



GUNSTER

ATTORNEYS AT LAW

It's 2010!  
Federal Estate & GST Taxes Have Been "Repealed" for 2010  
Important Points To Consider

To Our Clients:

The repeal of federal estate and generation-skipping transfer ("GST") taxes has finally become a reality. However, such taxes are repealed only for 2010. On January 1, 2011, federal estate and GST taxes are resurrected with higher tax rates and lower exemptions than were in effect during the last several years.

The repeal of federal estate and GST taxes for 2010 may be short-lived. Congress may act to reinstate the federal estate and GST taxes sometime during 2010, and may even act to reinstate such taxes retroactively to January 1, 2010.

Here are some highlights of the current law:

- ➔ The federal estate and GST taxes are repealed, but only for estates of decedents dying during 2010 and transfers subject to GST tax occurring during 2010.
- ➔ The federal estate and GST taxes are currently scheduled to go back into effect on January 1, 2011, as they existed prior to 2001. The estate and GST tax exemptions will return to \$1 million and the highest marginal estate tax rate will be 55%, with a 5% surcharge for estates between \$10 million and \$17.1 million in value.
- ➔ The way the income tax basis of property acquired from a decedent is determined has been dramatically changed. Under prior law, a beneficiary's income tax basis in property received from a decedent was equal to the fair market value of the property on the date of the decedent's death. In 2010, a beneficiary's income tax basis in such property is equal to the *lesser* of (i) the decedent's basis (a "carry-over" basis) or (ii) the fair market value of the property as of the decedent's date death.
- ➔ The carry-over basis of assets acquired from a decedent may be increased by up to \$3 million for property passing to a surviving spouse, and up to \$1.3 million for property passing to anyone else. Any such increases may not cause the basis to exceed the fair market value of the property as of the decedent's date of death.

The federal *gift* tax has *not* been repealed, but the *gift tax rate has been lowered* to 35% for 2010 (compared to a 45% tax rate in 2009).

- ➔ No *state* estate or inheritance taxes have been repealed.

The repeal of the federal estate and GST taxes may result in severe distortions of a client's intended disposition of assets, especially for clients with formula-based provisions in their estate planning documents.

For example, assume a client has a \$10 million estate, and an estate plan which provides that an

amount equal to the client's estate tax exemption (\$3.5 million in 2009) passes to a trust for the client's children, and the remainder passes outright to the surviving spouse. Because the estate tax has been repealed and there is no estate tax exemption amount in 2010, this plan could be interpreted to require that all \$10 million passes to the children's trust, or that the client's entire estate passes outright to the surviving spouse. This may or may not be what the client intended, and an amendment to the client's estate plan may be necessary to preserve the client's intended disposition of assets.

While the following factors are common problem areas, the list is by no means exhaustive and should not be relied on as the sole reasons for reviewing your estate plan:

- ➔ A client who has a greater probability of dying during 2010;
- ➔ A client whose estate plan leaves the estate or GST tax exemption amount to someone other than a trust primarily for that spouse's benefit;
- ➔ A client who has an estate plan which divides assets between individuals and charities based on a formula; and
- ➔ A client in a second or later marriage who has children from a prior marriage.

Each client's plan is unique, and the impact of this repeal will differ from plan-to-plan. Therefore, we urge you to call us at your earliest possible convenience to determine the impact of the temporary repeal of the federal estate and GST taxes on your estate plan. You may also wish to discuss making changes to your documents to maximize the tax benefits available if you die in 2010, while not disturbing your overall estate plan.

The reduction of the gift tax rate to 35% along with the 1-year repeal of the GST tax *may* present a "once in a lifetime" planning opportunity (*if* Congress does not retroactively reinstate the GST tax). We would be happy to discuss potential planning ideas and the associated risks and benefits with you. As always, we will do our best to keep you advised of developments as they become known to us, but the situation is truly a "moving target." So, we must rely on you to contact us.

Remember: Although the *federal* estate and GST taxes have been repealed for 2010, *states* with estate or inheritance taxes have *not* repealed such taxes. Additional planning will be required to address the impact of state estate taxes for clients who own real or tangible property outside of Florida or are residents of states other than Florida. Florida does *not* have an estate or inheritance tax.

This letter is not a detailed outline of our views or our planning suggestions and is not intended as legal advice to any particular person. This letter is intended to provide you with a brief summary of the current law, to advise you of the potential for additional legislation in 2010, and to alert you to the need to review your estate planning documents in light of the current law.

### **PRIVATE WEALTH SERVICES**

**IRS CIRCULAR 230 DISCLOSURE:** To ensure compliance with Treasury Department regulations, we inform you that this correspondence is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed under the Code. No portion of this correspondence may be used in connection with the promotion, marketing or recommendation to another party of any transaction or matter addressed herein as relates or may relate in any way to any U.S. federal tax advice.