



## 2010 Estate Tax Repeal?

FEBRUARY 2010

The Economic Growth and Tax Relief Reconciliation Act of 2001 (the Act) brought about a variety of tax law changes between 2002 and 2010. The Act called for an increasing estate tax exclusion from \$1 million in 2002 to \$3.5 million in 2009 with a top rate of 45%. This increase also applied to the generation-skipping transfer tax (GST). The culmination of this legislation was the repeal of the estate tax and GST for 2010 along with a \$1,000,000 gift tax exemption and a gift tax rate of 35%. After 2010, the estate tax is scheduled to revert to 2001 levels with a \$1 million applicable estate tax exclusion, with a top rate of 55%. The federal gift tax exemption remains at \$1 million.

While the repeal of the estate tax was heralded by lawmakers when the Act was signed into law, estate planners widely expected that legislation restoring the estate tax and GST in 2010 would be passed far before 2010. However, to date, there has been no legislation to change the Act. This Alert will address some of challenges the Act has caused for 2010 and how they may affect your estate plan.

### Dilemma for 2010 Estates

Although there is currently no estate tax imposed on the estates of decedents dying during 2010, the personal representatives of those estates should exercise caution when making distributions to beneficiaries. It is quite possible that

Congress may decide to retroactively pass legislation reinstating the estate tax (and GST tax) as of January 1, 2010. Personal representatives of decedents who died in 2010 need to monitor this issue carefully to avoid a situation whereby a tax liability could be due after distributions have already been made to beneficiaries.

### Formula-Based Allocations

Wills that contain formula-based allocation are a significant area of concern. For example, a common scenario is one where a married individual's will may state that the maximum amount of assets that can pass free of estate tax should be transferred to his or her children and the remaining assets should pass to the surviving spouse. Given the current law, if the first spouse died in 2010, the formula-based allocation would allow for the entire estate to be transferred to the children and nothing would pass to the surviving spouse. While under current law, this will not result in an estate tax, this may not be what the decedent intended for his or her surviving spouse (and may certainly not be what the surviving spouse expected!).

### Carryover Basis

Prior to 2010, the cost or "tax basis" of inherited assets was "stepped up" to fair market value as of the decedent's date of death. For example, the tax basis of a building inherited in 2009 was the fair

**Wilkin &  
Guttenplan, P.C.**

Certified Public Accountants  
and Consultants

1200 Tices Lane  
East Brunswick, NJ 08816

T 732.846.3000  
F 732.846.0618

www.wgcpas.com

*(Continued on reverse side)*

**TAX ALERT**

FEBRUARY 2010

market value of the building regardless of the decedent's original cost.

Under the Act, during 2010, assets passing to beneficiaries will receive a "modified carryover basis". An increase in basis of up to \$1.3 million will be allocated to assets passing to any non-spousal beneficiary while an increase of up to an additional \$3 million will be allocated to assets passing to a spousal beneficiary. This may result in adverse income tax effects once the inherited assets are sold due to a historic cost-driven tax basis.

Prior to 2010, the allocation of specific types of assets to particular beneficiaries was not one of primary focus since all beneficiaries would receive a fair market value basis in the inherited property. Under these modified carryover basis rules, personal representatives must be mindful that the selection of which assets to give to particular beneficiaries may have

a material impact to the beneficiary due to the differing tax basis of each asset.

**Revisit Your Estate Plan**

Given the current state of uncertainty in the estate tax law and the unusual treatment of many of the 2010 aspects of the Act, this is an important time to consult your W&G advisor or estate planning counsel to review your current estate plan to ensure that your estate plan goals are still being met.

*Any U.S. tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties that may be imposed on the taxpayer.*

**Wilkin &  
Guttenplan, P.C.**

Certified Public Accountants  
and Consultants

1200 Tices Lane  
East Brunswick, NJ 08816

T 732.846.3000  
F 732.846.0618

[www.wgcpas.com](http://www.wgcpas.com)