WISEMAN · BRAY PLLC
ATTORNEYS AT LAW

ESTATE PLANNING NEWSLETTER

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IMPORTANT ESTATE TAX NOTICE

INSIDE THIS ISSUE:

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Unlike many of our newsletters that are purely informative in nature, this newsletter is intended to alert clients, advisors, friends and colleagues of the potential need to take specific actions.

In our Fall 2009 newsletter, we discussed the possibilities for estate tax reform and the various opinions of those in the estate planning community regarding the future of the estate tax. Now, however, the unthinkable has happened because Congress failed to act. Nearly everyone expected Congress to extend the estate tax, at least on a temporary basis, into 2010, but Congress did not act at all.

Consequently, effective January 1, 2010, the Estate Tax and Generation Skipping Tax "are not applicable" for 2010. Additionally, instead of a "step up" in basis for the assets of decedents dying in 2010, we are now operating under a "modified carryover basis" regime. Under previous law, property (all noncash assets) got a step up in basis upon someone's death, which could significantly reduce capital gains taxes by increasing the basis the new owner (spouse, child, trust, etc.) had in the property.

No one knows if or when Congress will act on the Estate Tax and Generation Skipping Tax (GST). If the taxes are made applicable retroactively to January 1, 2010, there will likely be litigation about the constitutionality of a tax imposed retroactively. If Congress again takes no action in 2010, the Estate and Generation Skipping Tax **automatically** reverts to the law in effect in 2001.

This would mean: an Estate Tax Exemption amount of $1 million, a GST exemption of approximately $1.3 million, an estate tax rate of 55%, and the reinstatement of other technical provisions potentially costly to taxpayers. The 2001 law contained a provision stating that on January 1, 2011, the law will then be "just as if the 2001 law had never been enacted."

What does this mean for you?

The correct answer to this is "It depends." There are two primary issues that may need to be addressed: (1) allocation of assets for the surviving spouse of a married couple upon the death of the first spouse AND/OR (2) adjustments to your tax basis in your property (your noncash assets, including stocks, bonds, real property, business interests and the like).

Allocation of Assets at the First Death

For most married couples, your estate plan (joint revocable living trust, separate revocable living trusts or wills) is designed to divide the estate upon the death of the first spouse into a "marital share" and a "family share". The purpose of this division is to take advantage of the estate tax exemption amount by placing this amount in a family trust and to allow the balance of the assets above that exemption amount to pass into a marital share and qualify for the marital deduction. This type

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of formula has been in existence for over 50 years in varying degrees and is designed to minimize or eliminate estate taxes. This formula allows flexibility in the allocation depending on the exemption amount so your estate plan does not need to be amended with each change in the exemption amount.

However, the formula makes the division based upon certain terms used in the Internal Revenue Code. Because there is no estate tax in 2010, many of these terms have no meaning this year. Under current law, these terms will have meaning again and will be part of the law effective January 1, 2011. Thus, regardless of whether we revert to the old law or whether estate tax legislation is enacted this year, this is at most a one-year problem.

Unfortunately, because these terms have no meaning in 2010, your trust or will may need to be amended to clarify your intent for this year.

The Basis Issue

If you are unmarried and the sum of your **noncash assets** (valued at fair market value at your death) are more than $1.3 million, you will most likely not be affected.

If you are married or single and the sum of your **noncash assets** (valued at fair market value at death) exceeds $1.3 million, your will or trust should be amended to provide for proper allocation of the basis increases AND to provide that property passing to a surviving spouse gets the spousal property basis increase.

What happens if I do nothing?
Maybe nothing. However, if you or your spouse dies in 2010 and these changes could impact your estate, failures to plan for these new rules may result in higher capital gains taxes after death.

BE ESPECIALLY ALERT if you are married and assets pass to **anyone other than your spouse at the death of the first spouse to die**. This often happens in blended families where assets pass to children of a prior marriage at the first death. Please contact our office immediately if this describes your situation.

Here is what we recommend you do:

1. Read the information above to see if you fall into one of the categories affected
2. Then, call us to schedule a time to review your plan and make the necessary amendments.

When you call us, we will schedule a 1-hour conference to discuss this with you and determine if an amendment is needed. The fee for this conference is $250.

If an amendment is needed, we have an amendment that we can prepare for you that will be effective for most clients in 2010, 2011 and thereafter (subject to changes by Congress). Our minimum fee to prepare an amendment to address these issues is $500.

Please understand that this is a **1-year problem** and does not affect everyone. However, it can have an affect on your estate and on capital gains taxes at your death in certain circumstances.

We are doing our best to stay abreast of any changes, and we look forward to hearing from you.

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