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Steve Leimberg's Estate Planning Email Newsletter - Archive Message #2478

Date: 10-Nov-16

From: Steve Leimberg's Estate Planning Newsletter

Subject: [FLASH Jonathan Blattmachr & Martin Shenkman: Trump Wins, Republicans Control House and Senate, A Brave New World for Estate Planners](#)

"The election of Donald J. Trump as our 45th President was largely unexpected. It is difficult to forecast what that will mean during his term, and, perhaps, his second term. However, he has proposed wide-ranging changes to the nation's tax system which will affect virtually all Americans and their advisors. Estate planners in particular face a dramatic impact on their practices."

Jonathan Blattmachr, Esq. and **Martin Shenkman, Esq.**, provide members with their post-election commentary that analyzes the "Brave New World" that estate planners may soon have to deal with.

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Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,000 articles. Marty is the Recipient of the 1994 Probate and Property Excellence in Writing Award, the Alfred C. Clapp Award presented by the 2007 New Jersey Bar Association and the Institute for Continuing Legal Education; Worth Magazine's Top 100 Attorneys (2008); CPA Magazine Top 50 IRS Tax Practitioners, CPA Magazine, (April/May 2008). His article "Estate Planning for Clients with Parkinson's," received "Editors Choice Award." In 2008 from Practical Estate Planning Magazine his "Integrating Religious Considerations into Estate and Real Estate Planning," was awarded the 2008 "The Best Articles Published by the ABA," award; he was named to New Jersey Super Lawyers (2010-15); his book "Estate Planning for People with a Chronic Condition or Disability," was nominated for the 2009 Foreword Magazine Book of the Year Award; he was the 2012 recipient of the AICPA Sidney Kess Award for Excellence in Continuing Education; he was a 2012 recipient of the prestigious Accredited Estate Planners (Distinguished) award from the National Association of Estate Planning Counsels; and he was named Financial Planning Magazine 2012 Pro-Bono Financial Planner of the Year for his efforts on behalf of those living with chronic illness and disability. In June of 2015 he delivered the Hess Memorial Lecture for the New York City Bar Association. His firm's website is www.shenkmanlaw.com where he posts a regular blog and where you can subscribe to his free quarterly newsletter Practical Planner. He sponsors a free website designed to help advisers better serve those living with chronic disease or disability which is in the process of being rebuilt: [Chronic Illness Planning](#)

Before we get to their commentary, members should note that a new 60 Second Planner by Bob Keebler was just posted to the [LISI](#) homepage. In his commentary, Bob reviews the tax proposals made by President-Elect Trump and the prospects for enactment. Members should [click on this link](#) on this link to listen to the podcast.

Now, here is Jonathan and Marty's commentary:

EXECUTIVE SUMMARY:

The election of Donald J. Trump as our 45th President was largely unexpected. It is difficult to forecast what that will mean during his term, and, perhaps, his second term. However, he has proposed wide-ranging changes to the nation's tax system which will affect virtually all Americans and their advisors. Estate planners in particular face a dramatic impact on their practices.

Many predict a period of heightened market volatility which may have an impact on existing planning (budgets, forecasts, market returns, etc.). Market uncertainty could also add to the uncertainty that the Trump tax proposals will create, making planning even more difficult.

COMMENT:

Trump Tax Legislation Generally

In addition to Trump's personal victory, the Republicans were also victorious. The House of Representatives is controlled approximately 235 to 191 by the Republicans, and the Senate is controlled approximately 51 to 47 by the Republicans. This will make it more likely that many of Trump's tax changes discussed throughout this newsletter could be enacted.

There are other perspectives:

- Although the strength of the Republican success was significant, some pundits suggest that it may not assure Trump the support to push all legislation he proposes to enactment. Trump, according to this view, may have to spend time building bridges with not only Democrats, but those in his own party. But the pundits could not have been more wrong about the election, so the weight to afford any particular prognostication is "iffy" at best.
- Another perspective some have suggested is that under the rules of Senate parliamentary procedure, a Senator can filibuster virtually any bill (unless 60 Senators vote to end it). However, a filibuster does not apply to a budget bill that uses the so-called "reconciliation" process, so that may present an option for Trump to circumvent a filibuster should one occur.
- With the array of substantial legislation a Trump administration might propose, the inevitable horse trading will almost assuredly shape any actual legislation enacted.
- As we just learned from the election, political matters are often very difficult to forecast. Although the Republican platform has long advocated for estate tax repeal, and although Trump has included it as part of his plan, there is no assurance it will happen.

Thus, while no one can determine without an Ouija Board what will happen, these authors believe that the estate tax is doomed.

The impact of the possible changes will likely be much broader encompassing changes to individual and corporate income taxes and that those changes may suggest reconsideration of entity format, divided/distribution policies and more.

Estate Tax Repeal

President-elect Trump has proposed a repeal of the estate tax. The Republicans have long wanted to repeal the estate tax, and the large march upward in the estate tax exemption may have been a prelude to the elimination of the tax. The dubbing of the estate tax as a "death tax" reflects (and perhaps contributed to) the hatred many Americans, surprisingly many not affected by the tax, have had for what has become viewed as an unfair double tax.

The reality is that the estate tax affects very few taxpayers and raises insignificant federal revenue. A recent Forbes article noted: “In tax year 2015, just 4,918 estates paid \$17 billion in estate taxes (less than 1% of federal revenue). More than a third was raised from the richest of the rich—the 266 estates valued at \$50 million or more brought in \$7.4 billion to the Treasury.”

Many have viewed the estate tax not as a revenue raiser, but rather as a means of accomplishing a social objective of limiting the concentration of wealth. But statistics as to the concentration of wealth in the U.S. suggest that the estate tax has not been particularly successful at dampening wealth concentration. “The United States exhibits wider disparities of wealth between rich and poor than any other major developed nation.”

Timing of Repeal

If the estate tax is repealed, might repeal be effective January 1, 2017 or some other date? Might the Republicans delay repeal until 2018 because of income tax changes that will impact the federal fisc? Might repeal not be immediate but instead be phased in over a 10 year or other period? If the estate tax is repealed, might the tax come back at some future time in some different iteration? It also remains uncertain what might replace the estate tax. Might there be a capital gains tax on death? Could carryover basis become a reality? These possibilities are discussed in greater detail below. Another option might be to characterize inheritances as income. From an economic perspective if a lottery winning is treated as income, is it really unreasonable to treat an inheritance in a similar manner? So, while permanent estate tax repeal may be more likely than ever before, much uncertainty remains.

Tax History May Provide Some Lessons

Will Present-elect Trump be able to push through an estate tax repeal? Although the Republicans will have a small majority in the Senate, that should be sufficient to pass a budget measure. That was the position George W. Bush was in as well. Bush was able to push through the 2001 tax act which substantially reduced the top income and capital gains tax rates, made dividends taxed as long term capital gain and repealed the estate tax, by making it part of the budget bill enacted that year. Because the repeal of the estate tax was postponed (so tax relief could be granted elsewhere—largely, income tax reductions), many estate tax planners (including, attorneys, accountants, life insurance representatives and trust officers) never really experienced the significant reduction in business that they could have. And for those practicing in decoupled states there may have been no impact (but see discussion below as to decoupled states post-Trump estate tax repeal).

Also, the 2001 tax act provisions were “sunsetting” on account of what is known as the “Byrd” rule which allows a senator to object to any bill that increases expenditures or decreases revenues. That objection can be overcome by a vote of 60 senators. Even if that happens under what will be the Trump/Republican tax proposal, it seems doubtful the estate tax will not be repealed.

Gift Tax Repeal Possible

Among the many uncertainties is whether the gift tax also will be repealed. Trump has proposed a repeal of the gift tax along with the repeal of the estate tax. But the gift tax has and could continue to serve other important tax purpose.

The gift tax is not just a backstop for the estate tax, but it ensures the integrity of the income tax. If the gift tax were repealed a taxpayer (e.g., a parent) could shift income without tax cost to another (e.g., a child) who is in a lower tax bracket. The parent could simply gift the asset to be sold to the child to sell. Absent a gift tax cost there might be no impediment (other than transfer costs) to making such a transfer. The child could then sell the asset, recognize a lower income tax than the parent, and then gift some portion or all of the proceeds back to the parent.

However, what is the real impact of this purported backstop? When the gift tax exemption was \$1 million it likely had a far more significant impact as a backstop for the income tax since the transfer of assets could have triggered a gift tax at a much lower wealth level. Now, for most taxpayers, the high current gift tax exemption (2016) of \$5,450,000 may have no practical

backstop impact such that for most taxpayers, a repeal of the gift tax entirely would not open any flood gates of income shifting. For most taxpayers, shifting assets to a lower bracket family member for sale faces no tax impediment since the gift exemption is so high. If the gift tax is repealed that might permit wealthier taxpayers to shift assets, but at some level of wealth shift even the donee will be in the maximum income tax bracket as well so that there may be limited income tax benefit to shifting assets. Thus, for wealthy families there may be little income shift possible, not because of the impediment created by a gift tax, but because all family members are already in maximum income tax brackets. So as the exemption grows, the repeal of the gift tax becomes less relevant as a backstop to the income tax. Also, lowering the income tax rate as Trump has proposed will lessen the incentive to shift income in all events.

Would a repeal of the gift tax eliminate an impediment to asset protection planning for wealthier taxpayers? Shifting assets into irrevocable trusts to protect them from creditors is complicated by the need to avoid a gift tax. The repeal of the gift tax would permit asset protection planning unfettered by that limitation. Although it would also eliminate a primary non-asset protection motive used to justify such planning.

Carry Over Basis or Capital Gains Tax on Death?

When the estate tax was repealed for 2010 (by election essentially), carry over basis took effect. There is no assurance, however, that carry over basis will be enacted if the estate tax is repealed, and it may be a question of cost. Some may think that a capital gains tax at death will be enacted in place of the estate tax as it was in Canada in the early 1970s. Indeed, that is what President Elect Trump has proposed for transfers at death in excess of \$10 million. Trump's proposal may include additional exemptions from the capital gains tax on death for family businesses and farms.

The possibility of a capital gains tax on death should be carefully considered by those evaluating prior estate planning transfers, and transfers currently in process. Will shifting assets out of an estate into an irrevocable trust (even perhaps a grantor trust to preserve flexibility) avoid that capital gains tax on death? This could be vitally important to evaluating existing plans (should we terminate a trust if feasible?) and current planning (do we finish a SLAT in process?).

Example: Client is in the midst of creating an irrevocable, dynastic, grantor trust, to transfer assets to that are subject to valuation discounts. This planning was undertaken in the wake of the proposed 2704 Regulations. The adviser and client both were reconsidering the timing, structure and need for such planning as the Treasury has backpedaled from what the original Proposed Regulations appeared to provide for. Should the plan continue (see discussion later in this newsletter)?

If the above plan is completed and assets shifted to an irrevocable trust, will those assets outside of the client/grantor's estate a capital gains tax on death? Might they instead miss out on a basis step up by not being included in the client/grantors estate?

Since only very broad strokes of a tax plan have been presented so far, the details of any such plan cannot be known. For example, if a capital gains tax on death is instituted as part of the repeal of the estate tax, will transfers to trust be permitted as a means to avoid that capital gains tax? Some foreign countries tax assets inside trusts every 21 years if they have not been exposed to the capital gains tax on death. Might such a program be proposed in the negotiations that accompany so many tax bills?

If a capital gains tax on death is provided for, how will taxpayers find tax basis data to determine the tax? Many practitioners voice just such concerns in 2010 when a carryover basis regime temporarily existed. Perhaps the difficulties are not as significant as some think. Canada had an estate tax that was similar to the US estate tax system which it repealed it in favor of a capital gains tax on death. Canadian practitioners asked about issues of historic income tax basis determination indicated that they really had no great difficulty in this regards. When the Canadian system was created there was a step up in tax basis accompanying the new law so that taxpayers did not have to look back further than that year for basis data. Might such an approach be considered as part of a Trump repeal and capital gains on death plan? If so, then practitioners will have to guide all clients as to the recordkeeping involved to identify income tax or fair value basis for the year of transition.

The ramifications of the repeal of the estate tax would be significant in many ways. See Blattmachr & Gans, "Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning," Tax Notes, January 15, 2001.

Possible Transfer Tax Scenarios

The above summary of possible changes, suggests a number of possible iterations for the new planning environment. There are a range of possible tax scenarios given the election results:

- Immediately permanent repeal of the gift, estate, and GST tax.
- Permanent repeal of all transfer taxes to take effect over some phase out period, e.g. 10 years similar to what occurred in 2001. This would also present the risk that the tax may be changed again during such phase out period as happened in the past. It is not clear that Trump would be satisfied with such a lukewarm version of repeal.
- Repeal of the estate tax but retention of the gift tax as a backstop to the income tax.
- Repeal of the estate tax (with or without a repeal of the gift tax) and carryover basis.
- Repeal of the estate tax (with or without a repeal of the gift tax) and a capital gains tax on death.

Practitioners will have to contemplate these and perhaps other options while advising clients, especially those in the midst of 2704 planning, until actual legislation is proposed and is enacted.

Planning For Clients with Planning at Different Stages

Planning that Has Not Started: The most seductive planning approach many clients might opt for now is a "wait and see." For clients that have at most been discussing planning, e.g. to address the proposed 2704 Regulations, or to prepare for what was anticipated to be a Clinton 2 victory and roll back of estate tax laws to 2009 harsher levels, doing nothing more is likely the most enticing option. Unlike clients mid-stream in planning they have limited money or time invested in the planning process. While the wait and see approach has had significant risks and costs associated with it during past periods of uncertainty, does it now? The dangerous and potentially costly downside to not beginning plans under discussion is what if the client does not survive the political outcome that is expected to occur next year? What if the estate tax is not repealed? What if the 2704 Regulations are enacted and opportunities are lost. In 2012, practitioners advised clients about the risk of the estate tax exemption dropping from approximately \$5 million to \$1 million in 2013. A "wait and see" approach in 2012 could have resulted in a "wait and pay" result. But what is the downside in 2016 from waiting to see what 2017 brings? There is no particular proposed downside other than 2704 regulations if the estate tax is not repealed, and perhaps a capital gains tax on death that might be avoided by transferring assets to trusts now. It is unlikely that most clients will dollarize those risks at a very significant cost. What that might mean for planning that has not yet begun, is that unless there is either a significant non-tax motive, or a tax motive for a client in a terminal or other extreme situation, perhaps a "wait and see" approach is not unreasonable.

Planning in Process Now: The most seductive planning approach for clients in process might also be the same "wait and see." For example, many clients are midstream in the planning process forming non-reciprocal, spousal lifetime access trusts to which gifts might be made, or structuring note sale or similar transactions, to secure valuation discounts that were undertaken in light of the possibility of the 2704 regulations reducing or eliminating discounts, and the concern that a Clinton 2 victory would have led to a rollback in gift exemptions to the 2009 \$1 million level. What do those clients do now? If the plan is well along the way does it pay to complete it? One approach is to stop the planning and do nothing and await the outcome of any Trump tax plan. That, however, may not be the optimal approach.

Example: Client is a physician and has an estate of approximately \$20 million. Non-reciprocal SLATs have been drafted to which the clients contemplated gifts of discountable assets prior to the effective date of the 2704 Regulations. While the need to secure those discounts appears academic in light of the election, the clients could benefit from the asset protection benefits of the irrevocable trusts regardless of whether there are estate tax benefits. Since the transaction is reasonably close to completion, the trusts might be modified to reflect some of the planning ideas discussed below, and the transaction concluded.

Example: Client owns a valuable building held in an LLC. Planning had begun to shift the LLC interests to irrevocable trusts to secure discounts before the anticipated 2704 regulations became effective. The client is quite old and ill. If the likelihood of the client dying before repeal is significant the planning, perhaps in modified form, should be completed. If the risk is viewed as not that significant perhaps planning should be deferred as it is not clear whether planning will prove advantageous. There are no non-tax benefits to consummating the transactions as the client's wills would bequeath the assets to long term protective trusts for the children without further inter-vivos planning. A life expectancy analysis will be ordered for the clients to endeavor to gain better information on their current health status.

Example: Client owns a large family business. The family is involved in a complex note sale transaction that involves several tiers of transactions. Should the plan be abandoned? Perhaps not. Safeguarding and preserving the family business was the "prime directive" of the founding patriarch. Leaving stock in the family business exposed to possible remarriage, creditor risks, etc. Stock that is held in an irrevocable trust that is not GST exempt might be better protected in a dynastic trust. Since the transaction has progressed reasonably far down the planning continuum, and regardless of the outcome of the estate tax repeal, it may be advantageous to have the family business stock held in the dynastic GST trust. While the risk of death before repeal occurring may not be viewed as significant, and the risk of a worsening estate tax environment (e.g., 2704) not material, the efforts and cost to complete the transaction are not significant relative to the value of the business and it would be advantageous to have the stock held in the intended trust in all events. Perhaps, however, the transaction can be simplified to reduce the costs and expedite the planning, given the likelihood of repeal.

Already Existing Planning: Until something more definitive is known about a Trump estate plan, it might be premature to modify existing planning. If the estate tax is repealed a myriad of issues will be raised. If a client has a long term GRAT or note sale transaction in place, the contractual obligations to continue payments may not be affected by repeal. If a court ordered modification is obtainable, e.g. as the GRAT no longer serves its purpose, will that trigger a gift tax at inception of the transfer? If the gift tax is not repealed, will the result differ than if the gift tax is repealed? What about the fiduciary duty of the trustee? What will happen with audits in process under current law?

Reviewing Existing Wills and Revocable Trusts

Should repeal occur all existing planning and documents, including wills and revocable trusts, will have to be reviewed. Clients may be reluctant to incur the cost not seeing a tax savings. Practitioners have all had that experience over the past decade of ongoing tax law changes with clients that no matter how severely cautioned did not wish to incur the professional fees or hassle of revising documents. The same will no doubt be true if repeal occurs.

- A common approach taken in wills (or revocable trusts when used as the primary dispositive document) is to incorporate a credit shelter trust and a marital disposition (either outright or in trust). The purpose of the credit shelter trust was generally to make assets available to the surviving spouse but to avoid them being included in the surviving spouse's estate for estate tax purposes. If repeal occurs what relevance will these trusts have? While it might be comforting to clients to read generalizations, the reality is that all documents should be reviewed to ascertain the client's goals and the impact of repeal on that particular client's situation.

- It is also a common approach has been to draft to fund the credit shelter trust with the maximum amount that will not create a federal or state estate tax. A key consideration for

many clients is what they anticipated their will was accomplishing when it was written. If the credit shelter trust included children or other heirs (especially from a prior marriage), the result might not be what the client intended. If there is no federal (or state) estate tax how will the actual funding language used be interpreted? Might no assets be directed to the family credit shelter trust and the entirety of the estate devolve to the marital trust which might be contrary to the client intent? If the client only used a credit shelter trust to save estate tax which would no longer be relevant, what should be done? What the objectives existed when the document was completed? What will the client's objectives be if the estate tax is repealed? What will be the result of the provisions as interpreted under the new law? Will a capital gains tax on death that might replace a federal estate tax be viewed as constituting a "federal estate tax" such that a credit shelter trust might still be funded?

- If the testator who signed the will does not have capacity to sign a will, then perhaps the title (ownership) of assets can be modified to avoid the tax, or a reformation proceeding may have to be brought in court to modify the document to reflect current law. If a client currently has capacity (or after repeal has capacity) and the risk of the client becoming incapacitated would result in a will or revocable trusts funding of irrevocable trusts the client would not want if repeal occurred, what will be able to be done? Certainly, documents could be updated while the client has capacity to provide additional flexibility but would any client be willing to incur the cost of doing so? If repeal in fact occurs, how will the provisions of wills, revocable trusts and irrevocable trust be interpreted in an environment that may not have been contemplated at the time of drafting (and which still remains uncertain)?
- For smaller estates, the entire estate might be bequeathed outright to the surviving spouse and the surviving spouse might be given the right to disclaim (renounce) any portion of that bequest into a credit shelter trust. This might avoid any tax issues. This is because the surviving spouse can simply opt to retain all assets on the first spouse's death and not trigger the transfer of any assets into a credit shelter trust. While a disclaimer might provide flexibility, for many it is an overly simplistic and inadvisable plan as there is no protection afforded to the assets passing outright to a surviving spouse. With the incidence of elder financial abuse, divorce, lawsuits, etc. protecting the inheritance, not tax planning, could be of paramount importance.
- What happens to the requirement to pay income out at least annually from a QTIP trust? While that was require to qualify for the marital deduction, will such a provision remain desirable if estate tax repeal occurs? What can be done with existing trusts? How will a court view the request to terminate the income interest if it is not desirable? If the estate tax is repealed what tax relevance if any might a modification or reformation have?
- It will be noted that many of the foregoing issues arose before 2010 when possible estate tax repeal was to occur that year.

Life Insurance

Life insurance, even if acquired to fund estate tax, probably should not be dropped, certainly not without more in depth analysis. The estate tax may not be repealed. If the estate tax is repealed it might be reenacted before the client dies and there may well be some type of tax (if not a future estate tax perhaps a capital gains tax at death), for which insurance proceeds may provide some or all of the funding. In addition, the costs of acquiring an insurance policy are usually borne up front, which allows the owner to enjoy what is the most favorable tax aspect of life insurance: income tax free build up in wealth. With the extraordinarily low returns now available in the investment marketplace, life insurance may be a viable investment option without current (and, perhaps, without any) income tax, with the ability to shift to alternative investment platforms (e.g., from fixed income to growth stocks), without gain and usually with little or no cost.

State Estate and Inheritance Taxes

Most state estate taxes will disappear if the federal estate tax is repealed since they are based on the federal estate tax system. State inheritance taxes may remain but the negativity of the "death taxes" may result in the few states with remaining inheritance taxes evaluating those.

Whether states will adopt their own estate tax systems is, of course, unknown at this time. Some states, such as Pennsylvania, have independent inheritance tax systems which may not be affected by the repeal of the federal estate tax.

Future Trust Planning

Many clients will opt for simplistic outright bequests if there is no tax incentive. Practitioners will have to educate clients as to the obvious (to the practitioner but not necessarily to the client) benefits of continued trust planning:

Trusts can provide valuable divorce and asset protection benefits. In the absence of any transfer taxes this may become the primary goal for many trust plans. With increased longevity, the likelihood of remarriage following the death of a prior spouse will increase. The need for trusts on the first death to protect those assets is more important than most realize.

Trusts provide income tax planning opportunities by sprinkling income to whichever beneficiary is in the lowest income tax bracket. The distributions carry out income under the DNI rules. Even if the beneficiaries are all in the maximum income tax bracket there still might be significant state income tax differences or the ability to offset a trust gain by a beneficiary loss.

Elder financial abuse is burgeoning. Trusts provide control as a client ages or as the client's health wanes. While it might be suggested that using a revocable trust could mitigate the dissipation of wealth, that may not be correct, particularly as a client's cognitive abilities wane. The transition period from the client serving as sole trustee to a successor trustee can be dangerous. While the risks can be mitigated with a trust protector, co-trustee, or requiring consent of another party to modify or revoke the trust, irrevocable trusts provide another option.

Trust planning may also be modified to reflect the potential repeal of the estate tax:

- Discretionary trust distribution standards should replace mandatory income distribution standards since these will not be required to qualify for QTIP requirements.
- Consider including powers of appointment so that assets can be re-vested in the grantor (or perhaps another person) if it proves advantageous under the new post-repeal planning rules to obtain a basis step up. The provisions should permit inclusion but not mandate or force inclusion; if retaining assets in the trust might avoid a capital gains tax on death and that proves more advantageous, that approach could be pursued.
- The trust could give the trustee, or perhaps a third party acting in a non-fiduciary capacity, a power to grant grantor the right to control beneficial enjoyment so that would cause estate tax inclusion in the grantor's estate under IRC Sec. 2038. A corporate trustee may be unwilling to exercise such a power, so that it may be advisable to grant the power to an individual. It may also be advisable for that person not to act in a fiduciary capacity. When grantor dies a step up in basis for trust assets could be realized if those assets were included in the estate under estate tax rules in effect as of date of repeal. Thus it can be advantageous to create and fund a trust, not have it included under IRC Sec. 2036(a), and structure it so that creditors cannot attach trust assets. If the trustee does not grant the power, no estate tax inclusion will occur. If the trustee does grant the power, there will be estate tax inclusion. It might be advantageous to grant the trustee the right to select which assets to grant this power over. If an asset has declined in value, it may be preferable to avoid changing the basis at death.
- How might practitioners contemplate the repeal of repeal, or the reinstatement of an estate tax, in drafting new documents? With so much uncertainty, is it even advisable to endeavor to anticipate reinstatement in documents? What might be done with a tax apportionment clause for documents anticipating a future reinstatement of an estate tax? This situation is similar to what practitioners considered as 2010 approached with the law providing for no estate tax in that year. Lawyers had to construct their documents to say, in effect, "I leave my assets this way if there is an estate tax in effect when I die, but that way is there is none." This will require careful thought in structuring and drafting. And,

as indicated above, even if the estate tax is repealed, the repeal may disappear after ten years.

- If the estate tax might be reinstated, planning that removes assets from the client's estate (with the powers to cause inclusion if that proves advantageous) might protect the family from the estate tax if it come back in the future.
- Another virtually risk free option is a grantor retained annuity trust (GRAT). Although designed to eliminate some estate tax, the grantor can structure one with little or no gift tax effect. By having the remainder of the GRAT pass into a trust from which the grantor may benefit seems relatively riskless if the trust is created in a jurisdiction that protects self-settled trusts from the grantor's creditors. See http://www.shaftellaw.com/docs/tenth_annual_comparison_dapt_statutes_2016.pdf to see comparisons. And, in particular, see PLR 200949012.
- A married taxpayer might create a "QTIP-able" trust for his or her spouse at the beginning of 2017 and wait until October 2018 to see if QTIP (marital deduction) treatment should be elected. That will depend in part on whether the gift tax is repealed along with the estate tax. However, it is appropriate to ensure that the client can regain any significant assets transferred for at least two reasons. First, the client may want those assets back if there is no estate tax (or at least the benefit from them, or the continued control over them) and to obtain a step up in basis if that happens. As detailed in Rivlin & Blattmachr, "Searching for Basis in Estate Planning: Less Tax for Heirs," 41 Estate Planning 3 (August 2014), lifetime transfers, at least those in trust, can be reclaimed for estate tax inclusion. One way is to permit the trustee to grant the grantor at a later time some control over the trust assets, even asset by asset, causing estate tax inclusion under Section 2038. However, if the estate tax is repealed, there will presumably be no Section 2038, so how the step up in basis would be impacted under a repeal regime is uncertain.

2016 Year End Planning Considerations

Trust planning may still be worth completing if there is limited cost to doing so.

- Because repeal of the estate tax, much less the repeal of the gift tax, is not a certainty, it still makes sense for clients to do "common" year-end tax planning, such as making annual exclusion transfers (through Crummey trusts or by contributions to Section 529 plans), pay tuition and medical care costs gift tax free, and possibly use their remaining lifetime exemptions. Annual gift exclusion gifts to Crummey trusts may be useful to protect the dollars transferred, and to shift those dollars into trusts that can sprinkle income.
- Zeroed-out or nearly zeroed-out GRATs are a no cost (in terms of exemption and gift tax) option that might be useful in the event repeal does not occur, or is phased in.
- Gifts to 529 plans will provide valuable income tax savings and may still be advantageous.
- Trump has proposed reducing income tax rates. As such, 2016 may prove a higher tax year than 2017. Thus, accelerating income tax deductions into 2016 since individual income tax rates will likely be lowered on income tax to 33% in 2017, should be pursued. The deduction at the current 39.6% tax bracket may be worth more. For example, clients might make contributions to qualified plans, deductible IRAs, charitable contributions, etc. It may be especially appropriate to pay state and local income taxes this year if they are deductible at high federal tax brackets—and the deduction for state and local income taxes is proposed to be eliminated and that might occur next year.
- The corollary to accelerating expenses is to postpone 2016 income to 2017 when rates might be lower.
- A Roth IRA conversion probably should not be made in 2016 and consideration should be given to electing back into regular IRA status if a rollover occurred earlier this year and 2017 rates are lower. A Roth IRA rollover this year may be "undone" until, through extensions to file 2016 returns, until October 2017.

Business Planning Matters

The corporate tax rate likely will be reduced, perhaps, down to 20% or 15%. That means that C corporation income likely should be postponed until 2017. One important issue is whether an S corporation should elect C corporation status or whether an entity taxed as a partnership (or proprietorship) should elect C status. Of course, dividends from C corporations are taxable but, as mentioned above, the rate on them may go down to 16.6%, so the combined rate on earnings distributed from a C corporation maybe in the 30% + range. However, it is also proposed that the maximum tax rate on pass-through entities (e.g., an S corporation) be 25%. Advisors should consider the following:

- Defer capital asset acquisitions, since under Trump proposal you can expense all capital expenditures without having to amortize or depreciate them. The intent is that this type of incentive will encourage businesses to make more purchases.
- Form of business may change. It is anticipated C corporation rates may decline from 35% to 15-20%. What about dividends? There is a proposal for this under the Trump/Republican plan as well. There would be a 50% exclusion. This might cover capital gains, dividends and interest which would result in an effective tax rate of ½ of 33% or about 16.5%.
- Would a C corporation be better, especially if income will be accumulated?
- There is a proposal that tax rates on pass through entities would be capped at 25%. so leaving an LLC or S corporation or partnership might be advantageous since it will be 25% and can take funds immediately.

Portability Considerations

The federal government has permitted “portability” of the federal estate tax exemption. In general terms, “portability” of estate tax exemption allows one spouse to inherit the assets of their deceased spouse – which used none of the exemption permitted for non-marital and non-charitable transfers and also and inherit the unused exemption. If a client died, should a return be filed electing portability? Consider extending the return for as long as possible. Perhaps, the outcome of repeal will be known before the extended due date to permit a better decision to be made.

Non-Residents

The Sec. 2801 tax on expatriates who renounced citizenship and leaves assets to a US citizen may remain law, even if the estate tax is repealed. For non-residents, repeal should also happen since they only pay on certain US-sitused assets, and the tax is relatively easy to avoid. Also, if the estate tax is not going to be imposed on US tax payers, why should it necessarily be imposed on foreigners? The US is regarded as a tax shelter for foreigners, and this was done on purpose to bring in more foreign investment into the US, so repeal might recognize this. FIRPTA assesses tax on real estate but that may not be eliminated.

Conclusion

While there is much uncertainty, the results of the election seem to suggest a strong likelihood of estate tax repeal, and estate planning as we currently know it may be dramatically changed.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Jonathan Blattmachr
Marty Shenkman

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