

WHAT'S GOING ON WITH THE ESTATE TAX?

Good question. Congress has elected to keep us in suspense.



0% estate taxes in 2010 ... for now, anyway. On January 1, 2010 the federal estate tax went away – at least for the time being and perhaps for all of 2010 as envisioned back in 2001. President Obama and Congressional leaders wanted the estate tax to stick around in 2010 at 2009 levels (estate taxes up to 45% with a \$3.5 million exemption), but lawmakers were preoccupied with other matters.^{1,2}

Will Washington really give families million-dollar tax breaks? If no estate tax is imposed in 2010, it could mean a savings of millions for wealthy families. There is talk of bringing the tax back retroactively – after all, the federal government could really use the money. Yet the further we get from January 1, 2010 the more

difficult reinstating the estate tax for 2010 may become.

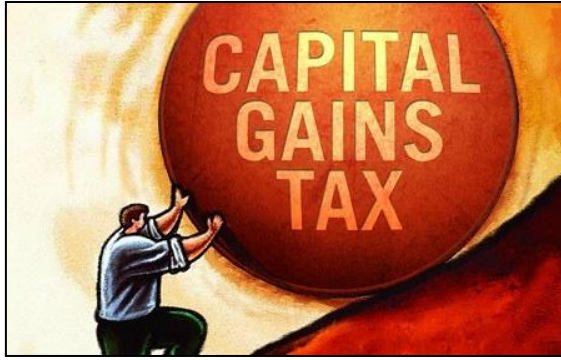
As American Institute of Certified Public Accountants vice-president for taxation Tom Ochenschlager told MarketWatch, "They're still talking (in Congress) about making something retroactive, but at some point they can't do that ... is it even constitutional? There's a real question about that."

The unconstitutional argument goes like this: if Congress moves to retroactively apply the estate tax for 2010, an estate could take the matter to court and point out that Congress had all year to reinstate it but failed to do so.

That argument aside, some estate planners think Congress will get around to a retroactive measure – one that would put the 2009 estate tax levels back into place for 2010.

What taxes are in place now? Some taxes still apply to estates in 2010 even if the estate tax doesn't. People who give away more than \$1 million during their life still face federal gift taxes – though in 2010, they max out at 35% instead of 45%.³

Also, all assets with capital gains are to be taxed at 15% above a \$1.3 million federal exemption when sold by heirs in 2010. The big news here is that heirs don't get to use a step-up this year. When they compute the value of an inherited asset, they have to use the basis (the original price paid for the asset) instead of how much that asset was worth when the original owner died. (In addition to the \$1.3 million exemption per estate just mentioned, there is another \$3 million exemption available for assets inherited from a spouse.)³



What precautions may be wise this year? As a potential heir, you'll want to document the cost basis of any assets you might receive in 2010. Good recordkeeping is in order.

Additionally, you may want to search a trust or a will for so-called formula clauses anchored by words such as "that portion", "that amount" or "that fraction", especially if the will or trust was created some years ago with the presumption of a

constantly increasing federal estate tax exemption.

These formula clauses are fundamental to bypass trusts created to defend estate tax exemptions for a couple. However, these clauses assume that there is an estate tax. With no estate tax in place, there is the possibility (depending on how the formula clause is worded) that a deceased spouse's assets would not be inherited by the surviving spouse, but instead go directly into the family trust – not the most useful result for the surviving spouse.³

What will 2011 bring? Well – if there are no changes – the estate tax and the generation-skipping tax would come back in 2011. Only the first \$1 million of an estate would be exempt from estate taxes. Assets above the exemption would be hit with a 55% federal penalty.³ However, the Obama administration had talked of keeping the 2009 estate tax levels in place for 2010 and beyond, which would be better than returning to the pre-EGGTRA levels in 2011.

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Citations.

¹ marketwatch.com/story/money-for-nothing-congress-awol-on-the-estate-tax-2010-02-15 [2/15/10]

² online.wsj.com/article/SB123846422014872229.html [3/31/09]

³ investmentnews.com/apps/pbcs.dll/article?AID=/20100214/REG/302149985/1031/RETIREMENT [2/14/10]