PROSKAUER ROSE LLP®

Personal Planning Strategies

A report for clients and friends of the firm

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In this issue:

A New Way to Transfer Wealth Gift and GST Tax-Free: Prepaying a Grandchild's Tuition

Grandparents looking to provide a financial benefit to their grandchildren for education without incurring transfer taxes have a new reason to smile, courtesy of the Internal Revenue Service (the "Service"). The Service, in a recent Private Letter Ruling ("PLR"), has concluded that prepayment of tuition pursuant to an agreement between the school and the donor grandparent is not subject to either gift or generation-skipping transfer ("GST") taxes. Anyone looking to benefit grandchildren should be able to transfer significant amounts of wealth transfer tax-free through one of these agreements. While PLRs are only binding on the Taxpayer who applied for it, the PLR in this case provides us with a road map that should apply to clients with similar fact patterns. This technique also would work for parents, but it has a particular appeal to grandparents, as shown below.

Transfer Taxes

In general, any gratuitous transfer of property made during life is subject to gift taxes. Gift taxes are imposed on gifts regardless of whether they are direct or indirect or whether the transfer is made in trust or otherwise. Similarly, GST tax is typically imposed on any gratuitous transfer made to a person two or more generations below the transferor's generation.

There are exceptions to these general rules, however. For example, every individual may currently transfer $1 million gift tax-free and $2 million GST tax-free during his or her lifetime. In addition, an individual may make $12,000 ($24,000 for married couples) "annual exclusion" gifts to an unlimited number of beneficiaries each year without incurring transfer taxes.

Another such gift tax exclusion – the one addressed by the Service in its recent Ruling – is given to "qualified transfers." Qualified transfers include "any amount paid on behalf of an individual as tuition to an educational organization." Thus, any payment of tuition made directly to an educational organization is exempt from gift tax. Furthermore, such payments are not subject to GST tax.

Therefore, if a transfer made pursuant to a prepaid tuition agreement constitutes a "qualified transfer," a grandparent would not have to pay any gift or GST tax on a payment he or she makes to the school. In addition, the transfer would not use any of the grandparent's annual exclusion amount or lifetime gift or GST exemptions.

Prepaid Tuition Payments Are Qualified Transfers

In the PLR, the Service stated that payments made pursuant to agreements between a grandparent and the school attended by her six grandchildren in which the grandparent agreed to prepay her grandchildren's education through high school graduation constituted qualified transfers, and therefore were exempt from gift and GST tax. The Service distinguished these agreements from a situation where a grandparent establishes a trust that requires the trustee to pay tuition for a grandchild, which the Treasury Regulations explicitly state is a completed gift for gift tax purposes and not a direct transfer to an educational organization and, therefore, subject to gift tax.

The Service emphasized two factors influencing its ruling: (1) The payments were made from the grandparent directly to the school and (2) the payments were not subject to refund and would be forfeited if the grandchild ceases to attend the school. It also noted that the difference between the amount prepaid by a grandparent and the amount actually charged by the school in a given year would be paid in that year by the grandchild's parents or the grandparent. If a tuition prepayment agreement contains these elements, payments pursuant to such an agreement will constitute transfers directly to a qualifying organization and those transfers will not be subject to gift or GST tax.

The Benefits of Prepayment

Prepayment agreements of this type may allow grandparents to financially assist their grandchildren (and indirectly their children) without any transfer tax costs. For example, assume that a grandparent has six grandchildren currently in grades K, 1, 2, 3, 4, and 5 and the agreements extended from their current grade through high school graduation, with tuition charged at $15,000 per year. Through the agreements, the grandparent would be transferring $945,000 transfer tax-free – without using any of her gift tax or GST tax exemptions.

Nor does this arrangement preclude other strategic uses of the annual exclusion amount. Simply prepaying tuition and making annual exclusion gifts of $12,000 a year for each of the 13 years the kindergartner is in school would allow the grandparent to transfer $351,000 tax-free for the benefit of the kindergartner alone before the child attained age eighteen. If the grandparent executed a similar agreement for the child's college education, the benefit would be even greater.

This arrangement may be more beneficial than other tax-preferred educational funding plans, such as qualified tuition programs ("529 plans"), because these tuition set-aside plans only apply to money set aside for higher education only and funding these plans will likely use up a donor's annual exclusion amount.

In addition, prepayment of tuition removes assets from the grandparent's estate that otherwise would be subject to estate tax. Since the maximum federal estate tax rate is 46% (and in states like New York that have a state estate tax, the maximum combined rate is 54.64%), the savings achieved by using assets to benefit a younger generation without having to pay transfer taxes can be substantial.

The Downside of Prepayment

The primary drawback of this technique is that the school takes complete possession of the money transferred to it. This means that if a grandchild needs to change schools for any reason – for example, because his or her parent is offered a new job in a new city, or because he or she has a special talent and wants to go to a school to develop that talent – the prepaid money is lost. It also means that the school, rather than the grandparent, retains the benefit of any growth in the principal amount paid to the school.

One way to avoid this drawback is for the grandparent to pay the school as the tuition comes due. If the grandchild changes schools, the grandparent will no longer be obligated and can create a similar kind of agreement with the grandchild's new school. Moreover, the grandparent retains use of the money until the tuition is actually owed. However, if the grandparent died before the grandchild graduated, the unpaid tuition would remain in her estate. By prepaying the entire tuition at once, the grandparent guarantees that she has funded the grandchild's entire education, even if she dies prior to the child's graduation.

Conclusion

Prepaying tuition following the Service's guidelines can be a tax-efficient way to provide a benefit for those in a younger generation.

If you would like to learn more about how these agreements might be used, a member of the Personal Planning Department will be happy to assist you.

Repeal of the Florida Intangibles Tax

Background

On March 23, 2006, the Florida House of Representatives voted overwhelmingly in favor of House Bill 209 which sought to repeal Florida's tax on intangible personal property. On April 26, 2006, the Florida Senate joined the House and also voted in favor of repeal. The bill has been sent to Governor Jeb Bush and is expected to be signed into law.

Under the bill, the effective date of the repeal will be January 1, 2007. Since the Florida intangibles tax had been imposed on the value of a taxpayer's intangible personal property as of January 1 of each year, the last date of assessment will have been January 1, 2006.

Impact on Intangible Tax Trusts

While the Florida Intangibles Tax was in effect, many taxpayers sought to avoid the imposition of the tax through the use of intangible tax trusts. These trusts generally fell into one of the following three categories:

1. Short-term intangible tax trusts lasting a few months;

2. Longer-term intangible tax trusts spanning two or more tax years; or

3. "Perpetual" intangible tax trusts which were intended to remain in existence forever.

With regard to short-term intangible tax trusts, taxpayers would transfer their intangible assets into the trust prior to January 1 of a particular year. The trust would then terminate a few months later in the following taxable year, at which time all of the assets in the intangible tax trust would be returned to the taxpayer. Since these short-term intangible tax trusts normally terminated within a relatively short period of time after creation (i.e., a couple of months), the repeal of the Florida Intangibles Tax will have little or no effect, since most of these trusts have already terminated by their own terms.

With regard to longer-term intangible tax trusts spanning two or more tax years, although these trusts may no longer be necessary as a result of the repeal of the Florida Intangibles Tax, the specified date of termination may not occur for a number of years. Normally, though, these types of intangible tax trusts provide the trustees with broad discretion to make distributions to the creator of the trust (i.e., the taxpayer) during the term of the trust, so it may be possible to terminate these intangible tax trusts by having the trustees exercise their discretion to distribute the balance of the assets held in the trust to the taxpayer.

Finally, "perpetual" intangible tax trusts typically provide that prior to January 1 of each taxable year, the taxpayer would contribute his or her intangibles assets to the trust and on a specified date subsequent to January 1, all but $100 of trust assets would be returned to the taxpayer. By leaving a nominal amount in the trust, the taxpayer could continue to use the trust in future years. In essence, these trusts would remain in existence with no termination date. Similar to the longer-term intangible tax trusts discussed in the prior paragraph, these trusts are no longer necessary and the trustees should be able to terminate these trusts by exercising their broad discretion to distribute the balance of the assets remaining in the trust to the taxpayer.

Impact on Family Limited Partnerships

Another method that many taxpayers utilized to avoid the imposition of the Florida Intangibles Tax was through the transfer of the taxpayer's intangible assets to an out-of-state limited partnership. In order for these entities to have avoided the imposition of the Florida Intangibles Tax, all partnership activity had to be conducted outside the State of Florida (i.e., the partnership agreement must have provided that all business be conducted at offices located outside of Florida; all mail must have been received by the partnership at its office outside of Florida; partnership meetings had to occur outside of Florida; etc.). Unlike the intangible tax trusts discussed in the preceding section, these limited partnerships may provide other estate planning benefits to the taxpayer. With regard to those family limited partnerships that will remain in existence, it will no longer be necessary to conduct partnership activity outside the State of Florida. However, it may be necessary to amend the partnership agreement to no longer preclude such partnership activity from occurring within the State of Florida.

Change of Domicile

Florida has traditionally been an extremely "tax-friendly" state. For example, there is currently no income tax or estate tax in Florida. In addition, for purposes of determining real property taxes, the annual increase in the value of a taxpayer's homestead property is capped at the lesser of 3% or the consumer price index. Now, as discussed above, there will no longer be an intangibles tax in Florida.

For those individuals who are contemplating a change in domicile to Florida, if they are currently residing in a jurisdiction which has a city and/or state income tax (the combined effect of which can exceed 10% annually), as well as an estate tax (with tax rates approaching 16%), the cost of remaining a resident in that jurisdiction could be prohibitive.

Conclusion

Since the Florida Intangibles Tax will be repealed, appropriate steps should be taken to terminate any existing intangible tax trusts and to modify any existing family limited partnership agreements to allow partnership activity to occur within the State of Florida. In addition, with Florida becoming even more "tax-friendly" with the repeal of the Florida Intangibles Tax, it may be an appropriate time for taxpayers to consider changing their domicile to the State of Florida. If you need any assistance with regard to any of these matters, you should contact us immediately.

Estate Planning Considerations for Assets Located in Multiple States

Introduction

As we have reported in past issues, the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") made significant changes to the federal estate, gift and generation-skipping transfer tax laws. In 2006, the federal estate tax exemption is $2 million (and the maximum federal estate tax rate is 46%), and is scheduled to increase to $3.5 million in 2009 (with a maximum federal estate tax rate of 45%). It should be noted that EGTRRA raises other issues pertaining to state death taxes which are equally as important as the changes to the federal estate tax exemption.

Prior to EGTRRA, a state death tax credit (up to a statutory maximum amount) was allowed to be applied against the federal estate tax for death taxes paid to a state. Most states capped their own estate tax at the maximum federal credit amount. Therefore, paying state estate taxes did not cause an increase in estate taxes because the federal government gave each estate a credit for taxes paid to the state.

Under EGTRRA, the state death tax credit has been phased out. Beginning in 2005, it was repealed entirely and replaced by a deduction in computing the federal estate tax for state death taxes actually paid.

What this means is that states (such as California and Florida) that follow the federal changes made by EGTRRA will lose revenue due to the repeal of the state death tax credit. The good news for taxpayers in these states is that they no longer have to pay any state estate taxes.

Several states concerned with this loss of revenue have "decoupled" from the federal system in order to preserve the tax dollars they would otherwise have lost by the repeal of the state death tax credit. For instance, Massachusetts, New Jersey, Connecticut, and New York have "decoupled" from the federal system and impose an estate tax calculated with reference to a maximum exemption that is lower than the actual maximum federal exemption available that year for federal purposes. In addition, the imposition of state estate tax in such states is based on the law that existed prior to EGTRRA. Thus, the state estate taxes in such states can still be prohibitive.

Although a resident of a state that follows the federal changes will no longer pay any state estate tax in his home state (also known as his domicile), that resident may still have to pay state estate taxes to other states. For example, for a Florida resident who owns real or tangible personal property in another state, such as New York, this change in the law could result in additional estate tax being owed to New York, the state in which such real or tangible personal property is situated. This article will discuss strategies used to avoid these additional state estate taxes.

What Types of Assets Are Subject to a State Death Tax?

When considering your estate plan, you need to consider the legal "situs" (i.e., residence) of your assets and whether state death taxes could potentially be an issue at your death. Assets whose situs is in another state are usually taxed by that state at your death. The following are some of the more common assets that often "reside" in a state other than the one where you reside:

1. Real estate and tangible personal property within the real estate (i.e., personal and household items such as furniture, artwork and antiques). For example, this applies if you are a Florida resident and own a second residence in New York (the "snowbird" situation).
2. Boats and airplanes.
3. A condominium is treated as real estate. In comparison, an interest in a cooperative apartment is treated like stock (i.e., an intangible asset). In other words, the condominium is likely taxed in the state where it is located while the interest in the cooperative apartment is not.

Probate Issues for Consideration

If you own assets in other states, these assets would be subject to probate in such states upon your death. Probate is the legal process that is commenced when you own assets in your individual name at your death. An executor (also called a personal representative) is appointed by the court when the probate proceeding is commenced as the person who will marshal your assets and ensure that they are distributed from your estate to your beneficiaries. By way of illustration, if you die a Florida resident with assets in Florida and real property in New York, a Florida probate would be commenced with respect to your Florida assets (and a personal representative would be appointed by the

Florida court to distribute your Florida assets to your beneficiaries), and a secondary probate would be commenced in New York with respect to your New York property (and an executor would be appointed by the New York court to distribute your New York property to your beneficiaries). This secondary probate in New York is called an ancillary probate proceeding. The ancillary probate is necessary because of your ownership of assets outside of your state of residence. Because the probate proceedings in Florida and New York involve the courts, attorneys and other complicated procedures, it can be time-consuming and costly.

It is common for a revocable trust to be used as part of an estate plan in order to avoid an ancillary probate proceeding. A revocable trust is a trust that you create during your life which you may change or revoke at any time. While you are alive, the trust would be for your benefit and you usually would act as sole trustee of your own trust. At your death, the trust would provide what happens to your assets, provide for a successor trustee and in general act as a will substitute. You can avoid the ancillary probate process discussed above by transferring all of your assets located in other states to your revocable trust during your lifetime. This technique works because the assets would not be owned by you, individually, but would be owned by your revocable trust which continues to exist and already owns the property upon your death. For example, if you die a Florida resident and own property in Florida and property in New York and all of your New York property has been transferred to your revocable trust prior to your death, the secondary New York probate (the ancillary probate) can be avoided. However, although the New York ancillary probate is avoided, the New York death taxes that may apply because of the revocable trust's ownership of the New York property would not be avoided.

How Can You Avoid Death Taxes and an Ancillary Probate Proceeding in a State Where You Are Not Domiciled?

If the determination is made that there will be death taxes owed to a state where real or tangible personal property is owned (i.e., a state other than the state in which you reside), there are steps that can be taken to eliminate tax in such state and the ancillary probate proceeding that would accompany the administration of such asset. Some of the ways to avoid death taxes and probate in other states are as follows:

1. Since only real or tangible personal property (i.e., residences, furnishings, boats, etc.) is subject to death taxes and probate in the state where the property is located, converting those assets into intangible assets would avoid both the state death taxes and ancillary probate in those states. Therefore, you may consider transferring out of state assets to a partnership, limited liability company (LLC) or corporation and retaining an interest in the entity as a partner, member or shareholder. For example, if you are a Florida resident who owns a second home in New York, you can transfer your New York home to an LLC and retain ownership of that new LLC. Upon your death, your estate only owns an interest in an LLC, which is an intangible asset, and thus not subject to New York estate tax or an ancillary probate proceeding.
2. Sell the asset. If this is not a feasible option, it may be possible to move the asset from the state where the tax and/or probate would apply.
3. Mortgaging the asset may reduce or eliminate death taxes in other states.
4. Give the property away. However, there may be federal and/or state transfer tax implications. For example, if you gift property to an individual in excess of $12,000 (the gift tax annual exclusion amount in 2006), a portion or all of your lifetime gift tax exemption (currently $1 million) would be utilized. If you have already used your entire $1 million lifetime gift tax exemption, gift tax would be owed on the transfer.

If you have questions pertaining to a particular state's death tax regime and how ownership of property in such state may affect your estate plan and potential death taxes, please do not hesitate to contact us.

GRITS: A Device To Benefit Nieces, Nephews and Unrelated Individuals

An often overlooked estate tax savings technique is the use of a grantor retained income trust ("GRIT"). Prior to 1990, GRITs could be used for the benefit of any individual, regardless of his or her relationship to the creator of the trust. However, in 1990 Congress enacted Chapter 14 of the Internal Revenue Code of 1986, as amended (the "Code"), to eliminate the use of GRITs to benefit close family members (i.e., children, grandchildren, etc.). Despite the restrictions imposed by Chapter 14 of the Code, GRITs are still a viable planning technique for the transfer of wealth while leveraging one's exemption from gift tax to extended family members such as nieces and nephews, and unrelated individuals, such as same-sex partners.

Structure of the GRIT

A GRIT is a form of an irrevocable trust in which the person creating the trust (the "settlor" or "grantor") reserves the right to receive all of the trust's income for a period equal to the earlier of (1) a term of years or (2) the settlor's death. For these purposes, income generally consists of interest, dividends, and rent, and does not include capital gains. The trust provides that if the settlor survives the trust term, the remainder is distributed to an individual or individuals (other than an immediate family member) or to a trust for the benefit of such individual or individuals. If the settlor dies during the trust term, the trust assets will be distributed to the settlor's estate. Alternatively, the trust may provide that if the settler dies, he or she can direct the ultimate beneficiaries of the trust through the use of a testamentary power of appointment (a power, which is exercised in the settlor's last will and testament, that directs who will receive the trust assets upon his or her death).

If successful, a GRIT maximizes the use of the settlor's gift tax exemption. At the time of creation, the settlor is deemed to have made a gift only of the present value of the remainder portion of the trust. There is no gift of the income portion because the settlor has retained that portion for himself or herself.

For example, suppose that in June of 2006, when you are age 70, you transfer assets with a value of $3,000,000 into a GRIT for the benefit of your niece. According to the IRS tables, your life expectancy is 17.2 years. You have decided to pick a term of 16 years for the GRIT. According to the IRS tables, the taxable gift on the transfer of the property to the GRIT would be $474,750, which is approximately 15.8% of the value of the initial transfer.

Assuming that (1) you survive the term of the GRIT, (2) a very conservative annual growth rate of 4%, and (3) a 45% estate tax rate at your death, approximately $2,300,000 in transfer tax savings could be achieved. Note that you would not pay any gift tax upon creation of the GRIT, assuming you have enough gift tax exemption to cover the gift at the time of the transfer. An individual is permitted to make lifetime gifts of up to $1,000,000 in addition to gifts which qualify for the annual exclusion (currently $12,000). Accordingly, if at the time of the creation of the GRIT, you have not used any of your $1,000,000 gift tax exemption, no gift tax would be due; provided that the taxable gift on the transfer of the property to the GRIT is $1,000,000 or less.

How the Gift Portion is Valued

There are two interests in a trust that can be valued for gift tax purposes: (1) the retained income interest; and (2) the remainder interest. These interests are valued by applying a predetermined monthly interest rate to a series of valuation tables issued by the Internal Revenue Service (the "Service"). The interest rate is referred to as the "7520 Rate" because it is determined under Section 7520 of the Code. In June 2006 this interest rate is 6%. It is important to note that the standard valuation tables may not be applicable if the settlor is terminally ill.

The 7520 Rate presumes that the assets in the trust would earn income at a prescribed rate. The higher the 7520 Rate, the more income is presumed to be earned, thereby increasing the value of the settlor's retained income interest for gift tax purposes. The higher the value of the settlor's income interest, the lower the value of the taxable gift (the gift of the remainder interest).

A factor that influences the valuation is the term of the settlor's retained interest. A longer term can help reduce the value of the taxable gift by increasing the value of the settlor's retained interest. However, the term should be one which the settlor is likely to survive. Ideally, the term should be close to, but less than, the settlor's life expectancy. If the settlor does not survive the term of the GRIT, you will have lost the tax advantage the GRIT was designed to achieve.

Trust Provisions

The GRIT must be "legitimate," meaning that some income must be earned and paid. The Service has stated in Treasury Regulations that if no interest or dividends are paid on the trust's holdings, the standard valuation tables cannot be used when determining the value of the transferred interest. There is no requirement that the income paid must equal the initial 7520 Rate. However, the GRIT must earn some income and pay such income to the settlor.

It is also possible to add additional powers in the GRIT to provide flexibility. One example is the addition of a "commutation" power which allows the Trustees to terminate the GRIT by distributing to both the income and remainder beneficiaries the value of their respective trust interests. The commutation power can be exercised to prevent the entire value of the trust from being included in the settlor's gross estate for federal estate tax purposes. In addition, the GRIT can be drafted so that the remainder interest is distributed to an existing trust for the benefit of the remainder beneficiary rather than outright to such beneficiary.

Income Tax Consequences

Since the GRIT is a "grantor trust" for income tax purposes, all of its income and deductions are included on the settlor's personal return, as if there had been no transfer at all, until the property passes to the ultimate beneficiaries of the GRIT. Therefore, the GRIT is generally income tax-neutral, meaning that the settlor's income taxes should be the same whether or not he or she creates the GRIT. If the settlor chooses to keep the property in trust for the beneficiary of the GRIT after the term of the GRIT, the continuing trust also can be structured as a grantor trust so that the settlor can continue to pay the income tax attributable to the trust's income each year until he or she chooses otherwise. The settlor's payment of the income tax is essentially an additional tax-free gift to the beneficiary of the GRIT.

Transfer Tax Consequences

As stated above, if the settlor survives the trust term, the only taxable transfer is the initial transfer of the remainder interest. If the settlor dies during the trust term, the entire value of the trust is included in the settlor's gross estate for federal estate tax purposes. It is important to note that if the settlor dies during the trust term, he or she is no worse off than if he or she never created the GRIT. Of course, if the settlor survives the trust term, a tremendous amount of transfer tax savings could be achieved.

Conclusion

Although the planning opportunities for GRITs have been significantly reduced for immediate family members, they still remain a viable option for individuals interested in passing on wealth to extended family members or unrelated individuals, such as same-sex partners. If you are interested in learning more about GRITs, please contact us.

Tax Increase Prevention and Reconciliation Act of 2005

On May 17, 2006 President Bush signed into law the Tax Increase Prevention and Reconciliation Act of 2005 ("TIPRA"). The key provisions of the bill are discussed briefly below.

Extension of Lower Rates on Dividends and Long-Term Capital Gains

The current 15% maximum tax rate on qualified dividends and long-term capital gains was scheduled to expire at the end of 2008. TIPRA extends these rates through the end of 2010.

Expansion of Kiddie Tax

Prior to the passage of TIPRA, only children under the age of 14 were taxed on their unearned income in excess of $1,700 at their parents' tax rate. TIPRA extends the so called "Kiddie Tax" to children under the age of 18 and retroactively applies starting on January 1, 2006.

Roth IRA Conversions

Under current law, taxpayers with adjusted gross income ("AGI") of less than $100,000 are eligible to convert a traditional IRA into a Roth IRA. Income taxes are imposed on the amounts converted. Beginning in 2010, TIPRA removes the $100,000 AGI limit for conversions from a traditional IRA to a Roth IRA and provides that the amount included as taxable income as a result of the conversion can be included in taxable income over a two-year period. This provision will present a unique opportunity to convert taxable income to tax-free income for one's children and grandchildren. We will provide planning advice for our clients as we approach 2010 with respect to this conversion opportunity.

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Personal Planning Newsletter

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