

**Section of Taxation**10th Floor  
740 15th Street, N.W.  
Washington, DC 20005-1022  
202-662-8670

April 15, 2010

The Honorable Max S. Baucus  
Chairman  
United States Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510-6200

The Honorable Charles E. Grassley  
Ranking Member  
United States Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510-6200

Re: Hearings on Federal Wealth Transfer Taxes

Dear Senators Baucus and Grassley:

The American Bar Association Section of Taxation and Section of Real Property, Trust and Estate Law respectfully request that the Committee on Finance hold a hearing on the significant issues presented by the changes in federal wealth transfer taxes that took effect on January 1 of this year. Although these changes were long scheduled to occur, the changes were nonetheless unexpected, and a number of very challenging issues -- both tax and non-tax -- have been created. This letter has 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 purpose of the hearing would be to assist the Committee in identifying and minimizing the largely unintended and unforeseen adverse consequences of the 2010 tax changes and of potential legislative approaches that might be taken to address those changes. These issues must be addressed regardless of the approach that Congress decides to take going forward. The principal underlying issues are summarized in our letter of April 5, 2010, a copy of which is enclosed.

Such a hearing could invite comment on the following topics:

1. *Present tax issues created by the 2010 changes.* An example is the challenge of interpreting and implementing the rules for carryover basis.
2. *Present non-tax issues created by the 2010 changes.* An example is the burden on the executor of an estate of a decedent who has died in 2010. Because of formula bequests drafted with reference to now-inapplicable federal tax terms and consequences, the executor may not know who the beneficiaries of the estate are or what their shares of the estate are. This already has prompted some 15 states to enact or consider legislation to help executors, but without a clear federal tax framework there is little consistency among these efforts and little assurance that they will work satisfactorily.
3. *Future issues created by the 2010 gap in the estate and GST tax.* An example is the determination of the tax treatment of a generation-skipping trust in 2011, which historically has depended on the tax profile of the trust maintained continuously through prior years.

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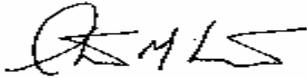
Christine A. Brunswick

Washington, DC

4. *Non-tax issues that might be created or aggravated by potential legislative approaches to address the 2010 gap.* Examples are (i) the continued uncertainty for an executor if a retroactive change in law to apply the estate tax is made because of the lengthy legal challenge that is certain to ensue; and (ii) the extraordinary pressure on an executor if an election is required to choose between the estate tax and carryover basis since under formulas commonly used in estate planning documents whichever choice the executor makes will benefit some beneficiaries over others. We anticipate that there are ways to address these issues, but they are not self-evident and may require very careful work.

Representatives of the ABA Section of Taxation and ABA Section of Real Property, Trust and Estate Law would be pleased to discuss this request with you or your respective staffs or to suggest a witness or witnesses who could contribute positively to such a hearing. Please contact Helen Hubbard, the Section of Taxation's Vice Chair for Government Relations, at 202.452.7005, if that would be helpful.

Sincerely,



Stuart M. Lewis  
Chair, ABA Section of Taxation

Sincerely,



Roger D. Winston  
Chair, ABA Section of Real Property, Trust and Estate Law

Enc: Letter of April 5, 2010

cc: Honorable Michael F. Mundaca, Assistant Secretary (Tax Policy), Department of the Treasury  
Honorable Douglas H. Shulman, Commissioner, Internal Revenue Service  
Mr. Russell Sullivan, Majority Staff Director, Senate Committee on Finance  
Ms. Cathy Koch, Majority Chief Tax Counsel, Senate Committee on Finance  
Mr. Kolan Davis, Minority Staff Director, Senate Committee on Finance  
Mr. Mark Prater, Minority Chief Tax Counsel, Senate Committee on Finance  
Ms. Tiffany Smith, Majority Tax Counsel, Senate Committee on Finance

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April 5, 2010

The Honorable Sander M. Levin  
Chairman  
United States House of Representatives  
Committee on Ways & Means  
1102 Longworth House Office Building  
Washington, DC 20515

The Honorable Max S. Baucus  
Chairman  
United States Senate  
Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510-6200

The Honorable Dave Camp  
Ranking Member  
United States House of Representatives  
Committee on Ways & Means  
1102 Longworth House Office Building  
Washington, DC 20515

The Honorable Charles E. Grassley  
Ranking Member  
United States Senate  
Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510-6200

Re: Reform of Federal Wealth Transfer Tax

Dear Chairmen and Ranking Members:

On behalf of the American Bar Association Section of Taxation, this letter emphasizes and comments on the pressing need for Congress to address the unusual status of the federal estate and generation-skipping transfer (“GST”) taxes in 2010 and 2011. This letter has 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.

This letter amplifies the July 14, 2009, Statement of Policy Regarding Reform of Federal Wealth Transfer Tax submitted by the Section of Taxation and the Section of Real Property, Trust and Estate Law of the American Bar Association,<sup>1</sup> which built on the 2004 report of a task force comprised of representatives from those Sections, the American College of Tax Counsel, the American College of Trust and Estate Counsel, the American Bankers Association, and the American Institute of Certified Public Accountants.<sup>2</sup>

**Summary**

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”),<sup>3</sup> the federal estate and GST taxes are suspended for 2010 and restored in 2011, while the gift tax is imposed at a lower 35% rate in 2010. This creates dilemmas in the interpretation and administration of the tax law that are uncommonly difficult, because, unlike most income tax changes, (i) it is a suspension of two entire tax systems, not just a temporary change in the rules affecting those tax systems, and (ii) it affects taxes that are applied on a continuous basis not tied to transactions or calendar years. Therefore, we believe it is important that the federal estate and GST taxes receive prompt congressional attention and that Congress be sensitive to the distinctive nature of transfer (estate, gift, and GST) taxes.

<sup>1</sup> Available at <http://www.abanet.org/tax/pubpolicy/2009/090714abasectaxandrealproptrustlawstatementofpolregardingreformoffederalwealthtransfertax.pdf>.

<sup>2</sup> 58 TAX LAW. 93 (Fall 2004); also available at [http://www.abanet.org/rppt/section\\_info/tttf/home.html](http://www.abanet.org/rppt/section_info/tttf/home.html).

<sup>3</sup> Pub. Law No. 107-16, 115 Stat. 38 (2001).

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### **Identification of Issues**

Estate planning is necessarily done on a long-term, often life-long, basis. Transfer taxes generally are computed on a cumulative basis and are not oriented to calendar years. The gift tax return is an annual return, when needed, but the gift tax is calculated with reference to all gifts since 1932, and the estate tax is calculated with reference to the decedent's estate plus all gifts since 1977. By its nature, the GST tax has an even longer temporal range over which actions create tax consequences in the future, sometimes the distant future.

Because of the inability to predict either the time of a person's death or other critical events, or what the tax law will be at the time death or another critical event occurs, estate planning involves a widespread use of formulas to define dispositions with different tax attributes by reference to exemptions, credits, and other tax terms in effect at the time. Even when the focus is to achieve a non-tax objective such as making equitable distributions among beneficiaries or defining the rights and expectations of parties to a premarital agreement, widely understood objective measures such as "gross estate," "adjusted gross estate," and "taxable estate" are often used.

Under sections 2210(a) and 2664,<sup>4</sup> added by EGTRRA, the estate and GST tax chapters "shall not apply" in 2010. These provisions of EGGTRA do not simply change rates, exemptions, credits, or substantive rules for defining the tax base. They suspend two entire tax systems that have been relied on for decades both to shape long-term estate plans and to provide clear tax results over a long temporal continuum.

Although basis and gain are by themselves not new concepts, the institution for one year of a carryover basis regime to replace the estate tax in 2010 is a challenge. Without technical corrections, regulations, other guidance, forms, instructions, or any of the other implementing measures common to most legislative initiatives, carryover basis is not well understood. The carryover basis regime will apply to more taxpayers than the most recent estate tax did. The pressure that the carryover basis regime creates, especially on married couples, to structure estate dispositions around unrealized appreciation rather than value has proved to be a much more vexing paradigm shift than many estate planners realized when EGTRRA was enacted in 2001.

Most persons are not affected by estate, gift, and GST taxes. The simple disposition of estates under wills or laws of intestate succession, all to a spouse or children or in a similar manner, works well in most of those cases. But for many of the taxpayers who are subject to estate tax, planning in 2010 has either stopped because no one knows what to do, or is proceeding frantically to cover all possible outcomes in an environment in which no one knows what works. With 2010 now entering its second quarter, the latter category seems to be growing. The possibility that Congress may reinstate and change the estate and GST taxes retroactively increases the difficulty of making an effective plan.

The dilemmas are not limited to 2010. In 2011, when the estate and GST taxes are scheduled to return, the interpretation and effect of these taxes will continue to be unclear, especially in the case of the GST tax. Because the estate and GST taxes are oriented to a long-term continuum, not to distinct calendar years, the blanket mandate of section 901(b) of EGTRRA that the Code "shall be applied and administered to years, estates, gifts, and transfers

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<sup>4</sup> References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

[after December 31, 2010,] as if the provisions and amendments [of EGTRRA] had never been enacted” will be impossible to apply with confidence.

### **Examples**

The following examples illustrate some of the current dilemmas.

1. The executor (or trustee) of someone who has died in 2010 does not know if the estate will face a federal estate tax obligation, does not know the income tax consequences if assets are sold to meet whatever the estate’s obligations are, and may not even know who the beneficiaries of the estate are (if the disposition of the estate is governed by formulas that rely on tax concepts). In light of the executor’s fiduciary duty to be prudent and impartial, these uncertainties create extraordinary pressures on the executor and hardship and exasperation for beneficiaries. Executors by and large try to do a conscientious job consistent with their fiduciary duties. Executors generally do not try to take advantage of the tax rules or the uncertainty about those rules. As a result, executors arguably are the most sympathetic group in need of relief. In contrast, it would be understandable if Congress did not provide as much relief to individuals who may have taken opportunistic inter vivos actions in 2010.

2. Someone who is sick or otherwise may be at an elevated risk of dying during 2010 does not know how to update estate planning documents to produce reasonable dispositive and tax results. This dilemma faces anyone who tries to plan for all contingencies and has already prompted a considerable amount of elaborate and wasteful drafting, but this dilemma is especially acute for the very elderly or frail.

3. Someone who tries to provide for alternative dispositions contingent on what the applicable law turns out to be is concerned about the uncertain timing and effective date of congressional action and about the possibility that any retroactive change in the law would be subject to a constitutional challenge that might take several years to resolve, potentially leaving the estate plan in a state of suspense.

4. Someone who is contemplating making a gift in 2010 does not know what rules might apply to the gift. The uncertainty is much broader than just the possibility that Congress might retroactively change the current 35% gift tax rate back to 45%. If the gift is in trust, as gifts often are, it is impossible to tell what the long-term GST tax treatment of the trust will be. These issues arise even in the case of continuing payments that cannot conveniently be avoided or deferred, such as additions to a life insurance trust to permit the trust to pay life insurance premiums.

Generally, the longer we go into 2010, the more problematic these situations become, especially for fiduciaries who need to make prudent investment decisions and are under increasing and understandable pressure from anxious beneficiaries.

### **Other Issues**

There are a number of miscellaneous tax issues that we also believe merit consideration including the income tax exemption of testamentary charitable remainder trusts in the absence of an estate tax deduction,<sup>5</sup> the gift tax treatment of inter vivos charitable remainder trusts and other

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<sup>5</sup> Reg. § 1.664-1(a)(1)(iii)(a).

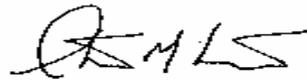
trusts,<sup>6</sup> and the basis of property received from a decedent dying in 2010 if the property is sold after 2010 when the carryover basis rules no longer apply.

Related transfer tax initiatives that have recently received attention include indexing the applicable exemptions for inflation, making those exemptions portable between spouses, and reunifying the estate and gift tax exemptions. Those initiatives are important, and are discussed, along with other potential reforms, in the July 14, 2009, Statement of Policy Regarding Reform of Federal Wealth Transfer Tax, but we believe the priority still should be the restoration of clarity to current law.

Finally, we also urge consideration of other provisions of Title V of EGTRRA that “sunset” in 2011. These provisions relate to conservation easements,<sup>7</sup> the allocation and effect of GST exemption,<sup>8</sup> and the extension of time to pay estate tax under section 6166.<sup>9</sup> Unless Congress identifies a policy reason not to do so, we suggest that these provisions be made permanent.

We appreciate your consideration of these comments. Representatives of the Section would be pleased to discuss this letter with you or your respective staffs. Please contact Helen Hubbard, the Section’s Vice Chair for Government Relations, at (202) 452-7005 if that would be helpful.

Sincerely,



Stuart M. Lewis  
Chair, ABA Section of Taxation

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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<sup>6</sup> I.R.C. § 2511(c).

<sup>7</sup> EGTRRA § 551.

<sup>8</sup> EGTRRA §§ 561, 562, 563, 564.

<sup>9</sup> EGTRRA §§ 571, 572.