

2010 The Year of No Estate Tax?

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Effective January 1, 2010, the federal estate tax and generation skipping transfer tax are repealed for the year 2010. The repeal will expire on December 31, 2010 and revert back to the 2001 law which includes estate and generation skipping taxes. The 2001 law provides a smaller estate tax exemption amount (\$1,000,000.00) than the 2009 law (\$3,500,000.00). Some believe that Congress will change the tax law retroactive to bring back the estate tax and generation skipping transfer tax in 2010.

Recent history suggests that the Supreme Court will uphold tax laws that are applied retroactively. Therefore, it is possible that Congress could enact estate and generation-skipping taxes for the year 2010 during some part of the year.

Almost everyone believed that Congress would take some action before the year 2010 to eliminate any uncertainties with the estate tax, but they did nothing. Prof. Michael Graetz of Columbia University noted that the lapse in the estate tax for the year 2010 is "congressional malpractice" on a front page story titled "Rich Cling to Life to Beat Tax Man" in the Wall Street Journal, dated December 30, 2009.

Nevertheless, Prof. Michael Graetz in the same article states: "If Congress couldn't do it this year, why will they be able to do it next year?" Thus, there is the possibility that Uncle Sam will not do anything in the year 2010. If so, there might be opportunities for creative estate planning in the year 2010. The problem is that no one knows what Congress will or won't do.

There are some income tax benefits that have been eliminated because of the repeal of the federal estate tax and generation-skipping transfer tax. The federal gift tax also remains intact during the year 2010. However, the tax rate for taxable gifts in 2010 is reduced from 45% to 35%.

Therefore, it is uncertain whether 2010 really is the year in which Uncle Sam could be left out of your estate. Nevertheless, there are few things to consider and be aware of for the year 2010.

- Couples who created a joint trust that divides into separate trusts upon the first death should review the trust provisions in light of the new law.
- It might be possible to make sizeable gifts in 2010 at a reduced tax rate (these gifts will want to be structured in a way to protect them from any retroactive change in the law.)

- If you have significant appreciated assets, you will want to review your estate plan to see what would happen should the law remain unchanged in 2010.
- If you have generation-skipping provisions in your trust (gifts to grandchildren or lifetime trusts for your children that will not be included the children's estate), those provisions should be reviewed.

There is significant uncertainty regarding what changes might be made to the estate tax and related tax laws in 2010 and 2011. We recommend that your estate plan be reviewed if you believe (or if you are unsure) that the changing tax laws will impact the goals of your estate plan. Please call us if you would like us to review your estate plan or discuss the current tax changes.