

U.S. TRANSFER TAX UPDATE

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The new year ushered in several noteworthy changes to US transfer taxes. Gift tax exclusions increased, as did estate tax and generation-skipping transfer tax credits.

Gift tax. For the 2009 calendar year, an individual's annual gift tax exclusion per donee increased from \$12,000 to \$13,000 (indexed for inflation). The exclusion amount can be doubled to \$26,000 per donee for a married couple if the other spouse consents to split the gift and allocate his or her annual exclusion to it.

An unlimited gift tax marital deduction applies to transfers from one US-citizen spouse to another, but not to a non-US-citizen spouse. To compensate for the lack of a marital deduction, cross-border couples are given a larger annual gift tax exclusion. The annual gift tax exclusion for a gift to a non-US-citizen spouse increased from \$128,000 to \$133,000 in 2009.

Estate tax and generation-skipping gift tax. The most significant US transfer tax change is the increase in 2009 in the federal estate tax and the generation-skipping transfer tax (GSTT) exemption amounts for a US citizen and resident to \$1,455,800, which shelters \$3.5 million in assets from each tax. Because the Canada-US treaty allows a Canadian resident (other than a US citizen) to claim a prorated US estate tax credit based on the credit available to US citizens, the 2009 increase also increases the US estate tax credit available to Canadian residents.

The estate tax and GSTT exemption amounts gradually increased to \$3.5 million under a schedule enacted in 2001. Under the schedule, the estate tax and the GSTT are repealed in 2010 and return in 2011 with a \$1 million exemption amount. Most commentators believe that Congress will implement a new exemption schedule before the end of 2009 and do not expect the repeal to take effect. Some commentators expect Congress to legislate retention of the current \$3.5 million exemption for at least 2010, a move likely supported by President Obama, who campaigned on a tax plan that included a \$3.5 million estate tax exemption and a 45 percent estate tax rate.

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Even if Congress fails to act by the end of 2009, it may retroactively reinstate the estate tax for 2010. The validity of retroactive legislation was upheld once before. On January 1, 1993, the maximum estate and gift tax rates decreased to 50 percent from 53 and 55 percent; later that year, President Clinton signed legislation that retroactively reinstated the higher maximum rates of 53 and 55 percent. Taxpayers unsuccessfully sued the government, arguing that the retroactive legislation was unconstitutional. Given that precedent, Congress may even wait until 2010 and attempt a retroactive change, thereby extending the estate tax uncertainty into the next decade.

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