunified" with the estate tax exemption in years 2011 and 2012 to allow aggregate transfers by gift or at death of \$5 million per person. The Federal gift tax rate, which was lowered to 35% in 2010, will remain at 35% in 2011 and 2012. The gift tax exemption amount remains at \$1 million in year 2010.

Portability of the Exemption Between Spouses

- Effective January 1, 2011, the surviving spouse will be able to use a deceased spouse's unused Federal estate and gift tax exemptions if the executor for the deceased spouse makes an election to that effect. Unlike the Federal estate and gift tax, the amount of property exempt from GST tax is not portable between spouses under the Act. Accordingly, so-called "credit shelter" bequests will still be necessary to maximize each individual's ability to transfer property free of GST tax in years 2011 and 2012.

Election as to Tax Treatment for Estates of Persons Dying in 2010

- The Act allows the executor of an individual dying in year 2010 a choice in estate tax treatment. The estate may elect either (1) to be subject to the estate tax described above (\$5 million exemption and 35% top tax rate) and get a "stepped up" (i.e., receive date-of-death fair market value) basis for income tax purposes for includible estate assets, or (2) to have no estate tax apply, but receive only a "carry over" basis for income tax purposes for includible estate assets, with the ability to "step up" the basis of a limited amount of assets.
- In addition, the Act provides that the rate of GST tax for the year 2010 is 0%. Accordingly, gifts in year 2010 to the grandchildren or more remote descendants (or some unrelated young donees) will avoid a GST tax that otherwise would be payable on such gifts beginning in year 2011.

New York's Estate Tax Unaffected by New Law

- The New York State's estate tax regime is not affected by the passing of the new legislation.
- New York's estate tax exemption amount therefore still remains capped at \$1 million, and New York's estate tax rate will remain at the top rate of 16%. Any New York estate tax paid continues to be deductible for purposes of the Federal estate tax. There is no gift tax in New York.

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The foregoing provides only a summary of the relevant provisions of the Act. Accordingly, we encourage you to contact us to discuss your specific situation in detail, and you should not take any planning actions without seeking the advice of a tax professional.