THE CLOCK IS TICKING ON CERTAIN ESTATE, GIFT PLANNING OPPORTUNITIES

The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 ("the Act") extended, until December 31, 2012, various Federal estate and gift tax provisions that allow a $5 million exclusion from the gift tax that is imposed on lifetime transfers of assets.

Pursuant to the estate and gift tax provision of the Internal Revenue Code ("IRC"), a gift to any one person in excess of the annual exclusion ($13,000 for 2011, $26,000 if married) that is made in any given year is subject to a "gift tax." The "taxable gift" is the value of the gift in excess of the annual exclusion amount. The current gift tax rate for 2011 and 2012 is 35 percent of the value of the taxable gift.

Each individual also has a lifetime gift tax exclusion as mentioned above. The gift tax and the estate tax are now unified, which means if you use your gift tax exclusion during your lifetime, it will reduce the amount of estate tax exclusion you have at death, dollar for dollar. The lifetime exclusion for gift taxes, and the estate tax exemption, for both 2011 and 2012 is $5 million for single filers ($10 million for married couples).

For example, a taxpayer who makes a taxable gift to an individual in the amount of $1 million will also have a gift tax liability to the Internal Revenue Service ("IRS") of $350,000.

What will happen after year-end 2012? If Congress takes no action then, by default, the tax structure will revert back to 2001 levels, when both the lifetime gift tax and estate tax exemptions were $1 million. The tax rate in excess of the $1 million will go from 35 percent to 55 percent. Using the example from above, that same $1 million "taxable gift" will generate a $550,000 gift tax payable to the IRS.

The current tax rate represents a tremendous tax-free gifting opportunity, including: gifts to irrevocable life insurance trusts; spousal access trusts; and life insurance trusts.

The easiest way to take advantage of this opportunity is to gift up to $5 million to an irrevocable life insurance trust ("ILIT") for the benefit of a spouse, child, grandchild, or anyone else. These assets will grow outside the donor's estate and will not be taxed at death. It is important to keep in mind the "three-year rule": the donor must survive at least three years after the trust implementation for an existing policy, otherwise the proceeds of the trust come back into the donor's estate.

Spousal Access Trusts

A spousal access trust ("SAT") enables the grantor's spouse to receive income from the trust during his or her lifetime. The spouse may be given anywhere from no access to virtually total access—it's all in the wording of the trust. This type of trust would name the children of the grantor as trust beneficiaries. As in a typical ILIT, the assets of the trust are not included in the taxable estate of the grantor and, if properly drafted, the SAT can be can be utilized to take advantage of the spouse's exemption from estate taxes.This may provide two dollars of tax advantage for every one dollar of gift. Additional leverage can also be provided by utilizing life insurance in the SAT.

Life Insurance Trusts

Life insurance trusts have been a mainstay of estate tax planning since the estate tax came into existence in 1913. While life insurance always provided leverage, with a large $5 million exclusion, the opportunities have increased dramatically. Also, the use of a survivorship guaranteed universal life ("SGUL") insurance policy within this type of trust maximizes the death benefit. Combining the gift tax exclusion and the generation skipping tax exemption creates the opportunity to generate wealth that can benefit successive generations.

The tax benefits presented by the Act are, without a doubt, far-reaching and of benefit to those who plan to establish trusts for future generations. With careful planning, these opportunities can be leveraged prior to 2013.

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