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Hooray, There's No Estate Tax: Now What Do I Do?

As we previously reported in both our [2009 Year-End Estate Planning Advisory](#) and our December 23 Client Advisory [Possible One-Year Elimination of Estate and Generation-Skipping Transfer Tax in 2010: Going, Going, Gone?](#), the federal estate and generation-skipping transfer ("GST") taxes are in a tremendous state of flux, having been set to expire on January 1. Now that the ball has dropped over Times Square, federal estate and GST taxes have, in fact, expired—at least temporarily. It is difficult at this early juncture to predict whether this will present significant estate planning opportunities. If Congress does nothing, the tax will return in 2011 at the 55% rate, and with only a \$1 million exemption. Certain members of Congress, however, have stated their intention to restore these taxes sooner, perhaps even retroactively to January 1—but in either event, whether this is done as a temporary extension of 2009 rates and exemptions, or as a more permanent fix with entirely new rates and exemptions, is anybody's guess.

While the opportunities are uncertain, the potential pitfalls presented by this temporary change are clear, and in some cases serious. Most important is the impact of this change on the estate plans of many married couples that contain formula bequests designed to set aside the largest amount that can pass free of federal estate tax under the will of the first of them to die. For someone dying in 2009, this would have resulted in up to a \$3.5 million "bypass" or "credit shelter" gift, and in a significant attendant estate tax savings upon the death of the second spouse. But for someone dying when there is no estate tax, that "bypass amount" would be **the entire estate, with the result that such a formula would potentially disinherit the surviving spouse**. Conversely, formulas that refer to the "applicable exclusion amount" (which at the moment does not exist) would result in **no amount being set aside and might disinherit everyone other than the surviving spouse**. **If you think that your estate plan contains such an uncapped formula, please bring it to our attention, and we will be glad to confirm for you whether that is the case, and if so, what your options are for remedying the situation.**

2010 will not be the year for spring cleaning. The estate of anyone who dies when there is no estate tax will not receive a full step up in basis. As a result, the beneficiaries of such an estate will need to retain potentially a lifetime's worth of business records in order to establish the historic basis of the estate's assets. In addition, the GST implications of your annual gifting program may need to be reconsidered this year, particularly if it involves gifts to trusts.

Unfortunately, thanks to Congress, 2010 promises to be a time of tremendous estate planning volatility. We will continue to provide information and updates on any new developments as they occur. In the meantime, if you otherwise have need to make changes to your will, revocable trust or business succession documents, there may be some important planning options to consider, along with important pitfalls to avoid, in order to provide maximum flexibility in the event that you *should* die at a time when there is no estate tax.

We Can Help

For more information or to review your estate planning options, please contact your Katten Muchin Rosenman LLP attorney, or any member of Katten's Trusts and Estates Practice.

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