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Potential Tax Law Changes Could Present Rare Estate Planning Opportunities

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President-elect Donald Trump has promised major tax reform in 2017. With Republicans retaining majorities in both houses of Congress, there is now a real possibility that the federal estate tax and the generation-skipping transfer (GST) tax may be repealed. Although somewhat less likely, it is also possible that the federal gift tax may be repealed.

Trump Proposal

The President-elect's tax proposals include the repeal of the estate tax, with the currently available step-up in basis for income tax purposes on assets owned at death being limited to \$10 million of assets. Presumably, assets exceeding \$10 million in value will be subject to some type of carryover basis rules. Many details remain to be seen, including whether the gift and/or GST taxes may be repealed in addition to the estate tax. It also is not clear whether the capital gains tax imposed on appreciated assets exceeding \$10 million would have to be paid at death versus when such assets are ultimately sold.

Likelihood of Repeal

While a "permanent" repeal of the estate tax would require 60 votes in the Senate in order to avoid a likely filibuster by Democrats, a 10-year repeal of the estate, gift and/or GST taxes could be done through the budget reconciliation process with only a majority vote. Of course, even a total repeal would never be truly permanent because it could always be reversed in the future by a new Congress.

Opportunities

If the federal estate, gift and GST taxes are actually repealed (even for 10 years or less), doing so would provide individuals with a rare, limitless opportunity to immediately create generation-skipping trusts which could potentially last in perpetuity, i.e., so-called “dynasty trusts.” Individuals could create and fund these trusts that would support generations to come, achieve asset protection goals and never be subject to estate, gift or GST taxes. If the gift tax remains in place but the estate and GST taxes are repealed, similar dynasty trusts could be established at death. Another focus would be on income tax planning and possibly postponing the sale of assets or shifting assets among family members in order to avoid or minimize the payment of capital gains taxes. As to charitable giving, it is unclear how charitable giving would be impacted by these changes. Obtaining an estate tax deduction is certainly not the only reason why people make charitable bequests at death. However, in some limited situations where a primary motivation for the charitable bequests was simply to avoid the payment of estate taxes at death, such estate plans will need to be revisited and possibly revised.

Additional Considerations

The Trump proposal also provides: “To prevent abuse, contributions of appreciated assets into a private charity established by the decedent or the decedent’s relatives will be disallowed.” While the foregoing statement is vague and will require clarification (and may never be enacted), it appears that there may be some effort to discourage contributions of appreciated assets to private foundations. Such gifts are permitted under current law and are popular with wealthy families who have established family foundations.

Conclusion

Vorys is closely monitoring these developments and will keep you up-to-date as these developments progress. Regardless of any potential estate, gift or GST tax changes, what remains certain is that there will still be a need to have an estate plan for many reasons: asset protection, planning for minor beneficiaries and special needs beneficiaries, blended families, business succession, avoiding probate, just to name a few. Please contact your Vorys attorney if you have questions about your specific estate plan.