Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010

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Tax Relief Act 2010

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Tax Relief Act 2010

- Short Title: "Tax Relief, Unemployment Insurance Authorization, and Job Creation Act of 2010" ("Tax Relief Act 2010" or "TRA")
- Temporary Extension—two years
  - Section 901 "sunset" provision of EGTRRA extended to 2013 [TRA §101]
  - TRA §101 says section 901 of EGTRRA applies to amendment made in TRA

Tax Relief Act 2010

- Exemptions and Rates Generally
  - Exemptions: $5 million exemption (truly unified for estate, gift and GST purposes
    - Indexed for inflation from 2010 to nearest $10,000 beginning in 2012
    - Estate and GST—beginning in 2010
    - Gift—beginning in 2011 (remains $1 million in 2010
  - Rate: 35% (beginning in 2010)

Tax Relief Act 2010

- Default Rule: Estate tax applies from January 1, 2010
- Carryover Basis Election: Executors for estates of decedents dying in 2010 can elect out of the estate tax and into carryover basis

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Tax Relief Act 2010

- Carryover Basis Election
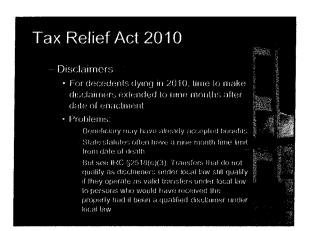 - To be made in the time and manner directed by Treasury Secretary
    - Form 8939 Allocation of Increase in Basis for Property Acquired From a Decedent
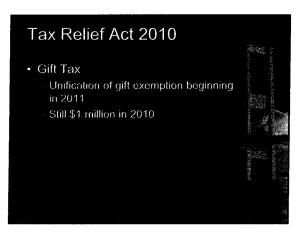   - IR-2011-33
      - Treasury announced that April 18 deadline for filing Form 8939 has been extended
      - Guidance will be issued at a later date
      - IRC stated that they would allow "at least 90 days" after release of form

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– Election does not affect the GST tax
  - Carryover basis election does not impact whether the decedent is a "transferor" for GST purposes
  - Effect: Testamentary trusts of 2010 decedents are not exempt from GST tax forever

Tax Relief Act 2010

- Extensions of time to File and Pay Estate and GST Tax and Make Disclaimers
  - Deadlines for filing estate tax or GST tax return is extended to no earlier than nine months after date of enactment
    - Enactment: 12/17/2010
    - Nine months after:
      - 09/17/2011 is a Saturday
      - Unclear whether due date will be Monday the 19th or Friday the 16th.

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– Disclaimers
  - For decedents dying in 2010, time to make disclaimers extended to nine months after date of enactment
  - Problems:
    - Beneficiary may have already accepted benefits
    - State statutes often have a nine month time limit from date of death
    - But see IRC §2518(c)(3): Transfers that do not qualify as disclaimers under local law still qualify if they operate as valid transfers under local law to persons who would have received the property had it been a qualified disclaimer under local law

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- Gift Tax
  - Unification of gift exemption beginning in 2011
  - Still $1 million in 2010

Tax Relief Act 2010

- GST Tax
  - "Applicable Rate" under IRC §2641(a) is zero
    - No GST Tax on GST transfers in 2010 (direct skips, taxable distributions or taxable terminations)
    - This does not mean that these trusts have an inclusion ratio of zero
  - GST Exemption is $5 million even if make the carryover basis election
  - GST tax rate is 35%

Tax Relief Act 2010

- GST Issues to be aware of
  - Testamentary transfer from 2010 Decedents are not exempt from GST tax
  - $5 million GST exemption in 2010 (three concerns/opportunities)
    - Elect out of automatic allocation for direct skip transfers in 2010
    - Timely allocation of 2010 GST exemption.
    - Late allocations of 2010 exemption to transfer in prior years

Tax Relief Act 2010:Portability

- Terminology:
  - Basic exclusion amount: individual's own exclusion amount
  - Applicable exclusion amount is a defined term and means Deceased Spousal Unused Exclusion Amount ("DSUEA") plus the basic exclusion amount

Tax Relief Act 2010:Portability

- Purpose of Portability
  - Allow surviving spouse to use last deceased spouse's unused basic exclusion amount
  - IRC §2010(c): surviving spouse gets:
    - Basic exclusion amount, plus
    - DSUEA

Tax Relief Act 2010: Portability

- Practicality of Portability
  - Sunsets in 2013 like the rest of TRA 2010
  - Good chance that it will be extended or made permanent
  - Only applies to last deceased spouse
  - Does not apply for GST purposes

Tax Relief Act 2010: Portability

- Must be elected
  - Executor of deceased spouse's estate must make the election
    - on a timely filed estate tax return
    - Statute of limitations stays open to determine proper amount of unused exemption
  - Any executor who doesn't make the election runs the risk of being sued
  - May now be necessary to file a 706 for every estate regardless of size

Tax Relief Act 2010: Portability

- Estate Tax Reporting of Surviving Spouse is unaffected
  - Must file 706 if estate is over basic exclusion amount
  - Filing limit does not increase to the Applicable Exclusion Amount
- DSUEA is not indexed for inflation

Tax Relief Act 2010: Portability

- Biggest Problem with Portability: multiple marriages
  - Only applies to DSUEA from "last deceased spouse"
  - If SS inherits DSUEA, remarries and then survives second spouse, DSUEA is lost
  - If SS makes gift utilizing DSUEA then loses DSUEA by surviving second spouse the amount of the gift may be recaptured when 706 is later filed upon death of SS.

Tax Relief Act 2010: Portability

- Portability vs. The Bypass Trust—Rarely Even a Close Call
  - Advantages of the Bypass Trust
    - Sheltering future appreciation from estate taxes
    - GST planning—portability does not apply to the GST exemption
    - Asset protection, professional asset Management, and other trust benefits
    - Planning for state estate taxes

Tax Relief Act 2010: Portability

- Advantages of Portability
  - Second basis step-up at Surviving Spouse's death
  - Good for estates that are largely Retirement Benefits
    - Retains income tax benefits for surviving spouse
    - If retirement benefits are placed in trust the amount of exclusion used is equal to full value of assets but are only sheltering the net amount after income taxes

Tax Relief Act 2010

- Sunset:
  - All of the estate tax changes in TRA 2010 and EGTRRA sunsets in two years
  - All of the concerns and uncertainties we had about 2011 are now extended to 2013