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Pigs Are Flying (Guest Commentary)

By Steve Bauman - 1/18/2010

Anyone who has even a remote interest in the estate tax is aware that it passed into history along with the wholly forgettable 2009. Yes, that pesky tax that affects fewer than 2 percent of all Americans, but has spawned a massive industry devoted to its compliance and avoidance, disappeared as we were singing "Auld Lang Syne" and welcoming 2010.

The Economic Growth & Reconciliation Act of 2001 was passed by Congress as a method to gradually reduce estate taxes. The act provided that the amount each American could leave free of estate tax would increase steadily from \$1 million in 2001 to \$3.5 million in 2009, and that the top estate tax rate would be lowered from 55 percent in 2001 to 45 percent in 2009. The act also provided that come 2010, the estate tax would be repealed but then, astonishingly, it would be reborn in 2011 with an exemption of only \$1 million per person and once again a top estate tax rate of 55 percent.

Many have quaintly referred to the death and rebirth provisions of the act as "quirky." No estate tax in 2010? "You had better hide from your children in 2010," we so often joked with our clients. I wish I had a dollar, or for that matter a nickel, for every time I have told clients over the last eight years that pigs will fly before Congress will allow the estate tax to expire.

But did it expire?

In November 2009, the House passed a bill (HR 4154) that would have permanently extended and kept in place the estate tax law effective as of the end of 2009, i.e., leaving the estate tax exemption at \$3.5 million and the top estate tax rate at 45 percent. However, the House bill found little support in the Senate, which failed to take up the bill for consideration before the end of the year. Therefore, without further action, the estate tax has been repealed for the entire year of 2010 and will be reborn in 2011.

Senate Majority Leader Harry Reid has said that the Senate will approve a retroactive estate tax bill when it reconvenes. However, it is anticipated that when the Senate does take up the bill sometime this year, advocates on both sides of the aisle will argue for and against making the reinstated estate tax law retroactive to Jan. 1.

Is a retroactive tax law legal? While advocates of retroactive reinstatement will cite the 1994 Supreme Court ruling in *United States v. Carlton*, many predict that a retroactive estate tax will face years of litigation.

Amid all this uncertainty, the one thing that is certain is that the alleged death of the estate tax has wreaked havoc for estate planners. Furthermore, the failure of Congress to act has also clouded the question of whether heirs of people who die in 2010 will be subject to higher capital gains tax on property they inherit. Senate Finance Committee Chairman Max Baucus called it embarrassing that Congress could allow the tax to lapse.

Our tax team has given considerable thought to what, if any, action one should take in light of the current circumstances. Unfortunately, the host of uncertainties makes it almost impossible to develop an effective estate plan. Until Congress, and possibly the courts, address this issue, no one should be comfortable that his current estate plan fully serves his needs.

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