Cooley

Changes to Estate Gift and GST Taxes in New Tax Law

December 30, 2010

On December 17, 2010, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "Act") was signed into law and will remain in effect through December 31, 2012.

As highlighted below, the Act makes significant changes to the estate, gift and generation-skipping transfer ("GST") taxes and presents important planning and wealth transfer opportunities. **We recommend that you contact us to discuss these opportunities and the overall impact of the Act on your estate plan**.

Estate Taxes

The Act reinstates the estate tax for decedents dying in 2011 and 2012 (prior to enactment of the Act, the estate tax was not in effect for 2010). *Under the Act, the estate tax exemption amount for decedents dying in 2011 or 2012 increases to $5,000,000 and the estate tax rate is reduced to 35%*.

In addition to reinstating the estate tax, the Act also eliminates the carryover basis regime for valuing the assets included in the decedent's estate and reinstates the stepped-up basis rules that applied prior to 2010.

Special Rules Applicable To 2010 Decedents:

- For decedents dying in 2010, the executor may elect to have either (i) the estate tax apply at a 35% tax rate, with a $5,000,000 exemption and a stepped-up basis to the value on the date of death (or the alternate valuation date), or (ii) the estate tax not apply, but applying the carryover basis regime.
- The period of time in which a beneficiary of a 2010 decedent's estate may disclaim an interest in property that would otherwise pass to him or her is extended from 9 months from the decedent's death to 9 months from the effective date of the Act.

Gift Tax

The Act increases the gift tax exemption to $5,000,000 from $1,000,000 for gifts made in 2011 and 2012, while keeping the gift tax rate at 35%. Accordingly, individuals who have used their full lifetime exemption can make up to an additional $4,000,000 in tax-free gifts over the next two years.

GST Tax

The Act increases the GST exemption amount to $5,000,000, effective as of January 1, 2010 through December 31, 2012.

The GST tax rate for 2011 and 2012 transfers will be 35%.

Portability

In 2011 and 2012, the estate tax exemption will be "portable" between spouses. Generally, portability allows a surviving spouse to take advantage of the decedent spouse's unused estate tax and/or gift tax exemption. Portability is available for decedents dying after December 31, 2010. As a practical matter, because the provisions of the Act are in effect only for two years, portability can only be used if both spouses die between January 1, 2011 and December 31, 2012.

Grantor Retained Annuity Trusts

The Act did not include provisions requiring Grantor Retained Annuity Trusts (GRATs) to have a minimum 10-year term or a minimum taxable gift as previously proposed. Therefore, zeroed-out GRATs continue to be a useful wealth transfer tool.