WITHUM SMITH+BROWN TAX BRIEF

Now is The Time for You to Review Your Estate Plan

JANUARY 9, 2009

BE IN A POSITION OF STRENGTH

The election is over and Barack Obama has become the next President of the United States. In addition, for the first time in fifteen years, the Democratic Party will have control over both the executive and legislative branches of government. Among other significant tax and budget policy decisions, the President and the new Congress will impact the future scope of the federal estate tax.

When President Bush took office, Congress passed the 2001 Tax Relief Act, which introduced federal estate tax reform and appeal. Under current law, the value and individual's estate, which includes taxable lifetime gifts passed during lifetime that can pass free of federal estate tax, stands at $2 million for those dying in 2008 and $3.5 million in 2009. The maximum federal estate tax rate imposed on the value of an individual's estate in excess of the applicable amount is 45%. Although the current law provides for a repeal of the federal estate tax in 2010, it further provides for the reinstatement of the federal estate tax for 2011 and forward with an estate exemption of only $1 million (indexed for inflation) and a 55% maximum federal estate tax rate.

In response to the 2001 Act, many states, including New Jersey, New York and Connecticut, passed legislation so not to conform to the federal changes. The exemption amounts for these states are $675,000, $1 million and $2 million, respectively. Although Pennsylvania no longer has an estate tax, the inheritance tax still applies.

Legislative action on the estate tax in 2009 seems likely, in view of the otherwise scheduled repeal in 2010 and the reversion in 2011 to pre-2001 estate tax law. Given the current economic environment and the need for the federal government to raise revenue, complete repeal of the estate tax is unlikely. During the campaign, President Obama proposed freezing the federal estate tax at the current 2009 levels, which would keep the $3.5 million exemption and a 45% maximum estate tax rate.

THE EXPECTED LEGISLATIVE CHANGES PROVIDE AN OPPORTUNITY FOR YOU TO REVIEW AND CONSIDER CHANGES TO YOUR ESTATE PLAN.

Questions or comments?

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The President's proposals also included the portability of the estate exemption to a surviving spouse. Therefore, if you were to pass away and your surviving spouse did nor remarry, the surviving spouse could take advantage of your unused exemption. This would effectively give married couples $7 million of estate exemption before the imposition of the federal estate tax. Even if this proposal becomes law, this does not mean that proper estate planning, which includes the re-titling of assets and having provisions for the funding of estate exemption trusts in your Wills, should be ignored. Estate exemption trust planning protects assets from new spouses and creditors, future appreciation is removed from the estate and you take advantage of the first spouse's state estate tax exemption if you reside in a state that has an estate tax.

In addition, other estate and gift tax revenue raising options will be considered, including:

- 1. Eliminating the use of Qualified Personal Residence Trusts as a technique to save taxes on the transfer of an individual's home. This was originally proposed during President Clinton's administration.
- 2. Invalidating discounting for lack of marketability and control for Family Limited Partnerships and fractional interest discounts unless they involve an actual for-profit business.
- 3. Restricting the benefits of Grantor Retained Annuity Trusts by requiring a taxable gift of at least ten percent of the value of the property transferred.
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The expected legislative changes provide an opportunity for you to review your estate plan and consider revisions and planning opportunities that will affect how your plan distributes your assets under current law and the changes that will likely occur.

If you have any questions, please contact the WS+B tax department. *#292*

Questions or comments?

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