Post Mortem Elections and Strategies:
A Review of Income, Gift and Estate Tax Planning Issues for the Family Business Owner

By

Steve R. Akers
Bessemer Trust Company
Dallas, Texas

(This outline is excerpted from a considerably longer outline. Send an email to the author if you would like to receive the longer outline).

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II. INTRODUCTION; PLANNING IN 2010 IF ESTATE TAX DOES NOT APPLY

This outline is intended as a summary some of the “hot topics” and items of particular current interest. It is not an overall discussion of post mortem planning strategies, but it focuses on selected topics. A more complete (and much lengthier) outline is available from the author (akers@bessemer.com).

A. Estate and GST Taxes Do Not Apply in 2010.

Under §2664, chapter 11 “shall not apply” to estates of decedents dying after 12/31/09 and chapter 13 “shall not apply to generation skipping transfers” after 12/31/09. There is some possibility that the law might be changed retroactively to apply to decedents who have died previously in 2010. Therefore, the executor must administer the estate in light of the possibility that there is no applicable estates tax, but that carryover basis provisions apply, and in light of the possibility of a retroactive reenactment of the estate tax in 2010. for an excellent discussion of planning implications in 2010, including estate administration issues for 2010 decedents, see Blattmachr, Gans, Zaritsky & Zeydel, The Impossible Has Happened: No Federal Estate Tax, No GST Tax, and Carryover Basis for 2010, J. Tax’n (Feb. 2010).

Depending on the nature of formula clauses and other bequests in the will, the unanticipated law change may result in a very different disposition than the decedent intended or than would be ideal. Careful consideration of disclaimers will be particularly important for decedents dying in 2010.

B. Sunset Provision in 2011. Section 901(a) of EGTRRA says the act does not apply to decedents dying, gifts made, or generation skipping transfers after 12/31/2010. Section 901(b) says the Code shall be applied to “years, estates, gifts, and transfers described in subsection (a) as if the provisions and amendments described in subsection (a) had never been enacted.” (This has been called the “Bobby Ewing provision,” by reference to the full year of shows on the old “Dallas” television series that we found never happened but were all a dream.)

Read literally, Section 901(b) of EGTRAA raises a host of surprising results. The uncertainty revolves around two possible ways of interpreting that provision. (1) Does the phrase mean that after 2010, we assume that the EGTRAA provisions were never in effect in 2001-2010? (2) Alternatively, does it mean that going forward from January 1, 2011, we apply the Code to future gifts and estate transfers as if everything added in EGTRAA were not there. This raises the most uncertainty in the GST area. For example, will GST exemption that was automatically allocated during 2001-2009 still be given effect, or is it ignored because it would not have been available if EGTRAA had never been enacted?

C. Modified Carryover Basis. For decedents dying after December 31, 2009, the basis of property acquired from a decedent is the lesser of the decedent’s adjusted basis or the fair market value of the property on the decedent’s death. I.R.C. § 1022(a)(2). There are two exceptions from the carryover basis provisions: (1) The executor can allocate up to $1.3 million (increased by certain unused losses and loss carryovers and built-in losses) to increase the basis of assets, §1022(b); and (2) the executor can also allocate up to $3.0 million to increase the basis of assets passing to a surviving spouse, either outright or in a trust very similar to a QTIP trust, §1022(c). In order for either of the basis adjustments to apply, the assets must be “property acquired from the decedent” and property “owned by the decedent at the time of death.” §§1022(d)(1) & 1022(e). There are special definitions of each of those requirements. IRD does not qualify for any basis adjustment. §1022(f). Gifts from the surviving spouse to the