PRACTICAL PLANNER NEWSLETTER
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More Info:

◦Publications:

◦■ For a consumer e-book Estate Planning After the 2010 Tax Act by Martin Shenkman, see the kindle book section on www.amazon.com.

◦■ For a professionals: www.cpa2biz.com for Estate Planning after the Tax Relief and Job Creation Act of 2010: Tools, Tips, and Tactics, by Martin Shenkman and Steve Akers (Product Code: 091056HS). All royalties are donated to the National MS Society, Michael J. Fox Foundation for Parkinson's Research and Association of Hole in the Wall Camps.

Creative solutions that coordinate all your planning goals: · Estate · Tax · Business · Personal ·Financial ·Asset Protection

Planning Potpourri

Roth Conversions: If you converted your IRA to a Roth, call your CPA and re-evaluate. Some folks converted to get the income tax out of their estate and to thereby reduce their estates for estate tax purposes. This may no longer be relevant in light of the $5M exemption. If this was your motivator, consider recharacterizing back to a traditional IRA and saving the tax. Some planned on paying income tax immediately on conversion because of the anticipated increase in income tax rates over the next two years. That never happened so review the ability to defer tax over 2 years with your CPA.

2010 Gift Tax Returns: These will have more traps than the Augusta National so proceed with caution. The end of 2010 had some funky generation skipping transfer tax planning opportunities that may require special treatment. The deadlines are also rather confusing in that it appears that gifts must be reported on time but the GST consequences of those same gifts might be reported at a later date. Transfers to certain trusts in 2010 may not require an allocation of GST exemption (but some will!) so evaluate each and determine if an affirmative election out of the GST automatic allocation rules is required. Given the uncertainty of what 2013 might bring, and a possible lapse in the GST automatic allocation rules (your CPA will translate this!) you might want to affirmatively elect to allocate GST exemption on all gift tax returns to gifts that should be covered, regardless of what is presently required. 2010 gift tax returns are not for the faint of heart to prepare.

Court Proceedings for 2010 Decedents: Even if you have a veritable Cleaver family and everyone gets along a court proceeding may be required to interpret what a will for a 2010 decedent means. How should a formula clause be interpreted? What impact does the retroactive estate tax have? What about a state law passed to deal with the uncertainty of 2010? Will a disclaimer be effective? Time is of the essence in these proceedings.

Special Grandchildren Trusts: Funky trusts set up in 2010 to take advantage of the unique GST planning opportunities may have to be invested differently then other similar trusts, distributions may differ from what would otherwise be anticipated, and no further gifts should be made

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PRACTICAL PLANNER

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD

Shapeshifter Estate Tax

Summary: Shapeshifters for non-Star Trek fans (aren't we all?) are creatures that can change shape and form in contrast to those of the Federation and its allies who are referred to as "solids." The estate tax morphed into a Shapeshifter, and may never be a solid after the 2010 estate tax guessing game. In the aftermath of The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 we all continue "...to boldly go where no taxman has gone before." ...

Quickie Summary

You have undoubtedly been bombarded by articles on the 2010 Tax Act and its impact on estate planning. So here's the Cliff Notes: In the waning days of 2010 Congress made the estate tax retroactive to January 1, 2010 with a $5 million estate and GST exemption, a 0% GST tax rate, and a 35% gift and estate tax rate. Executors have the option of electing the carryover basis regime for those dying in 2010 (in English that means the kids of the fat cats who died in 2010 pay no estate tax). In 2011 and 2012 the gift, estate and GST exemption is $5M. It's indexed in 2012 for inflation, but that's a peanut for now. Portability – if your spouse dies before you, on your death your estate may be able to use his/her unused exemption. In 2013 the exclusion is back to $1M with a 55% rate, well, at least that's what's on the books. Sounds simple. For almost everyone you can just ignore the estate tax and do an Alfred E. Neuman: "What! Me Worry?" Yes, you do have to worry and plan.

Portability

Prior to the 2010 Tax Act you had to do a bypass trust and carefully divide the ownership of your assets to safeguard your spouse's estate tax exemption. The 2010 Tax Act created a new concept called portability so theoretically you can use your spouse's exemption with no effort. Well, theoretically I can still eat lots of cheesecake but look like the guy on the infomercials if I buy that ab machine! So much for theory and so much for portability. The rule only exists for 2011-12. GST benefits aren't portable. Outright bequests provide no protection from post-death inflation of the first of you and your spouse to die. Outright bequests could end up with the new spouse and not your kids. Need we go on?

2013

No one coulda described it better than Yogi Berra: "This is like deja vu all over again." $1M/55%. In 2012 your CPA will be calling about changes in the estate tax rules. Didn't you have enough of that confusion in 2009 and 2010? Here's some of the 2013 possibilities (they're making odds on each possibility in Vegas): $1M/ 55%. While most tax experts believe this is unlikely not planning for could be the costliest mistake you've ever made. But depending on your situation, there may be less costly and more flexible ways to address this possibility. Continue the $5M/35%. Continue the $5M/35% but eliminate our favorite tax toys: discounts, GRATs, Crummey powers, etc. That would goose up revenue but not superficially take back what was given. $3.5M/ 45% which is what most thought would happen. This could be with, or without GRATs, discounts, etc. Repeal the estate tax (looking more likely than before according to some).

What Repeal Could Bring

But if they repeal the estate tax what will they do? Here's a possibility. Repeal estate tax and instead charge a capital gains tax on all assets on your

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Checklist: Plan Docs

Summary: The 2010 Tax Act is a game changer. Here's some thoughts on how some of your existing documents might change. But the bottom line is everyone (yeah really, this isn't an advertisement for your estate planner, it's intended to help you), needs to review:

√ Power of Attorney: Review the gift provision. In an old document you may have given broad powers to make gifts to reduce an estate that was taxable then, but which is not now. Perhaps you view the likelihood of tax sufficiently remote that you would prefer the protection of prohibiting your agents from making gifts. What if 2013 really brings a $1M exemption? Should you tailor a specific provision to grant your agent the authority to make gifts if the exemption declines to $1M? What about $3.5M?

√ Will/Living Trust: You've probably heard it 100 times but most folks still have not dealt with it. Wills and living trusts almost always included formula clauses: "Leave the largest amount that won't create a federal estate tax to my kids." Whatever clause you have, it has to be reviewed and revised. You have to address with your adviser what you would want under each of the 2013 scenarios listed in the lead article

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...Shapeshifter Estate tax and the 2010 Tax Act

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final income tax return. No issue there with taxing what was already taxed, it wasn't. This solves the step up in basis issue at death, you appraise everything and pay your capital gains tax. The really ultra-wealth folks that complained about the estate tax rate shouldn't gripe because the rate would be the low capital gains rate. But if this is done the gift tax will have to remain because it would be essential to back stop the estate tax. That could mean a $1M lifetime gift exclusion. Yet another reason certain groups of taxpayers need to plan now and plan fast.

What to do Now

Everyone (yes you too!) has to revise their planning first, their documents second. Everything has changed. Formula clauses from old documents probably won't work (that could undermine your entire dispositive scheme). Some of you should be planning like "all get out." Others might actually creatively scale back and simplify planning. Portability won't fix a will with a formula clause created when the estate tax world was different. State estate tax remains a thorn to address cautiously and creatively.

The Little Estate Tax Secret

For folks with $2M to $5M estates in the past planning might have been accomplished with a bypass trust, dividing assets and an insurance trust owning some life insurance. Most of your planners could do that on autopilot. Most of the time and gray matter they devoted to you was spent on a myriad of other planning issues. Even if you're so far under the estate tax radar that estate tax is not a concern (but read Yogi Berra's quote above), you still need all the other "stuff" your planners addressed before. "Estate Planning" was too often viewed as "Federal Estate Tax Minimization Planning." The latter was never more than a component of the broader planning picture. So even if the federal estate tax has disappeared (and it hasn't), the rest of the "plan" is still vital.

Estate Planning for Real People

Estate planning should always addressed a myriad of personal issues. Do you have sufficient assets for retirement? Do you equalize gifts or bequests to your children? Do you equally or equitably divide your estate? Religious issues. Planning for illness or disability. And more.

How to Plan

If your wealth could subject you to estate tax under the $5M exemption you should use these beneficial tax breaks and aggressively plan. If you're under the tax radar today, but might not be in 2013, plan, but creatively and flexibly so that what you do is protective of a bad 2013 tax outcome, but not so costly or immutable that you're unduly hampered by the result if the estate tax is repealed. If you're confident you'll always be below the estate tax radar, revise your plan and documents so that they work under the new paradigm and the 2013 scenarios listed above. If asset or malpractice protection is a concern for you, jump all over these tax breaks and exploit this historic opportunity to shift wealth into protective structures. If the gift exemption drops to $1M in 2013 you will have lost a unique chance to protect your wealth. Non-married partners should use the new exemption to equalize wealth between partners. The low gift tax exemption, and lack of gift tax marital deduction, had prevented this in the past. But the $5M exclusion may afford the first great opportunity to shift wealth without a tax. Portability is not available to non-married partners (the bias in the law was continued).

More Info

We provided email subscribers with a wealth of information on the law as it developed from mid-December onward, as well as notices of seminars, webinars and two books. Much of this has been posted on www.laweasy.com. If you missed these and want to be included in future mailings of white papers and other materials go to the site and sign up for the e-newsletter which will include all mailings. For laypersons an e-book Estate Planning after the 2010 Tax Act is available for $10 on Amazon. For professionals, a comprehensive book analyzing the 2010 Tax Act, power points, webcasts and more is available from the American Institute of CPAs. The product is called Estate Planning

> *Lost in Space: We skipped Nov and Dec 2010 issues while writing two books on the new tax law.*
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Review: Andrew Wolfe, CPA, Esq.

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...Checklist: Update Your Planning Documents

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above. You need more personal direction, more flexibility and options. If your will included a charitable lead trust ("CLT") to reduce estate tax perhaps you want to eliminate it if you won't face a tax now. But what about state estate tax? What if 2013 brings a $1M exemption? Perhaps you should include say a $500,000 CLT if you reside in a state with a state estate tax on your death, and a $1M CLT if the federal exclusion drops to $3.5M or lower.

√ <u>Insurance Trusts</u>: Your Irrevocable Life Insurance Trust (more affectionately referred to by the acronym "ILIT"), should be reviewed for a host of possible matters. If you had large value life insurance policies that you wanted to transfer to the ILIT but could not under prior law because of the limited annual gift exclusions, now, with the Super Size Me exemption, you might simply gift a fat Mcpolicy to your McILIT. Other folks might want to cancel life insurance since they no longer think they need it to pay the federal estate tax that it was bought to address. But Hold your Horses! The tax may be back in 2013, you might face state estate tax, a good policy might be viewed as a ballast for your investments, etc.

√ <u>Guarantee Agreements</u>: If you sold assets to a family trust for a note, you may have opted to have some portion of the note supported by a guarantee from another family member, entity or trust. With the new $5M gift exemption you can gift more assets to the trust and perhaps lower or even eliminate the guarantee. This will require a review of the documents to determine what is required to accomplish this.

√ <u>Split-Dollar Agreement</u>: If you used a split-dollar agreement to finance life insurance you might wish to unwind that agreement. Your exit strategy in the past may have been a loan from a dynasty trust, rolling GRATs (which you can still do), etc. If you want to spend less bonding time with your estate planner, just pay the puppy off and unwind it.

√ <u>Grantor Trust</u>: A common planning strategy was (and in many cases remains) transferring assets into trusts that remain taxed to the grantor/donor senior family member. By dad continuing to pay the income tax on income earned by a trust the assets of which inure to Junior and not dad, that tax burn continues to deplete dad's estate every year. Well if dad's estate is below $5M he might just prefer to Solarcaine that tax burn by toggling off the grantor trust status of the trust. So all grantor trusts should be reviewed.

√ <u>Self-Settled Domestic Asset Protection Trust</u>: If you don't have one, now might be the time to grab one! These cuddly characters are referred to be their acronym "DAPT." But whatever ya call 'em, and recognizing some of the still meaningful uncertainties about their use, consider the following. The gift exemption today is $5M. In 2013 it might be $1M. If you are worried in the least about asset protection (malpractice claims, divorce, etc.) why not (subject to all the due diligence to minimize the likelihood of a fraudulent conveyance problem) set one up now and pump non-protected assets into it? In 2013 the opportunity might be gone! Until this year the $1M gift exemption constrained this planning. Now it does not. If you always wanted a great excuse to go salmon fishing in Alaska, now might be the time. (But ask your CPA if

Recent Developments

So how much of your income might NY tax? Lots more than one couple thought. First a little background then we'll review a recent case that will send tax shivers up your spine. You can be domiciled in one state under its tax laws, and simultaneously be deemed a statutory resident in another state under its tax laws. You can be taxed in both. Ouch. While sometimes one state will offer a credit for tax you paid to another state the credits are not always available and the offset is not always perfect. John Barker worked in investments in NYC more than 183 days of every year. The couple owned a vacation pad in the Hamptons and spent a mere 19 days or less each year, what the court called "brief sojourns." The court found that the house was more than a mere "camp or cottage" under 20 NYCRR 105.20(e) that would exempt it. The court found that the vacation house was useable year-round and the Barkers maintained "dominion and control over the dwelling." See Matter of Roth, March 2, 1989. These factors supported the court concluding that the house was a "permanent place of abode." The combo of work and house proved costly and the Barker's got a $1M tax bill from NY! By determining that the Barkers were "resident individuals" for NY tax purposes they were taxable on all income, not just NY source income. The court remanded to an administrative law judge to determine if penalties for filing false tax returns should be assessed too. Matter of Barker, 822324. In New York if you have a permanent place of abode which serves as a living quarters for more than 11 months a year, you may be deemed domiciled in NY for tax purposes. Some folks will try to rent the apartment for two months or more in a year to avoid that property or apartment from being characterized as a "permanent place of abode." Sate tax auditors will look at what happened to your stuff, whether the tenant was unrelated, whether a real rent was paid, and any other relevant fact to determine if the lease should be respected. If you have a vaca-