

# Personal Planning Strategies

## *Wealth Management Update*

A monthly report for wealth management professionals.

December 2008

As part of our ongoing efforts to keep our clients and friends informed of recent developments related to our practice area, we have summarized below some items we think would be of interest. Please let us know if you have any questions.

### **December AFR Down for GRATs, QPRTs and Split Interest Charitable Trusts**

The December applicable federal rate for use with CRTs, CLTs, QPRTs and GRATs is 3.4%. This is a decline from November. Remember that lower rates work best with GRATs and CLATs. And, because of a special rule in the Internal Revenue Code, a taxpayer can elect to use the most favorable rate for a three month period with respect to a CLAT. Thus, given the strong possibility that income tax rates will go up in 2009, it makes sense to fund a grantor type CLAT in January or February of 2009 (to obtain an income tax deduction) in order to take advantage of the lower interest rate (using the election) and higher income tax rates. Keep in mind that it is possible that rates will continue to drop.

### **IRS Notice 2008-99**

In Notice 2008-99, the Internal Revenue Service identified a transaction involving a charitable remainder trust ("CRT") as a transaction of interest with the potential for tax avoidance or evasion under the Internal Revenue Code of 1986, as amended (the "Code"), and the Treasury Regulations. The transaction in the Notice is described as follows: A Grantor contributes appreciated assets to a CRT. The CRT sells the assets without paying any tax on the gain because a CRT is a tax exempt entity. Under normal circumstances, when distributions are made from the CRT to the Grantor or other beneficiary of the trust, those distributions are taxable to the recipients as a result of the sale of assets at a gain within the CRT. However, under this transaction, before any distributions are made to the Grantor, the Grantor and the charity, as owners of the present interest and remainder interest in the CRT, sell their interests simultaneously to an unrelated third party for an amount equal to the fair market value of the CRT assets. The Grantor then takes the position that the sale of his income interest in the CRT is also not taxable due to an exception in the Code that states that no gain is recognized if all interests in the trust are sold at the same time. Thus, the IRS' concern is that gain on the disposition of the sale of the appreciated assets contributed to the CRT is never recognized. The Notice states that these transactions of interest must be disclosed if such transaction was entered into after November 2, 2006.

Statute of Limitations with Respect to Resigning Trustee's Duty to Account – *Tydings V. Greenfield, Stein & Senior, LLP*, 2008 NY Slip Op 07763 (N.Y. 10/16/2008)

The New York Court of Appeals addressed the issue of when the statute of limitations period begins to run for an accounting proceeding against a former Trustee of a trust. Since the statute of limitations period for an accounting proceeding against a former Trustee is not prescribed by law, it falls under a six year statute of limitations period. Such period was determined to begin when the relationship between the Trustee and the trust has ended and the Trustee yields the trust to a successor Trustee.

Challenge to Property Tax Cap, 'Portability' – *Bruner v. Hartsfield*, Fla. Cir. Ct., No. 2007-CA-003247, 10/27/08

The Florida Circuit Court addressed the constitutionality of the Florida Save Our Homes Amendment (which caps annual increases in homestead property assessments), including Amendment 1 (which allows homeowners to be able to transfer the tax break if they move to another residence). The Plaintiff's argument was that the Save Our Homes Amendment created a durationally weighted property tax system benefiting long term property owners. The Court rejected this argument stating that the Save Our Homes protections have a "rational and legitimate" basis unrelated to the time of residency. Specifically, the Court referenced the state legislature's interest in neighborhood preservation, continuity and stability and the state's valid objective to promote and protect taxpayer's financial ability to purchase and maintain their primary residence.

New York State Proposed Regulations Regarding a Change in Certain Rules for Determining Residency for Personal Income Tax Purposes

In New York, individuals who are not domiciled in New York are considered statutory residents for income tax purposes if they maintain a permanent place of abode in the state and spend more than 183 days of the tax year in New York. The current rule is that a place of abode is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose. This "temporary stay" exception would be removed by the proposed amendment. The intent of the amendment is to level the playing field among non-New York residents by providing equal treatment for all taxpayers who maintain a permanent place of abode in the state and who are in New York for more than the 183 days, regardless of their purpose for being there.

Barack Obama's Tax Proposals

What can we expect from Barack Obama from a tax perspective?

It is possible that major tax legislation would not be introduced until the end of 2009 or 2010. However, some action will be required as many of the tax cuts implemented by George Bush will expire at the end of 2010 and it will need to be determined whether the provisions will expire or be extended.

I. Estate and Gift Taxes.

- A. Obama is against the repeal and proposes to freeze estate tax levels as they are in 2009 with a \$3.5 million estate and generation-skipping transfer tax exemption and a 45% top estate tax rate. This proposal would prevent the one year repeal in 2010.
- B. One issue that received little attention is whether the 2010 elimination of the step-up in basis provisions will be addressed. Major bookkeeping issues are likely to result if the step-up rules cannot apply.
- C. No changes are anticipated with respect to the gift tax.

II. Individual Income Taxes.

- A. Obama plans to restore the top income tax rates of 36% and 39.6% for taxpayers with an adjusted gross income of \$250,000 for married couples and \$200,000 for all other filers.
- B. High income taxpayers would also be subject to a maximum capital gains and dividend tax rate of 15% to 20%.
- C. Extension of the lower 10%, 15%, 25% and 28% income tax brackets and the lowering of capital gains rate for taxpayers in those brackets.
- D. Senior citizens over 65 are exempt from income tax if they earn less than \$50,000.
- E. Restructure of retirement accounts so they are automatic. This means the employee would be required to opt out, rather than opt in. For those employers who do not sponsor retirement plans, they must offer access to automatic IRAs through payroll deductions.

III. With respect to corporate taxes, some proposed revenue raising changes include (1) requiring publicly traded financial partnerships to pay corporate income tax, (2) reallocating multinational tax deductions and (3) closing the loophole for deductibility of CEO compensation.

IV. Regarding health care, Obama's concern is that all children have health care coverage. He proposes to provide refundable tax credits to low income families who lack access to employer provided and public health insurance so that these families would buy health insurance in a new insurance exchange. Small employers would receive a credit to provide insurance and all employers who fail to provide insurance would be required to make a contribution to the cost of a national plan. Lastly, coverage for children would be mandatory and family policies would be required to provide coverage to children up to the age of 25.

## **Personal Planning Newsletter**

**Editor: Henry J. Leibowitz**

**Contributor: Jennifer Zakin**

Proskauer's Personal Planning Department includes lawyers with significant and diverse personal planning experiences. The following individuals serve as contact persons and would welcome any questions you might have.

For more information, please contact:

### **Boca Raton**

**Elaine M. Bucher**

561.995.4768 — [ebucher@proskauer.com](mailto:ebucher@proskauer.com)

**Albert W. Gortz**

561.995.4700 — [agortz@proskauer.com](mailto:agortz@proskauer.com)

**George D. Karibjanian**

561.995.4780 — [gkaribjanian@proskauer.com](mailto:gkaribjanian@proskauer.com)

**David Pratt**

561.995.4777 — [dpratt@proskauer.com](mailto:dpratt@proskauer.com)

### **Los Angeles**

**Mitchell M. Gaswirth**

310.284.5693 — [mgaswirth@proskauer.com](mailto:mgaswirth@proskauer.com)

**Andrew M. Katzenstein**

310.284.4553 — [ak Katzenstein@proskauer.com](mailto:ak Katzenstein@proskauer.com)

### **New York**

**Henry J. Leibowitz**

212.969.3602 — [hleibowitz@proskauer.com](mailto:hleibowitz@proskauer.com)

**Lawrence J. Rothenberg**

212.969.3615 — [lrothenberg@proskauer.com](mailto:lrothenberg@proskauer.com)

**Philip M. Susswein**

212.969.3625 — [psusswein@proskauer.com](mailto:psusswein@proskauer.com)

**Ivan Taback**

212.969.3662 — [itaback@proskauer.com](mailto:itaback@proskauer.com)

**Jay D. Waxenberg**

212.969.3606 — [jwaxenberg@proskauer.com](mailto:jwaxenberg@proskauer.com)

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

BOCA RATON | BOSTON | CHICAGO | HONG KONG | LONDON | LOS ANGELES | NEWARK | NEW ORLEANS | NEW YORK | PARIS | SÃO PAULO | WASHINGTON, D.C.

[www.proskauer.com](http://www.proskauer.com)

© PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.