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REPEAL OF THE REPEAL - MAJOR CHANGES TO THE FEDERAL ESTATE TAX LAWS

The 2010 Tax Act provides some certainty as to the estate tax laws for the next two years and provides tax planning opportunities through 2012.

Increase in Federal Estate Tax Exemption to \$5 Million

A significant change under the 2010 Tax Act was an increase in the federal estate tax exemption to \$5 million. The exemption had been \$3.5 million in 2009, and, until the 2010 Tax Act, the exemption was scheduled to drop to \$1 million in 2011. In addition, the exemption will be adjusted by the rate of inflation for years after 2012 in \$10,000 increments.

Portability of Federal Estate Tax Exemption Between Spouses

The 2010 Tax Act introduces an entirely new provision that allows "portability" of the federal estate tax exemption between spouses. Upon the death of the first spouse, the decedent's unused exemption can be transferred to the surviving spouse. A surviving spouse is limited to the unused exemption of his or her last deceased spouse. For the exemption to be portable, a federal estate tax return must be filed following the death of the first spouse to die. The generation-skipping transfer tax exemption is not portable.

Persons Dying in 2010

Prior to the enactment of the 2010 Tax Act, there was no federal estate tax for persons dying in 2010. Under the 2010 Tax Act, the federal estate tax was reinstated retroactive to January 1, 2010. However, purportedly to head off any challenge of this retroactive reinstatement of the federal estate tax (which challenge had been anticipated on behalf of estates of the mega-wealthy who died in 2010, such as George Steinbrenner), the 2010 Tax Act provides that the decedent's estate can "opt out" of the federal estate tax for 2010.

There are advantages and disadvantages to "opting out" of the new federal estate tax for 2010. If the estate of a decedent who died in 2010 takes the default position and is subject to the federal estate tax (whether or not any tax is actually due), most assets in the decedent's estate receive a step up in basis equal to fair market value of the assets on the decedent's date of death. Alternatively, if a decedent's estate elects to "opt out" of the federal estate tax, no part of the estate will be subject to the federal estate tax, but the decedent's assets receive a carryover basis equal to the decedent's basis in the assets during life, subject to a special basis adjustment of \$1.3 million and a \$3 million marital basis adjustment.

No Changes to Minnesota Law

It is important to note that there have been no changes to Minnesota estate tax law. The estate tax exemption in Minnesota remains at \$1 million. Thus far, Minnesota has not adopted the changes enacted under the 2010 Tax Act, such as portability of the estate tax exemption to a surviving spouse.

Changes Effective Through 2012

The estate tax law changes enacted by the 2010 Tax Act are effective through 2012. Although it appears that many of the provisions were written with permanent enactment in mind, no one can predict what will happen after 2012. We encourage you to contact your attorney at Moss & Barnett to discuss how the new tax laws may benefit you and your family.