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December 1, 2010

The Honorable Max Baucus, Chairman  
Senate Committee on Finance  
511 Hart Senate Office Building  
Washington, DC 20510

The Honorable Charles Grassley  
Ranking Member  
Senate Committee on Finance  
135 Hart Senate Office Building  
Washington, DC 20510

The Honorable Sander Levin, Chairman  
House Committee on Ways & Means  
1236 Longworth House Office Building  
Washington, DC 20515

The Honorable Dave Camp  
Ranking Member  
House Committee on Ways & Means  
341 Cannon House Office Building  
Washington, DC 20515

Re: Request for Action on Pending Estate & GST Tax Legislation

Dear Chairmen Baucus and Levin, and Ranking Members Grassley and Camp:

We urge that Congress, before adjournment, address the limbo that legislative inaction has created for the nation's taxpayers. Specially, we ask Congress to resolve the systemic uncertainties resulting from the one-year suspension of the estate and generation-skipping transfer ("GST") taxes in 2010 and reinstatement of the 2001 transfer tax laws as of January 1, 2011, under the "sunset" provisions of Section 901 of the 2001 Economic Growth and Tax Relief Reconciliation Act ("EGTRRA"). Our comments reflect our belief that taxpayers should not suffer worse tax consequences due to this one-year limbo than they would have otherwise, under either the pre-2010 or post-2010 law. We are concerned that the current uncertainty regarding application of the estate, gift and GST tax laws has created substantial obstacles for families and business owners trying to plan for the orderly transfer of their assets. Because the uncertainty was created legislatively, we believe its resolution requires legislative action, as it does not appear that the Treasury Department or the Internal Revenue Service would have the authority to resolve all of the numerous issues through rulings, regulations or other issuances.

By this letter, we seek to identify several of the most urgent issues requiring immediate resolution. We do not seek to review the extensive discussion of the numerous technical issues described in the comprehensive report that we submitted on December 7, 2004, as two of the sponsoring organizations of the Report on Reform of Federal Wealth Transfer Taxes ("the Report").<sup>1</sup> In addition, the Section of Taxation of the American Bar Association also previously explained the uncertainties resulting from the current transfer tax laws by letter to you dated April 5, 2010, a copy of which is enclosed.

Members of Congress have voiced many different positions about the proper approach to the transfer tax laws during the past several years. We do not take a position on the policy decisions that Congress must make in fashioning these tax laws, but believe that Congress must provide certainty regarding the general structure of the unified estate, gift and GST tax system. Attorneys around the country tell us that many Americans have been paralyzed in their basic estate planning, for fear that the final regime that Congress enacts may result in adverse tax consequences or require a new estate plan.

<sup>1</sup> Available at

[www.abanet.org/tax/pubpolicy/2009/090714abasectaxandrealprotrustlawstatementofpolregardingreformoffederalestateandwealthtransfertax.pdf](http://www.abanet.org/tax/pubpolicy/2009/090714abasectaxandrealprotrustlawstatementofpolregardingreformoffederalestateandwealthtransfertax.pdf)

An initial uncertainty that Congress should address is whether any legislative changes in the transfer tax system will be applied retroactively to events that occurred prior to the enactment of such changes. Given the significant time that has elapsed since the estate and GST tax were suspended on January 1, many of your colleagues have suggested that retroactive estate or GST taxation is no longer feasible. Alternatively, some have suggested that if the estate tax will be imposed retroactively, such taxation might be elective, so that an estate could opt for the estate tax with the normal basis adjustment rules of IRC § 1014 or elect to be subject to the modified carryover basis rules of new IRC § 1022. Although such an election might mitigate the public perception of unfairness and avoid the attendant litigation resulting from retroactive application of the federal estate tax, it would not resolve the myriad technical problems with application of modified carryover basis detailed in the Report.

However Congress chooses to proceed with respect to a retroactive application of estate or GST taxation, there are many technical issues that are important to resolve, the most significant of which are described below:

1. If the estate tax is applied retroactively, families of decedents who have died in 2010 should have the opportunity to restructure their decedents' estate plans to create the type of deductible dispositions that are common when planning for the estate tax. For example, many individuals plan to leave their estate to their spouses, so that no estate tax is incurred at the first spouse's death (because assets passing to a spouse qualify for the estate tax "marital deduction"). If an individual left her estate to her children because she believed that the estate tax would not apply to her 2010 estate, and if Congress retroactively imposes the estate tax, those children should have the ability to decide to allow the assets to pass to the decedent's husband (or a qualifying marital trust), so that the estate will qualify for the marital deduction, in order to defer the imposition of estate taxes until her husband's subsequent death.

2. Similarly, if the GST tax laws are applied retroactively, or if the 2010 gift tax rates were increased retroactively, donors should have the right to restructure or rescind transfers that were made in 2010 in reliance on the suspension of the GST tax in 2010 or on the application of a maximum 35% gift tax rate. If those rescissions or restructurings are permitted under local law, they should be respected for federal tax purposes.

3. The GST tax does not apply to GSTs that occur in 2010 (such as gifts to grandchildren). While that is clear, there are many issues causing confusion, which could be resolved if IRC § 2664 were revised to clarify that the GST rules and definitions of Chapter 13 *otherwise* continue to apply during 2010. For example, substantial confusion exists as to whether property that is transferred by a GST in 2010 to trusts, custodianships or guardianships for grandchildren will be subject to GST tax in a later year when distributed to individual grandchildren. A clarifying revision to IRC § 2664 would resolve this uncertainty. Alternatively, Congress could choose to revise the Internal Revenue Code to provide that, just as trusts funded prior to the enactment of the GST tax are not subject to the GST tax regime (unless assets are later added to such trusts), then assets transferred to trusts in 2010 would likewise not be subject to the GST tax regime in future years, unless assets are later added to those trusts.

4. As noted, the GST tax does not apply to GSTs in 2010, so there is no express GST exemption that exists this year. This means that no GST exemption can be allocated to such transfers to protect them from the imposition of GST tax when distributions are made to grandchildren in the future. Because no GST exemption exists in 2010, considerable uncertainty exists as to how to avoid such future GST tax. To alleviate this uncertainty, we suggest clarification of the GST tax rules to treat the taxpayer as having the amount of GST exemption in 2010 that the taxpayer would have had under pre-EGTRRA law based on the "sunset" provisions in Section 901 of EGTRRA.

Alternatively, we suggest that Congress allow taxpayers to allocate their GST exemptions available in 2011 to 2010 transfers as of the time the gifts were made in 2010, just as taxpayers normally can make timely allocations of their GST exemption available in the year of transfer under the laws that apply in all other years.

5. EGTRRA enacted GST tax rules to facilitate proper compliance and efficient administration, which were not based on changes in the GST exemption or GST tax rate. In particular, these include rules clarifying valuation for purposes of determining a final inclusion ratio and allowing automatic allocations of GST exemption to indirect skips, relief to make allocations that were missed but will be treated as timely made, retroactive allocations upon the untimely death of a child, and qualified severances. We suggest preservation of all of these GST administrative rules that were enacted under EGTRRA.

6. The estate tax also does not apply to estates of decedents dying in 2010. Similar to the GST tax, many issues causing confusion could be resolved if IRC § 2210 were revised to clarify that the estate tax rules and definitions of Chapter 11 *otherwise* continue to apply during 2010. For example, some wills or revocable trusts contain bequests or provisions for allocating administrative expenses determined by reference to the amount of the gross estate or referring to deductible expenses for federal estate tax purposes. Other wills or trusts make charitable bequests that are dependent on the bequests qualifying for the federal estate tax charitable deduction.

7. Section 901 of EGTRRA provides for the “sunset” of all EGTRRA provisions, requiring the tax law to be applied from January 1, 2011, as if EGTRRA “had never been enacted.” This provision has created a host of uncertainties regarding the transition rules as to what laws will apply after 2010, in light of the one-year hiatus of the estate and GST tax in 2010. In particular, there are many uncertainties under the GST tax transition rules and those rules should be clarified to avoid taxpayer confusion (and the potential for years of lawsuits) over the interpretation of these rules. The degree of uncertainties under these transition rules cannot be overstated and are described in the Report at pages 14-19. Clarification is imperative to avoid substantial administrative burdens on both taxpayers and the government, and unfairness to taxpayers who acted in reliance on those rules.

8. As noted (and as the Report detailed in more than 65 pages), the carryover basis rules will be extremely difficult to administer. Many families have no idea of the basis of assets that decedents have held for many years. Compliance with the carryover basis rules of IRC § 1022 will require significant resources of both taxpayers and the IRS, to implement a program that will apply only to beneficiaries of estates of decedents dying in 2010. It is up to Congress to weigh the advantages and disadvantages of a carryover basis system, but there can be little doubt that implementing such a system will be technically complex and administratively burdensome.

We urge Congress to pass legislation promptly to provide the certainty and stability that taxpayers deserve in the transfer tax system.

These comments are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law and Section of Taxation. These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

The Honorable Max Baucus  
The Honorable Sander Levin  
The Honorable Charles Grassley  
The Honorable Dave Camp  
December 1, 2010  
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Although the members of the Sections who participated in preparing these comments have clients who would be affected by the federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments.

Sincerely yours,



Alan F. Rothschild, Jr.  
Chair, ABA Section of Real  
Property, Trust and Estate Law



Charles H. Egerton  
Chair, ABA Section of  
Taxation

Enclosure

cc: Honorable Timothy F. Geithner, Secretary, Department of the Treasury  
Honorable Douglas H. Shulman, Commissioner, Internal Revenue Service  
Honorable Michael F. Mundaca, Assistant Secretary (Tax Policy), Department of the Treasury  
Mr. John L. Buckley, Majority Chief Tax Counsel, House Ways and Means Committee  
Mr. Russell Sullivan, Majority Staff Director, Senate Finance Committee  
Mr. Jon Traub, Minority Staff director, House Ways and Means Committee  
Mr. Kolan Davis, Minority Staff Director, Senate Finance Committee  
Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation

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