



Tax Relief Act of 2010

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On December 17, 2010, President Obama signed into law The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 (the "Tax Relief Act of 2010" or the "Act"). The Act reinstated the federal estate and generation-skipping transfer taxes effective for decedent's dying and transfers made after December 31, 2009 and re-coupled the estate and gift tax exemptions for 2011 and 2012.

In 2010, the exclusion from federal estate tax was increased to \$5 million per person, and the exclusion is indexed for inflation for decedents dying after 2011, with the highest estate tax rate set at 35%. The lifetime gift and generation-skipping transfer tax exemptions were also increased to \$5 million per person for transfers made after 2010. The highest tax rate for both taxes is set at 35%. The familiar annual exclusion from gift tax remains in effect at \$13,000 for 2011.

One highlight of the Act is that it provides that any estate exclusion amount remaining unused upon the death of a spouse after 2010 generally can be used by his or her surviving spouse as an additional exclusion from the gift and estate taxes. In other words, if the first spouse to pass dies in 2011 with a taxable estate of \$2 million, then the surviving spouse's lifetime estate and gift tax exemption (\$5 million) can be increased by the deceased spouse's unused portion (i.e. \$3 million), for an aggregate exclusion of \$8 million. This new "portability" rule may, in some cases, eliminate the need to equalize the estates of married couples while living and to utilize so-called "credit shelter" or "bypass" trusts in their estate plans.

As you know, we have all had to live through the "sunset" of the federal estate and generation-skipping transfer taxes in 2010 and the uncertainty caused by Congress' delay in taking action to settle this complicated area of the federal tax law. Unfortunately, the compromise reached by Congress which culminated in the Tax Relief Act of 2010 only stays in place for the next two years (i.e. for estates of decedents dying, gifts made or generation-skipping transfers made prior to 2013). Unless Congress acts to extend the provisions of the Act before the end of 2012, the estate and gift tax rules in effect prior to 2001, which feature a \$1 million lifetime exclusion for estate, gift and generation-skipping transfer taxes with a tax rate of 55%, will spring back into place.

The reinstatement of the federal estate and generation-skipping transfer tax regimes, the higher exemptions, the portability of the estate tax exemption among spouses and the 2013 sunset rule requires estate plans to be re-evaluated in light of the changes in the law. This is particularly true with respect to certain wills that set by formula, either by referring to an amount up to the exemption or express the sum as a percentage of whatever the limit happens to be when a person dies, the amount each family member is to receive under a decedent's will or trust

We encourage you to contact a member of our Firm's Tax and Estates Department to discuss the potential impact of the Tax Relief Act of 2010 on your current estate plan and to assess whether changes should be made. We look forward to hearing from you.

About the Author: Mr. Fernandez focuses his practice on structuring and implementing business transactions and tax planning for closely held businesses and individuals. His work includes assisting clients with all legal and tax aspects of the formation and operation of various business entities, including proprietorships, partnerships, corporations, limited liability companies and joint ventures. If you have any questions about the impact of the Act, please contact Mr. Fernandez (afernandez@wispearl.com) or one of the other attorneys in Wisler Pearlstine's Business Corporate Tax, or Estate Planning, Trust and Wills Practice Groups.

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