

Tax Law Note

2010-2012 Tax Update

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Kicking the can down the road. [President] Barack Obama and the Republican leadership reach a deal on taxes that leaves leftist Democrats and tea-partiers fuming. And the deficit keeps growing.¹

I. Introduction

Astute legal assistance attorneys and estate planners waited for the sunset of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) to see what would become of the federal transfer tax system and the expiring “Bush Tax Cuts.”² Despite years of waiting, due to the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act (i.e., Tax Relief Act) of 2010, they will need to wait for another two years.³ Fortunately, there will be some degree of tax certainty during that time. With this in mind, legal assistance attorneys and estate planners should stay abreast of the fluid tax landscape by monitoring the constantly changing laws.⁴

II. Income Tax Update

The Tax Relief Act of 2010, along with other tax legislation and related events, has created numerous income tax changes for the 2010 tax year and beyond.⁵ For example, due to Emancipation Day in Washington D.C., the due date to file federal income tax returns has been extended to 18 April 2011, rather than 15 April 2011.⁶ In addition, due to the Tax Relief Act of 2010, there will be no personal exemption income phaseouts through 2012.⁷ As a result, both lower and higher income taxpayers will be able to benefit from the full personal and dependent exemption amount valued at \$3,650 per person in 2010.⁸ Further, more taxpayers may be eligible to take advantage of Volunteer Income Tax Assistance (VITA) and get their tax returns prepared for free. Specifically, VITAs can help prepare tax returns of certain taxpayers filing a Schedule C who meet specific requirements.⁹ Taxpayers may now also use their

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¹ *Kicking the Can Down the Road*, THE ECONOMIST (Dec. 9, 2010) [hereinafter *Kicking the Can Down the Road*, THE ECONOMIST], available at <http://www.economist.com/node/17677736>.

² See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in 26 U.S.C. (2006)) (establishing numerous temporary tax cuts through 31 December 2010, at which time the tax system would revert to what it was like in 2001). See generally Major Samuel Kan, *Setting Servicemembers Up for More Success: Building and Transferring Wealth in a Challenging Economic Environment—A Tax and Estate Planning Analysis*, ARMY LAW., Jan. 2010 at 52 (providing background on the unified federal transfer tax system and the impacts of the Economic Growth and Tax Relief Reconciliation Act).

³ See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (extending the “Bush Tax Cuts” for another two years).

⁴ Individuals may sign up on numerous websites to receive e-mail tax updates keeping taxpayers abreast of the changing tax laws. See, e.g., IRS website, at https://service.govdelivery.com/service/multi_subscribe.html?code=USIRS (providing free IRS Tax Tips and other tax updates); CCH website at <http://tax.cchgroup.com/NewsHeadlines/default.htm?cookie%5Ftest=1> (providing free federal and state tax updates); and BNA website at <http://0-news.bna.com/jag.iii.com/dtln/> (providing extremely useful tax updates, case law updates, and BNA tax publications to paying BNA Daily Tax Report subscribers). In addition, those tax return preparers working at Volunteer Income Tax Assistance (VITA) offices can receive Volunteer Tax Alerts and Quality Site Requirement Alerts through their designated IRS Stakeholder Partnerships, Education, and Communication (SPEC) representative.

⁵ See, e.g., U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4491-X, VITA/TCE TRAINING SUPPLEMENT 5 (2011) [hereinafter PUB. 4491-X] (listing numerous tax provisions that were extended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

⁶ See U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 17, YOUR FEDERAL INCOME TAX: FOR INDIVIDUALS 1 (2010) [hereinafter PUB. 17] (explaining that the due date for filing IRS Form 1040 is 18 April 2011, because of the Emancipation Day holiday in the District of Columbia).

⁷ I.R.C. § 151(d)(3) (2006) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (extending the repeal of the personal exemption phaseouts for another two years). See also PUB. 17, *supra* note 6, at 24. Phaseouts are specified reductions of benefits that occur once the income (normally adjusted gross income) of taxpayers exceed certain thresholds. Thresholds are certain amounts of income that are normally established based on the filing status of taxpayers. For example, see *infra* notes 17 and 18.

⁸ See Rev. Proc. 2009-50, 2009-45 § 3.19, I.R.B. 617. See PUB. 17, *supra* note 6, at 24. See U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4012, VOLUNTEER RESOURCE GUIDE, at C-1 to C-7 (2010) [hereinafter PUB. 4012] (providing a very useful quick resource guide to identify personal and dependent exemption requirements).

⁹ See U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., PUB. 4491, VITA/TCE TRAINING GUIDE 9-1 to 9-2 (2010) [hereinafter PUB. 4491] (listing the requirements to qualify for VITA assistance, to include having business expenses under \$10,000, having no employees, operating only one business as a sole proprietor during the tax year, using the cash method of accounting, not having inventory at any time during the year, not having a net loss from the business, and not deducting expenses for the business use of a home).

tax refunds to purchase up to three U.S. Series I Savings Bonds by filing an IRS Form 8888, Allocation of Refund.¹⁰

A. Income

In addition to these changes, the individual income tax rates of 10, 15, 25, 28, 33, and 35% have been extended through 2012, as shown in Appendix A.¹¹ Additionally, through 2012, the maximum capital gain rate for capital assets held longer than one year will continue to be 15%,¹² and qualified dividends will be taxed at a maximum capital gain rate of 15%.¹³

B. Adjustments (“Above the Line Deductions”)

Along with these more favorable tax rates, for two more years, qualifying taxpayers are entitled to take numerous

¹⁰ See *id.* at 3.

¹¹ See Rev. Proc. 2009-50, 2009-45 I.R.B. 617. See also Rev. Proc. 2010-24, 2010-25 I.R.B. 764. See also Rev. Proc. 2010-35, 2010-42 I.R.B. 438. See also I.R.C. § 1 (as amended by the Tax Relief of 2010, Pub. L. No. 111-312, §101, 124 Stat. 3296). See generally TOP FEDERAL TAX ISSUES FOR 2010, CPE COURSE 4.2 (CCH Editorial Staff Publication) (explaining that “EGTRRA [the Economic Growth and Tax Relief Reconciliation Act of 2001] should not be confused with JGTRRA, which is short for the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA). Basically, JGTRRA did for the capital gains tax rates what EGTRRA did for the individual income tax brackets: lower them significantly. JGTRRA reduced the maximum rate on net capital gains and taxed qualifying dividends at that same low rate.”). It is important to note that these individual tax rates and the applicable tax brackets reflect a two year extension of marriage penalty relief. “A marriage penalty exists when the tax on the combined income of a married couple exceeds the sum of the taxes that would be imposed if each spouse filed a separate return as a single person. This occurs most often when both spouses have income.” See 2010 TAX LEGISLATION, TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010, RIC MODERNIZATION ACT OF 2010, AND OTHER RECENT TAX ACTS ¶ 310 (CCH Editorial Staff Publication) [hereinafter “CCH 2010 TAX LEGISLATION”]. In short, not only for 2010, but also for 2011 and 2012, “the size of the 15-percent rate bracket for joint returns will remain twice the size of the corresponding rate bracket for single returns.” See *id.* However, unless Congress acts, in 2013, “the 15-percent tax bracket for joint filers will be less than the combined 15-percent tax bracket of two single filers and married taxpayers may have more of their taxable income pushed into a higher marginal tax bracket than their unmarried counterparts.” See *id.*

¹² See I.R.C. § 55(b)(3) (West 2010). See I.R.C. 1(h)(1) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). See PUB. 17, *supra* note 6, at 114 tbl.16-1 (explaining that if the regular tax rate is lower than 25%, then the maximum capital gain rate is 0%, while if the regular tax rate is 25% or higher, the maximum capital gain rate is 15%; contrasting that the maximum capital gain rate on collectibles is 28%, while the maximum capital gain rate on an unrecaptured § 1250 gain is 25%; explaining that unrecaptured § 1250 gain can result from selling real property that was previously depreciated).

¹³ I.R.C. § 55(b)(3) (West 2010). See also I.R.C. 1(h)(1) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). See PUB. 17, *supra* note 6, at 63 (explaining that qualified dividends are shown in box 1b of the IRS Form 1099-DIV; explaining that qualified dividends are subject to the 15% rate if the regular tax rate is 25% or higher, and subject to the 0% rate if the regular rate is lower than 25%).

adjustments, which will reduce taxpayers’ gross income to determine their adjusted gross income (AGI).¹⁴ For example, the Tax Relief Act of 2010 extended the educator expense deduction through 2011.¹⁵ This allows teachers to take an adjustment of up to \$250 for qualified expenses, rather than taking a miscellaneous itemized deduction subject to numerous limitations that would constructively reduce or even eliminate the benefit.¹⁶ Through 2012, the Act also increases the modified adjusted gross income (MAGI) phaseout to \$75,000 (\$150,000 for joint returns) for taxpayers to take the student loan interest deduction, valued at up to \$2,500 per tax return.¹⁷ In addition, the Act extends the qualified tuition and fees adjustment, valued at up to \$4,000 per tax return, through 2011.¹⁸

C. Deductions

After accounting for these adjustments, taxpayers can take certain deductions. Specifically, taxpayers can choose to take standard deductions or to itemize their deductions. The standard deductions for 2010 are listed in Appendix B. Taxpayers whose expenses exceed the standard deduction will want to itemize their deductions. Through 2012, there will be no income phaseouts for taxpayers who itemize their deductions.¹⁹ In addition, through 2011, taxpayers will be

¹⁴ See PUB. 4491, *supra* note 9, at 17-1.

¹⁵ I.R.C. § 62(a)(2)(D) (West 2010).

¹⁶ *Id.* § 62(a)(2)(D). See also PUB. 4491-X, *supra* note 5 (supplementing IRS Publication 4491 to take account of the tax changes created by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010).

¹⁷ See Rev. Proc. 2009-50, 2009-45 § 3.23 I.R.B. 617. See also I.R.C. § 221 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 345 (explaining that if not for the Tax Relief Act of 2010, the phaseout increase would have expired after 2010). See generally PUB. 4012, *supra* note 8, at E-3 (explaining that taxpayers filing joint returns in 2010 will have their student loan interest deduction reduced once their modified adjusted gross income (MAGI) reaches \$120,000 and eliminated once their MAGI reaches \$150,000; other taxpayers will experience a reduction once their MAGI reaches \$60,000 and an elimination once their MAGI reaches \$75,000).

¹⁸ I.R.C. § 222 (West 2010) (establishing that taxpayers with an AGI between \$65,001 and \$80,000 (between \$130,001 and \$160,000 for joint returns) will be limited to a \$2,000 adjustment; those with an AGI over these amounts will not receive any adjustment). See also U.S. Dep’t of the Treasury, Internal Revenue Service, Form 1040, U.S. Individual Tax Return (2010) and U.S. DEP’T OF THE TREASURY, INTERNAL REVENUE SERVICE, FORM 1040, INSTRUCTIONS (2010). See generally CCH 2010 TAX LEGISLATION ¶ 350 (describing under what circumstances taking the adjustment might be better than taking the corresponding educational credit such as when a taxpayer has a high marginal tax rate and the adjustment will lower the taxpayer’s adjusted gross income).

¹⁹ See I.R.C. § 68 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296) (extending 2001 tax relief temporarily until 2012). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 320 (providing tax tips regarding taking itemized deductions as the law limiting deductions changes over time). See generally PUB. 17, *supra* note 6, at 201 (explaining that the limit on taking itemized deductions expired in 2010 and would have resumed in 2011, if not for the Tax Relief Act of 2010).

able to continue to deduct state and local general sales taxes in lieu of state and local income taxes.²⁰ Furthermore, through 2011, taxpayers can also deduct qualified mortgage insurance premiums.²¹

D. Credits

After accounting for these deductions, taxpayers may be able to take numerous credits. The Tax Relief Act of 2010 has extended many of these tax credits. First, the American Opportunity credit, valued at up to \$2,500 per student, is extended through 2012.²² Second, the increased earned income credit, valued at up to \$5,666 for taxpayers with three or more qualifying children, and the increased applicable income phaseouts, have been extended through 2012.²³ Third, the child tax credit, valued at up to \$1,000 per qualifying child under the age of seventeen, and the earned income refundable component have been extended through 2012.²⁴ Fourth, the child and dependent care credit dependent care expense limits and increased credit percentages have been extended through 2012.²⁵ Fifth, the nonbusiness energy property credit, valued at up to \$1,500 in 2010 and \$500 in 2011, has been extended through 2011.²⁶

Servicemembers may also benefit from two recent provisions on purchasing a principal residence. First, most civilians have to repay the government for the first-time homebuyer's credit if they purchased a home after 31 December 2008, and failed to stay in the home for thirty-six

months.²⁷ However, servicemembers do not have to repay the government if they claimed the first-time homebuyer's credit and later sold their home after 31 December 2008, as long as the servicemember is on government orders for qualified extended duty service at least fifty miles away from the home.²⁸ Second, servicemembers may qualify for a military extension to purchase a home and claim the first time homebuyer's credit on homes purchased as late as 1 July 2011, if the home is placed under a binding contract before 1 May 2011.²⁹

In addition, other legislative acts have expanded and increased certain credits. For example, the Patient Protection and Affordable Care Act of 2010 extended and increased the adoption tax credit, making it fully refundable in the year claimed.³⁰ Although the credit in 2010 begins to phaseout for taxpayers with a modified AGI of more than \$182,520, the credit is extremely valuable because expenses of up to \$13,170 can be claimed.³¹

E. Other Tax and Related Issues

In addition to these numerous changes to both tax deductions and tax credits, many additional changes affect the 2010, 2011, and 2012 tax years. First, the alternative minimum tax rates (AMT) exemption amounts have been increased through 2011, as shown in Appendix C. This welcome change for the middle class provides some degree of temporary relief. Second, in 2011, employee payroll taxes will be reduced by two percentage points to 4.2%.³² Third, unemployment benefits have been extended through 2012.³³ Fourth, Coverdale education savings accounts contributions have been increased from \$500 to \$2,000 through 2012.³⁴

²⁰ I.R.C. § 164(b)(5)(I) (West 2010).

²¹ *Id.* § 163(h)(3)(E) (West 2010).

²² *Id.* § 25A.

²³ *Id.* § 32(b)(3). See also PUB. 4491, *supra* note 9, at 2 and 30-1 (explaining the maximum credits available for those with no qualifying children to those with three or more qualifying children).

²⁴ I.R.C. § 24(a). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 360 (explaining that by "keeping the earned income threshold at \$3,000 for computing the earned income refundable child tax credit, more low-income taxpayers will continue to be eligible for the refundable child tax credit.") Refundable credits are defined as credits that are applied against any tax owed, with the remainder refunded to the taxpayer. See PUB. 4491, *supra* note 9, at 29-4. Examples of refundable credits include the making work pay credit and the earned income credit. See *id.* at 29-4 and 30-1. In contrast, a nonrefundable credit is a dollar-for dollar reduction of a taxpayer's tax liability and thus can only reduce the tax liability to zero. See *id.* at 23-1. Examples of nonrefundable credits include the retirement savings contribution credit and the residential energy credit, which includes the nonbusiness energy property credit and the residential energy-efficient property credit. See *id.* at 27-2 and 27-5.

²⁵ I.R.C. § 21 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296).

²⁶ *Id.* § 25C (West 2010). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 372 (explaining the limitations of the credit including that the "maximum credit allowable" is measured over the lifetime of the taxpayer). See also PUB. 4491, *supra* note 9, at 27-6 (explaining that if a taxpayer "claimed a \$1,000 credit in 2009, the taxpayer could only claim up to a \$500 credit in 2010").

²⁷ See I.R.C. § 36(f)(4)(D) (West 2010).

²⁸ See *id.* § 36(f)(4)(E)(i). However, servicemembers who purchased a home in 2008 and later sold their homes before 31 December 2008, would not be able to claim the credit. See *id.* § 36(d)(2).

²⁹ *Id.* § 36(h)(3) (establishing that servicemembers who served on qualified official extended duty outside the United States for at least ninety days during the period beginning after 31 December 2008, and ending before 1 May 2010, may claim the first-time homebuyer credit on a purchase made before 1 May 2011, or on a purchase made before 1 July 2011, if the property was placed under a binding contract before 1 May 2011.)

³⁰ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10909, 124 Stat. 119. See also PUB. 4491, *supra* note 9, at 5.

³¹ See *id.*

³² I.R.C. § 3101(a) (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 601(a)(2), 124 Stat. 3296).

³³ See Supplemental Appropriations Act of 2008, Pub. L. No. 110-252, § 4007, 122 Stat. 2323, 26 U.S.C. § 3304 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 501, 124 Stat. 3296) (extending assorted unemployment benefits through assorted dates in 2012).

³⁴ See I.R.C. § 530 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, § 101, 124 Stat. 3296). See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 330.

In addition to these anticipated changes, there are some surprising potential changes on the horizon. Specifically, two tax cases are pending in the Second Circuit that challenge the IRS's position on tax benefits for same-sex marriages.³⁵ One case challenges the ability "to obtain a refund of the federal marital deduction as a surviving spouse in an estate where two women had a marriage recognized in New York" while the other case challenges "the application of IRS rules to obtaining medical subsidy spousal benefits in a state pension plan for same-sex couples in New Hampshire."³⁶ More importantly the Department of Justice has stated that it will not defend the constitutionality of Section 3 of the Defense of Marriage Act (DOMA) as applied to same-sex married couples in these cases.³⁷ This announcement may indicate a significant possible legal change on the horizon, especially in light of the repeal of the military's "Don't Ask, Don't Tell" policy.³⁸

III. Gift Tax Update

There are also significant federal gift tax changes taking place over the next few years. Specifically, in 2010 and 2011, transferors will be able to transfer a total of five million dollars of taxable gifts during their lifetime that is not subject to any federal gift tax.³⁹ Taxable gifts over five million dollars in 2010 and 2011 will be subject to a 35% tax rate, as shown in Appendices D and E.⁴⁰

Similarly, in 2012, transferors will also be able to transfer a total of five million dollars worth of taxable gifts during their lifetime free of gift tax.⁴¹ However, in 2012, the five million dollar exemption will be subject to an inflation adjustment,⁴² and taxable gifts over that amount will be subject to a 35% tax rate.⁴³ However, on the last day of 2012, the act will sunset.⁴⁴ Unless Congress acts prior to the end of 2012, beginning in 2013, transferors will only be able to transfer a total of one million dollars of taxable gifts during their lifetime free of gift tax.⁴⁵ In 2013, taxable gifts over that amount will be subject to a 55% tax rate.⁴⁶

Knowing these rules, individuals may consider making large gifts over the next two years even if the value of the gifts exceeds the annual exclusion amount.⁴⁷ This would allow them to take full advantage of the larger but temporary unified credit. In this manner, even though the individuals would be making taxable gifts, no federal gift tax would be due as long as the transferor did not transfer gifts worth more than five million dollars during his life (Appendix E). If Congress does not act and the resulting unified credit becomes one million dollars in 2013, the transferor would have saved approximately \$2.2 million (i.e., .55 x \$4 million) by making the gifts in 2011 and 2012. Despite this advantage, transferors should realize that the assets transferred to young children may generate "kiddie tax"⁴⁸ issues if the assets generate unearned income.

³⁵ See *Windsor v. United States*, No. 1:10cv-8435, S.D.N.Y. See *Pederson v. OPM*, No. 3:10-cv-1750, D. Conn.

³⁶ *Justice Department Will No Longer Defend Constitutionality of Law Defining Marriage*, BNA DAILY TAX REP. (BNA) No. 37, at K-4 (Feb. 23, 2011), available at http://0-news.bna.com/jag.iii.com/dtln/display/batch_print_display.adp (last visited Mar. 7, 2011).

³⁷ See Department of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/print/PrintOut2.jsp>. See also Letter from Attorney General Eric H. Holder, Jr., to Speaker of the House John A. Boehner, Defense of Marriage Act (Feb. 23, 2011), available at [http://op.bna.com/gr.nsf/id/1lbe-8ecsa5\\$File/Holder%20Letter.pdf](http://op.bna.com/gr.nsf/id/1lbe-8ecsa5$File/Holder%20Letter.pdf). But see Speaker of the House John Boehner, Statement Regarding the Defense of Marriage Act (Mar. 9, 2011), available at <http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=228539> (last visited Mar. 22, 2011) (announcing that House Speaker John Boehner convened a Bipartisan Legal Advisory Group which directed the House General Counsel to initiate a legal defense of DOMA; under house rules, the advisory group has the authority to instruct the House General Counsel to take legal action on behalf of the House of Representatives).

³⁸ See Memorandum from Sec'y of Def. Robert M. Gates, for Under Sec'y of Def. (Pers. and Readiness) (Jan. 28, 2011) (on file with author). See also Memorandum from Under Sec'y of Def. Clifford L. Stanley, for Sec'y of the Military Dep'ts (Jan. 28, 2011), available at http://armypubs.army.mil/epubs/pdf/ad2011_01.pdf.

³⁹ See I.R.C. § 2505 (West 2011). See also *id.* § 2010(c).

⁴⁰ See *id.* § 2502 (establishing that the rate of federal gift tax will be the same rate as that against the federal estate tax under IRC § 2001(c)). See also *id.* § 2001(c).

⁴¹ See *id.* § 2505. See also *id.* § 2010(c).

⁴² See *id.* § 2505 (establishing that the unified credit against the federal gift tax will be the same as the unified credit against the federal estate tax). See *id.* § 2010(c)(3)(B) (establishing an inflation adjustment for the unified credit against the federal estate tax rounded to the nearest multiple of \$10,000).

⁴³ See *id.* § 2502 (West 2011) (establishing that the rate of federal gift tax will be the same rate as that against the federal estate tax under IRC § 2001(c)). See also *id.* § 2001(c) (West 2010).

⁴⁴ See Tax Relief Act, Pub. L. No. 111-312 §§ 101, 302, 124 Stat 3296.

⁴⁵ See *id.* § 101, 124 Stat 3296. See generally CCH 2010 TAX LEGISLATION, *supra* note 11, ¶ 715 (explaining the possibility of a return to the 2001 lower exclusion amounts and higher tax rates if Congress does not act before 1 January 2013).

⁴⁶ See CCH 2010 Tax Legislation, *supra* note 11, ¶ 715.

⁴⁷ See Rev. Proc. 2010-40, § 3.21, 2010-46, I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is \$13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is \$136,000). The annual exclusion amount is an amount indexed to inflation.

⁴⁸ I.R.C. § 1(g). See also 2011 U.S. MASTER TAX GUIDE ¶ 103 (CCH Editorial Staff Publication 2010) (explaining that although ordinarily, "a child's tax liability is computed in the same manner as any other taxpayer after taking into account the limits on the personal exemption and standard deduction, if applicable . . . certain children with investment income may be subject to tax on that income at the parent's top marginal rate if this results in a higher tax than would apply at the child's rate."). In short, the "kiddie tax" helps prevent the shifting of income from higher income taxpayers to lower income taxpayers for the purpose of reducing taxes. See *infra* note 69 and accompanying text (discussing the standard deduction for individuals who can be claimed by other taxpayers).

IV. Estate Tax Update

A. Taxpayers Dying in 2010

In addition to these federal gift tax changes, there are numerous federal estate tax changes contingent upon when a taxpayer passes away. If an individual died in 2010, the personal representative administering the estate can either choose the estate tax or elect for a carryover basis regime to apply.⁴⁹

First, if the decedent had left an extremely large gross estate in 2010, the personal representative may want to elect for a carryover basis regime to apply. With this election, no federal estate taxes would be due, even if the decedent's gross estate was worth billions of dollars. However, the beneficiaries would not receive a stepped-up basis (i.e., a basis equal to the asset's fair market value on the day of the transferor's death) in the assets they receive. Instead, the beneficiaries would receive a carryover basis and the personal representative would have the ability to allocate a limited step-up in basis by filing IRS Form 8939.

The amount of assets that could be stepped-up depends on whether the assets pass to a surviving spouse. If there was no surviving spouse, the personal representative could only allocate up to \$1.3 million dollars to step up the basis of designated assets.⁵⁰ However, if there was a surviving spouse, the personal representative could allocate up to \$3 million dollars to step up the basis of assets passing to the spouse, plus an additional \$1.3 million dollars to step up the basis of assets passing to anyone else, including additional assets passing to the same surviving spouse.⁵¹ For example, if the decedent devised real estate to his surviving spouse that he previously had acquired for \$1 million but had since increased in value to \$5.3 million at his death, his surviving spouse could take the asset with a stepped-up basis equal to the asset's date of value of \$5.3 million. After receiving the property, she could immediately sell the property for \$5.3 million and pay no income taxes on the gain. If the stepped-

⁴⁹ See Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296. Basis is defined as the "value assigned to a taxpayer's investment in property and used primarily for computing gain or loss from a transfer of the property. Basis is usu. the total cost of acquiring the asset, including the purchase price plus commissions and other related expenses, less depreciation and other adjustments." BLACK'S LAW DICTIONARY 171 (9th ed. 2009). Carryover basis is defined as the "recipient's basis in property transferred by gift or in trust, equaling the transferor's basis." See *id.* at 172. In contrast, stepped-up basis is defined as the "beneficiary's basis in property transferred by inheritance, equaling the fair market value of the property on the date of the decedent's death or on the alternate valuation date." See *id.* at 172. Alternate valuation date is defined as the "date six months after a decedent's death. Generally, the estate can elect to appraise the decedent's property either as of the date of the decedent's death or as of the alternate valuation date." See *id.* at 91.

⁵⁰ See I.R.C. § 1022 (West 2010). See Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296.

⁵¹ See I.R.C. § 1022 (West 2010). See Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296.

up basis had not been so allocated (e.g., the basis was allocated to other property) and the surviving spouse had sold the property with a carryover basis of only \$1 million, the surviving spouse would be liable for taxes on the \$4.3 million of gain.

Second, if the decedent left an estate of approximately \$5 million in 2010, the personal representative would probably choose for the estate tax to apply rather than electing for a carryover basis regime, because amounts under \$5 million would pass free of federal estate tax due to the \$5 million exemption.⁵² Sums over that amount would pass free of estate taxes if the unlimited marital deduction, charitable deduction, or other applicable deduction applied (Appendix F).⁵³ The amount of the gross estate over \$5 million and not entitled to a deduction would be subject to a 35% federal estate tax.⁵⁴

B. Taxpayers Dying After 2010

In comparison to individuals whose deaths occur in 2010, individuals who pass away after 31 December 2010 and leave behind an estate in 2011 or 2012 do not have a choice between an estate tax and a carryover basis regime. Instead, the estate will be subject to the federal estate tax with an exemption amount of \$5 million, subject to an inflation adjustment in 2012.⁵⁵ If an individual dies after 2010 but before 2013 and does not use his full exemption, his surviving spouse could use the remaining exemption, as well as her own exemption, if she dies after her spouse in 2011 or 2012 (Appendix F).⁵⁶ However, unless Congress acts, a person who passes away in 2013 will be subject to the

⁵² See I.R.C. § 2010(c)(3) (West 2010).

⁵³ See, e.g., I.R.C. §§ 2053 (providing a deduction for funeral and administrative expenses), 2054 (providing a deduction for casualty losses), 2055 (providing a deduction for charitable contributions), 2056 (providing a potential unlimited marital deduction for transfers to surviving spouses who are U.S. citizens), and 2058 (providing a deduction for state death taxes paid).

⁵⁴ See *id.* § 2001 (West 2010).

⁵⁵ See *id.* 2010(c)(3)(B) (West 2010).

⁵⁶ See *id.* § 2010(c)(4). See Tax Relief Act, Pub. L. No. 111-312, § 303, 124 Stat. 3296 (establishing that the surviving spouse's exclusion amount will be increased by the unused exclusion amount of the deceased spouse who dies after 2010 but before 2013, if the executor of the estate of the deceased spouse files a timely estate tax return and makes an election). "Thus presumably those who do not file an estate [tax] return because they are below the filing threshold . . . will not benefit from the portability rule [because they will not have made a timely election]." JANE G. GRAVELLE, CONG. RESEARCH SERV., R41203, ESTATE TAX OPTIONS (Dec. 23, 2010) available at http://0-news.bna.com/jag.iii.com/dtln/DTLNWB/split_display.adp?fedfid=18905621&vname=dtmot&wsn=499616500&searched=13646497&doctypeid=1&type=date&mode=doc&split=0&scm=DTLNWB&pg=1. It is important to note that at the time this article was published the IRS had neither released the IRS Form 8939 nor established the form's filing due date.

federal estate tax with only a one million dollar exemption.⁵⁷ Additionally, any unused exemption will not be able to be used by a surviving spouse.

C. Drafting Testamentary Documents in Light of the Tax Law Changes

Understanding the changing federal transfer tax system, legal assistance attorneys and estate planners should not conclude that estate planning is no longer necessary for smaller estates due to increased exemption amounts and the ease in carrying over unused exemption amounts in the short term. Specifically, estate planners should not rely on the ability to carry over the exemption amount of the first spouse to die, since the ability to do so is currently limited in its applicability. First, how can it be determined if the surviving spouse will pass away in 2011 or 2012? Second, how would one know that the executor of the estate of the first spouse to die would timely file an estate tax return and make the requisite election?⁵⁸ Third, if the second spouse dies after 2012, how would one know if the ability to carry over the exemption will be extended by Congress?

Since it is impossible to know the future, estate planners should draft their testamentary instruments to account for the numerous possibilities and to ensure the use of both spouses' exemptions. One way to accomplish this task is to draft testamentary instruments that establish trusts funded with self adjusting formula clauses. Specifically, attorneys can draft wills that set up both credit shelter and marital deduction trusts, such as qualified terminable interest property (QTIP) trusts. Military attorneys can accomplish this task using DL Wills.⁵⁹ Military attorneys that use DL Wills should ensure that they keep the software program updated by downloading the latest updates incorporating the latest changes in federal and state law.⁶⁰ Furthermore, to ensure that spouses are properly provided for, clients can acquire non-probate assets such as life insurance or pay on death accounts with spouses designated as beneficiaries.

⁵⁷ See Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010).

⁵⁸ See I.R.C. § 2010(c)(4). See Tax Relief Act, Pub. L. No. 111-312, § 303, 124 Stat 3296. See *supra* note 56 and its accompanying text.

⁵⁹ See Drafting Libraries (Wills Software), available at <https://www.draftinglib.com/> (last visited Feb. 24, 2011) (providing information on how to acquire the software and internet links to update the software).

⁶⁰ See *id.* For example, the most current edition of DL Wills at the time this article was published was DL Wills Version 10, supplemented as of 14 March 2011.

V. Generation Skipping Transfer Tax Update

In addition to these federal estate tax changes, there are numerous Generation Skipping Transfer (GST) tax changes taking place over the next few years. In 2010, although there is a federal GST tax, the tax rate is 0%.⁶¹ As a result, individuals who made large taxable transfers to skip persons such as grandchildren in 2010 successfully avoided the costly tax.

To contrast, in 2011, taxpayers will be able to transfer a total of five million dollars of taxable gifts during their lifetime or bequests at their death to skip persons and avoid the GST tax due to the \$5 million GST tax exemption.⁶² Sums over that amount and not subject to a deduction will be subject to a 35% tax rate in addition to any applicable federal gift or estate taxes.⁶³

Similarly, in 2012, the same rules for 2011 will apply, except that the five million dollar GST tax exemption may be adjusted for inflation.⁶⁴ However, unless Congress acts prior to the end of 2012, only a one million dollar GST tax exemption will apply in 2013.⁶⁵ Sums over that amount and not eligible for a deduction will be subject to a 55% tax rate in addition to any applicable federal gift and estate taxes.⁶⁶

⁶¹ Tax Relief Act, Pub. L. No. 111-312, § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero).

⁶² See I.R.C. § 2631 (West 2010) (establishing that the GST exemption amount will be the same as the federal estate tax exemption amount under IRC § 2010(c)). A skip person is defined as a "beneficiary who is more than one generation removed from the transferor and to whom assets are conveyed in a generation-skipping transfer." BLACK'S LAW DICTIONARY, *supra* note 49, at 1514.

⁶³ See *id.* § 2641 (establishing that the federal GST tax rate is equal to the maximum federal estate tax rate imposed by IRC § 2001 multiplied by the inclusion ratio with respect to the transfer). See *id.* § 2642(a) (defining the inclusion ratio as one minus the applicable fraction; defining the applicable fraction as a fraction with the numerator equal to the GST exemption allocated to the trust or property transferred, and the denominator equal to the value of the property transferred reduced by the sum of certain taxes and charitable deductions allowed with respect to such property). See also *id.* § 2001(c) (establishing that the maximum federal estate tax rate for 2010 through 2012 is 35%).

⁶⁴ See *id.* § 2631(c) (West 2010) (establishing that the federal GST exclusion amount will be equal to the federal estate tax exclusion amount). See *id.* § 2001(c)(3) (West 2010) (establishing that the federal estate tax exclusion amount will be subject to an inflation adjustment in 2012).

⁶⁵ See Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010).

⁶⁶ See Tax Relief Act, Pub. L. No. 111-312, § 101, 124 Stat. 3296 (amending the Economic Growth and Tax Relief Reconciliation Act of 2001 such that the act will sunset on 31 December 2012 rather than 31 December 2010). See also I.R.C. § 2001(c) (establishing the maximum federal estate tax rate).

VI. Conclusion

Legal assistance attorneys and estate planners need to understand the tax law changes that occur from year to year so that they can properly advise their clients, prepare tax returns, and draft appropriate testamentary documents. An attorney's failure to understand these tax law changes and

properly advise their clients to plan and execute an appropriate estate plan can result in their clients needlessly paying significantly more federal gift, estate, and generation skipping transfer taxes. Similarly, if clients are not properly advised, they may pay more federal income taxes than their legal liability, and not take advantage of the government's intent, to stimulate the economy.⁶⁷

⁶⁷ See *Kicking the Can Down the Road*, THE ECONOMIST, *supra* note 1. However, the long-term cost of the short-term stimulus may be significant. See *id.*

Appendix A

The Marginal Tax Brackets for the 2010 Tax Year⁶⁸

1. Single Individuals (other than Surviving Spouses and Heads of Households):

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,375	0	+ 10% of amount over \$0
8,375	34,000	\$838	+ 15% of amount over \$8,375
34,000	82,400	\$4,681	+ 25% of amount over \$34,000
82,400	171,850	\$16,781	+ 28% of amount over \$82,400
171,850	373,650	\$41,827	+ 33% of amount over \$171,850
373,650		\$108,421	+ 35% of amount over \$373,650

2. Married Individuals Filing Joint Returns and Surviving Spouses:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	16,750	0	+ 10% of amount over \$0
16,750	68,000	\$1,675	+ 15% of amount over \$16,750
68,000	137,300	\$9,363	+ 25% of amount over \$68,000
137,300	209,250	\$26,688	+ 28% of amount over \$137,300
209,250	373,650	\$46,834	+ 33% of amount over \$209,250
373,650		\$101,086	+ 35% of amount over \$373,650

3. Heads of Households:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	11,950	0	+ 10% of amount over \$0
11,950	45,550	\$1,195	+ 15% of amount over \$11,950
45,550	117,650	\$6,235	+ 25% of amount over \$45,550
117,650	190,550	\$24,260	+ 28% of amount over \$117,650
190,550	373,650	\$44,672	+ 33% of amount over \$190,550
373,650		\$105,095	+ 35% of amount over \$373,650

4. Married Individuals Filing Separate Returns:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	8,375	0	+ 10% of amount over \$0
8,375	34,000	\$838	+ 15% of amount over \$8,375
34,000	68,650	\$4,681	+ 25% of amount over \$34,000
68,650	104,625	\$13,344	+ 28% of amount over \$68,650
104,625	186,825	\$23,417	+ 33% of amount over \$104,625
186,825		\$50,543	+ 35% of amount over \$186,825

⁶⁸ See Rev. Proc. 2009-50, 2009-45 I.R.B. 617, Rev. Proc. 2010-24, 2010-25 I.R.B. 764, and Rev. Proc. 2010-35, 2010-42 I.R.B. 438. See also I.R.C. § 1 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 2496).

5. Estates and Trusts:

<u>Taxable Income</u>		<u>Pay</u>	<u>Marginal Tax Rate</u>
Over	But Not Over		
\$0	2,300	0	+ 15% of amount over \$0
2,300	5,350	\$345	+ 25% of amount over \$2,300
5,350	8,200	\$1,108	+ 28% of amount over \$5,350
8,200	11,200	\$1,906	+ 33% of amount over \$8,200
11,200		\$2,896	+ 35% of amount over \$11,200

Appendix B

2010 Standard Deductions⁶⁹

Filing Status	Standard Deduction	If Over Age 65 (Add Per Taxpayer)	If Blind (Add Per Taxpayer)
Married Filing Jointly or Qualifying Widow(er)	\$11,400	+ \$1,100	+ \$1,100
Head of Household	\$8,400	+ \$1,400	+ \$1,400
Single	\$5,700	+ \$1,400	+ \$1,400
Married Filing Separately	\$5,700	+ \$1,100	+ \$1,100

⁶⁹ See Rev Proc 2009-50, 2009-45 I.R.B. 617. See also I.R.C. § 63(c)(2). See generally PUB. 17, *supra* note 6, at 138–39 (providing a worksheet to calculate the 2010 standard deduction; explaining that individuals for whom an exemption can be claimed on another person’s tax return is generally limited to the greater of \$950, or the individual’s earned income + \$300 for a total value up to \$5,700, the 2010 regular standard deduction amount). See *supra* note 48 and accompanying text (discussing the “kiddie tax”).

Appendix C

2010 and 2011 Alternative Minimum Tax Rates⁷⁰

Filing Status	2010 AMT Exemption	2011 AMT Exemption
Married Filing Jointly and Surviving Spouses	\$72,450	\$74,450
Single and Head of Household	\$47,450	\$48,450
Married Filing Separately	\$36,225	\$37,225

⁷⁰ I.R.C. 55(d)(1) (West 2010).

Appendix D

Exclusions, Exemptions, and Gift / Estate / GST Tax Rates⁷¹

Year	Annual Gift Exclusion ⁷²	Estate / GST Exclusion ⁷³	Gift Tax Exclusion ⁷⁴	Highest Gift, Estate, and GST Tax Rate ⁷⁵
2002	\$11,000	\$1 Million	\$1 Million	50%
2003	\$11,000	\$1 Million	\$1 Million	49%
2004	\$11,000	\$1.5 Million	\$1 Million	48%
2005	\$11,000	\$1.5 Million	\$1 Million	47%
2006	\$12,000	\$2 Million	\$1 Million	46%
2007	\$12,000	\$2 Million	\$1 Million	45%
2008	\$12,000	\$2 Million	\$1 Million	45%
2009	\$13,000	\$3.5 Million	\$1 Million	45%
2010	\$13,000	\$5 Million ⁷⁶	\$5 Million	35% ⁷⁷ (but the GST Tax Rate is 0%) ⁷⁸
2011	\$13,000	\$5 Million	\$5 Million	35%
2012	To be Determined	\$5 Million + ⁷⁹	\$5 Million + ⁸⁰	35%
2013	To be Determined	\$1 Million	\$1 Million	55%

⁷¹ See JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-108-07, at 11, 14 (2007) available at www.jct.gov/x-108-07.pdf (last visited Mar. 17, 2011) (showing similar tables). See also CCH 2010 Tax Legislation, *supra* note 11, ¶705 (providing an in-depth explanation of the gift, estate, and GST taxes, as well as how the Tax Relief Act of 2010 impacts these taxes).

⁷² See § I.R.C. 2503 (Jan. 1, 1998) (establishing the \$10,000 annual exclusion with an inflation adjustment). See also Rev. Proc. 2010-40, § 3.21, 2010-46, I.R.B. 663 (establishing that the annual exclusion for gifts in 2011 is \$13,000; establishing that the annual exclusion for gifts to spouses who are not United States citizens in 2011 is \$136,000).

⁷³ See I.R.C. §§ 2010 and 2631 (West 2010).

⁷⁴ See *id.* § 2505 (West 2011). See also I.R.C. § 2010 (West 2010).

⁷⁵ See I.R.C. §§ 2001 and 2502 (West 2011). See I.R.C. §§ 2601 and 2602 (as amended by the Tax Relief Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296) (discussing the taxes imposed by the GST tax).

⁷⁶ See CCH 2010 Tax Legislation, *supra* note 11, ¶ 705 (explaining that the \$5 million GST tax exemption is available in 2010 even if the executor of a decedent in 2010 elects for the estate tax not to apply).

⁷⁷ But see Tax Relief Act, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296 (establishing that in 2010, the personal representative may elect a carryover basis regime to apply; if the administrator so elects, the estate tax would not be applicable, but the beneficiaries would only be allowed to take a limited step-up in basis depending on how the administrator chooses to allocate the \$1.3 million or up to \$4.3 million if the property is allocated to a surviving spouse).

⁷⁸ Tax Relief Act, Pub. L. No. 111-312, § 302(c), 124 Stat. 3296 (establishing the 2010 GST tax rate as zero). See also I.R.C. § 2641 (defining the applicable rate (i.e., the tax rate) with respect to the GST tax as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer).

⁷⁹ See I.R.C. § 2010(c)(3)(B) (West 2010) (establishing that in 2012 the exemption amount will be subject to an inflation adjustment rounded to the nearest \$10,000).

⁸⁰ See *id.* § 2505(a) (West 2011) (establishing that the federal gift tax exclusion amount will be equal to the federal estate tax exclusion amount). See *id.* § 2001(c)(3) (West 2010) (establishing that the federal estate tax exclusion amount will be subject to an inflation adjustment in 2012).

Appendix E

Federal Gift Tax Computation Examples

2009: Mr. Smith, who has previously never made any taxable gifts to anyone, gives his son \$688,000. Due to the \$13,000 annual exclusion and \$1 million federal gift tax exemption, no federal gift tax is due.

2010: Mr. Smith gives his son another \$3,338,000. Due to the \$13,000 annual exclusion and \$5 million federal gift tax exemption, no federal gift tax is due.

2011: Mr. Smith gives his son another \$1,113,000. Since the value of his lifetime gifts has exceeded both the \$13,000 annual exclusion and \$5 million federal gift tax exemption, federal gift tax is due at a 35% tax rate.

	2009	2010	2011
Gift	\$688,000	\$3,338,000	\$1,113,000
- Annual Exclusion	<u>- 13,000</u>	<u>-\$13,000</u>	<u>-\$13,000</u>
= Taxable Gift	= \$675,000	\$3,325,000	\$1,100,000
Taxable Gift	\$675,000	\$3,325,000	\$1,100,000
+ Prior Taxable Gifts	<u>- 0</u>	<u>+675,000</u>	<u>+4,000,000</u>
= Total Taxable Gifts	= \$675,000	=\$4,000,000	=5,100,000
Tax of Total Gifts under I.R.C. § 2502(a)	\$220,550 ⁸¹	\$1,330,800 ⁸²	\$1,765,800 ⁸³
- Tax from Gifts made in Prior Years	<u>- 0</u>	<u>- 0</u>	<u>- 0</u>
= Gift Tax in Current Year	= \$220,550	= \$1,330,800	= \$1,765,800
Gift Tax in Current Year	\$220,550	\$1,330,800	\$1,765,800
- Federal Gift Tax Credit (Unified Credit) ⁸⁴	<u>- 220,550</u>	<u>-1,330,800</u>	<u>-1,730,800</u>
= Gift Tax Owed	= \$0	= \$0	= \$35,000

⁸¹ See *id.* § 2502(a) (LEXIS 2009) (applying gift rates under I.R.C. § 2001(c) for gifts made *prior to* 31 December 2009). For example, tax on taxable gifts of \$675,000 = 155,800 + .37 x (675,000 – 500,000) = \$220,550.

⁸² See *id.* § 2502(a)(2) (West 2011) (applying gift rates for gifts made *after* 31 December 2009 *but before* 1 January 2013). For example, tax on taxable gifts of \$4,000,000 = 155,800 + .35 x (4,000,000 – 500,000) = \$1,330,800.

⁸³ See *id.* § 2502(a)(2) (West 2011) (applying gift rates for gifts made *after* 31 December 2009 *but before* 1 January 2013). For example, tax on taxable gifts of \$5,100,000 = 155,800 + .35 x (5,100,000 – 500,000) = \$1,765,800.

⁸⁴ See *id.* §§ 2505(a) and 2510(c) (West 2011) (setting the federal gift credit for gift taxes imposed by I.R.C., § 2501). For example, the maximum credit for lifetime taxable gifts = \$155,800 + .35 x (5,000,000 – 500,000) = \$1,730,800.

Appendix F

Outline for Calculating Federal Estate Tax⁸⁵

IRC Section Property Covered

- §2033 Property Owned at Death
- + §2035 Certain Transfers Within Three Years of Death
- + §2036 Transfers with Retained Life Estate or Retained Control
- + §2037 Transfers Taking Effect at Death
- + §2038 Revocable Transfers
- + §2039 Annuities and Employee Death Benefits
- + §2040 Property Passing by Rights of Survivorship
- + §2041 General Powers of Appointment
- + §2042 Life Insurance Proceeds (Where Decedent Held Incidents of Ownership)
- + §2043 Transfers for Partial Consideration
- + §2044 QTIP Transfers for which Marital Deduction was Previously Allowed
- = **Gross Estate (GE)**

Type of Deduction

- §2053 Deduction for Administrative and Funeral Expenses, as well as Debts
- §2054 Deduction for Casualty Losses
- §2055 Charitable Deduction
- §2056 Marital Deduction
- §2058 Deduction for State Death Taxes Paid (dying between 1 Jan. 2005– 31 Dec. 2012)
- = **Taxable Estate**

- + Adjusted Taxable Gifts Taxable Gifts Made After 1976 not Otherwise Includable in GE
- = **Tentative Estate Tax Base**

x §2001 Estate Tax Rate Schedule

- = **Tentative Estate Tax**

Type of Credit

- Gift Taxes Paid on Taxable Gifts Made After 1976
- §2010 Estate Tax Unified Credit
This may include the Deceased Spouse's Unused Exclusion Amount (for surviving spouses dying in 2011 and 2012)
- §2011 Credit for State Death Taxes (decedents dying after 31 Dec. 2012)
- §2012 Credit for pre-1977 Gift Taxes on Property Included in Gross Estate
- §2013 Credit for Taxes on Prior Transfers to Decedent (i.e., prior inclusion in a GE)
- §2014 Credit for Foreign Death Taxes
- = **Federal Estate Tax**

⁸⁵ See JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN, AND ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 869-870 (7th ed. 2005) (showing a similar outline). See also G. VICTOR HALLMAN & JERRY S. BLOOM, PERSONAL FINANCIAL PLANNING 472 (7th ed. 2003) (showing a more general outline).