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Trusts & Estates Client Alert

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IMPORTANT YEAR-END ESTATE PLANNING OPPORTUNITIES UNDER PENDING TAX COMPROMISE LEGISLATION

Please read the important information relating to U.S. tax advice at the end of this Client Alert.

The Senate introduced on December 9, 2010 legislation (S.A. 4753) to implement the compromise tax cut proposal. The legislation contains provisions addressing the application of estate, gift and generation skipping transfer (“GST”) taxes in 2010, 2011 and 2012. Although we understand that certain provisions are still under negotiation, indications are that the legislation will be enacted shortly.

2010 Opportunities: If the legislation is enacted as introduced, it would create significant year-end estate planning opportunities. For example:

- Individuals could in 2010 create trusts for their grandchildren free of GST tax (though the gifts to the trusts would be taxable gifts using the transferor’s lifetime exemption from gift tax or subject to gift tax). No federal estate or GST tax would then be due until the death of the last surviving grandchild, even if no exemption from GST tax is ever applied to the trust.
- Trusts that are not exempt from GST tax¹ could in 2010 make GST tax-free distributions (possibly including in further trust) to or for the benefit of grandchildren or more remote descendants.

If you or the trustees of any non-GST-exempt trusts for your family wish to take advantage of the potential GST tax “holiday” in 2010, please contact us as soon as possible to discuss the alternatives.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Trusts and Estates Group, whose names and contact information are provided herein.

In addition, if you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose the “Client Alerts & Newsletters” link under “Newsroom/ Events”.

This Client Alert is a source of general information for clients and friends of Milbank, Tweed, Hadley & McCloy LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

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¹Non-GST-exempt trusts generally include trusts created after September 25, 1985, unless exemption against GST tax was applied.

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December 13, 2010

Estate, Gift and GST Tax Provisions: Some of the significant gift, estate and GST tax provisions of the legislation are as follows:

- **GST Tax:** The GST tax rate will be zero for transfers made in 2010 and 35% for at least 2011 and 2012.² The GST tax exemption amount will be \$5 million for at least 2011 and 2012.
- **Estate Tax:** For at least 2011 and 2012, the estate tax rate will be 35% and the estate tax exemption amount will be \$5 million, indexed for inflation beginning in 2012.
- **Gift Tax:** For at least 2011 and 2012, the gift tax rate will be 35%. The gift tax exemption amount will be \$1 million through the end of 2010 but will increase to \$5 million (\$10 million for married couples) for at least 2011 and 2012.
- **2010 Estates:** Estates of decedents dying in 2010 will have the option either to pay estate tax or to pay no estate tax but to accept, for income tax purposes, the modified carryover basis regime that currently applies to decedents dying in 2010.
- **Portable Exemption:** Beginning in 2011, estates may elect to allow the decedent's surviving spouse to "inherit" the unused estate tax exemption amount of the decedent.

The legislation in its current form does not contain any provisions that address grantor retained annuity trusts (GRATs) or discounts for family-owned entities.

A table summarizing the gift, estate and GST tax rates and exemption amounts under the legislation is as follows:

	2010		2011		2012	
	If legislation passes:	If Congress does nothing:	If legislation passes:	If Congress does nothing:	If legislation passes:	If Congress does nothing:
Gift Tax Rate	35%	35%	35%	55%	35%	55%
Gift Tax Exemption	\$1 million	\$1 million	\$5 million	\$1 million	\$5 million ³	\$1 million
Estate Tax Rate	35% (or 0% if estate elects carryover basis)	No estate tax	35%	55%	35%	55%
Estate Tax Exemption	\$5 million	N/A	\$5 million	\$1 million	\$5 million (increased by a cost-of-living adjustment)	\$1 million
GST Tax Rate	0%	GST tax not applicable	35%	55%	35%	55%
GST Tax Exemption	\$5 million	N/A	\$5 million	\$1 million (increased by a cost-of-living adjustment)	\$5 million	\$1 million (increased by a cost-of-living adjustment ⁴)

² Please note that the legislation was only intended to extend the lower rates and increased exemption amounts through 2012. However, because of a drafting error, the legislation as introduced appears to extend the rates and amounts to years after 2012.

³ Although not entirely clear under the legislation, it appears that the gift tax exemption is intended to be increased by a cost-of-living adjustment for 2012.

⁴ Although not entirely clear under the legislation, it appears that the GST exemption is intended to be increased by a cost-of-living adjustment for 2012.

IMPORTANT YEAR-END ESTATE PLANNING OPPORTUNITIES UNDER PENDING TAX COMPROMISE LEGISLATION

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In light of these various developments and changes, we recommend that you contact us to discuss your current estate planning documents and possible planning opportunities.

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Statement About Circular 230

Recent amendments to a Treasury Department regulation, known as Circular 230, require lawyers and accountants to follow strict rules in issuing a written statement about a Federal tax issue. The most onerous rules of compliance under §10.35 of the Circular involve written advice about so-called Listed Transactions, arrangements that have tax avoidance as their principal purpose and what are called Marketed Opinions. We do not believe any issue discussed in this memorandum relates to a Listed Transaction. We believe the tax benefit sought is consistent with the Internal Revenue Code of 1986 as amended (Code) and Congressional purpose. That means the principal purpose is not tax avoidance. We also believe no issue discussed herein is a significant Federal tax issue – meaning that we believe the IRS does not have a reasonable basis for a successful challenge on the overall Federal tax treatment of the issues discussed in this memorandum. That means we do not think this memorandum must comply with §10.35 of the Circular. Nevertheless, we add the following statements to ensure compliance with said §10.35. Notwithstanding these statements, we believe the conclusions reached herein are correct.

1. The written advice contained in this memorandum is not intended or written by us to be used, and it cannot be used, by any taxpayer for the purpose of avoiding penalties.
2. No one may use any part of this memorandum in promoting, marketing or recommending an arrangement relating to any Federal tax issue to any taxpayer.
3. Nothing herein shall be construed to impose a limitation on disclosure by any person of the tax treatment or tax structure of any transaction that is addressed herein.

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