

ESTATE PLANNING MEMORANDUM

TO: All Estate Planning Clients
FROM: Edstrom, Bromm, Lindahl & Freeman-Caddy
SUBJECT: Estate & Gift Tax Law Changes as of Jan. 1, 2010

I. ESTATE AND GIFT TAX LAW CHANGES (FEDERAL)

In June, 2001, President Bush signed into law the “Economic Growth and Tax Relief Reconciliation Act of 2001”. The Act affected many areas of tax law as various provisions are phased in or out. The Act is still in effect as of the date of this Memorandum. Following is a brief summary of the Act as it relates to the estate and gift tax laws that affect the typical estate plan:

A. Federal Estate Tax (“FET”) and Generation Skipping Tax (“GST”). These taxes were repealed for person’s dying after December 31, 2009. However, the FET is scheduled to be reinstated in 2011 at the same levels and rates as existed pre-2001.

B. Reductions in FET rates:

<u>Year</u>	<u>Maximum Rate of FET</u>
2010	0%
2011	55%

C. Increase in unified credit exemption amount for FET purposes:

<u>Year</u>	<u>Estate Tax Exemption Amount</u>
2010	\$0
2011	\$1,000,000

D. The annual Gift Tax exclusion for 2010 is \$13,000.

E. The unified credit for Gift Tax purposes is limited to \$1,000,000.

F. The current step-up in basis at death is **repealed** for persons dying after December 31, 2009, except as follows:

1. An estate may select assets for an aggregate basis increase of \$1,300,000 – as an increase over a decedent’s existing basis (indexed for inflation).
2. An estate may select assets passing to a surviving spouse for an aggregate basis increase of \$3,000,000 (indexed for inflation).

G. The new law contains a “sunset” provision that restores 2001 rates after December 31, 2010, unless Congress takes affirmative action. The rates being as follows:

Unified credit is \$1,000,000
GST Exclusion - \$1,000,000 (indexed)
Top FET Rate 55%

- H. It's highly likely that Congress will attempt to address these issues at some point during the 2010 calendar year. The two prominent proposals addressed by Congress in 2009 involved the following: (1) Unity of the GST and Gift Tax exemption with the FET exemption; and (2) Adoption of portability of the FET exemption between spouses. The bills differed as follows: (1) one called for a \$3.5 million exemption while the other called for a \$2 million exemption, but both would have the exemption indexed for inflation; (2) the first uses a flat 45% tax rate while the other calls for a progressive rate of 45% for estates valued up to \$5 million, 50% for estates valued between \$5 million and \$10 million, and 55% for estates valued over \$10 million.

Should Congress pass FET legislation in 2010, they will likely make it retroactive to the first of the year. Some have argued that retroactive taxation is patently unconstitutional while others argue that the United States Supreme Court ruling in *Carlton v. United States*, 512 U.S. 26 (1994), upholds the constitutionality of retroactive tax legislation if: (1) the legislation is a rational legislative purpose and is not arbitrary; and (2) the period of retroactivity is not excessive. Regardless of the outcome, it is safe to assume that this is an issue that will be resolved through significant litigation in the Federal court system.

II. ESTATE AND INHERITANCE TAX LAW CHANGES (STATE OF NEBRASKA)

The Nebraska State Legislature repealed its separate state estate tax in 2007, but is currently one of a handful of states that imposes a separate state inheritance tax. Effective January 1, 2008, the Nebraska Legislature amended the state inheritance tax to the following classes of beneficiaries:

- **Class 1:** Transfers to a surviving spouse are entirely exempt from inheritance tax. Other members of this class include a decedent's parents, grandparents, siblings, children, grandchildren, or the spouse or surviving spouse of any such persons. After a \$40,000 per beneficiary exemption, transfers to members of this Class are taxed at a rate of 1%.
- **Class 2:** These beneficiaries include a decedent's uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or any lineal descendant of the same. Each such beneficiary is allowed a \$15,000 exemption, after which a transfer is taxed at a rate of 13%.
- **Class 3:** Any transfers that don't involve members of the above two Classes are taxed at a rate of 18% after a \$10,000 per beneficiary exemption. However, transfers involving charitable and educational bequests are entirely tax free.

The above inheritance tax is due and payable to the county or counties which are the situs of the assets of the decedent within 12 months of the decedent's date of death. A penalty is assessed for failure to pay the appropriate inheritance tax before said date.

LB 35 (2009) as passed by the Nebraska State legislature allows use of an affidavit for transfer of real estate without probate for real estate valued at \$30,000 or less. Furthermore, personal property may be transferred without probate for personal property valued at \$50,000 or less.

III. YOUR ESTATE PLAN

A. Single person. These provisions should not require extensive changes in your trust or will unless your trust or will contains formula bequests based on the unified credit, generation skipping exclusion or charitable deduction. You should continue to review your estate plan periodically, particularly prior to the continuation of any family gift program.

B. Married couple with combined estate under \$3.5 million. Even the most liberal of proposals discussed by Congress in 2009 included a federal estate tax exclusion of \$3.5 million. However, we still advise that you reassess your estate plan on a periodic basis to ensure that it adheres to the on-going changes in the federal and state laws.

C. Married couple with combined estates in excess of \$3.5 million. We would advise that you reassess your estate plan on a year-to-year basis to ensure that appropriate steps are being taken to minimize your exposure to federal estate tax liability.

IV. ESTATE PLANNING vs. TAX PLANNING

Remember not to confuse estate planning with tax planning. Even with permanent repeal of the Federal estate taxes, taxes are still a consideration with the new carry-over basis rules going into effect. In the meantime, your plan still needs to achieve these objectives:

- A. Get your estate to whom it is suppose to go – who, what, when, where and how much.
- B. Reduce administration expenses (probate).
- C. Minimize capital gain by maximizing allowable step-up in basis.
- D. Protect assets for certain beneficiaries or from subsequent spouses in the event of remarriage.

V. CONCLUSION

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