What I learned at the USC Tax Institute on Wednesday morning (EGT day)

Ron Aucutt, who has deep insight into the legislative process, addressed what would happen **if a person used the full $5M exemption for gifts in 2011** and then died in 2013 when the exemption amount was lower and the gift and estate tax rates higher. He said that the effect of new subsection (g) of IRC Section 2001 is only to increase the tax rate, not to claw back prior gifts into the taxable estate. He acknowledged that neither the statute nor the legislative history is clear, and that it would be a good idea for the IRS to provide guidance. However, he did not expect the IRS to ever get around to providing this guidance unless the tax rates really do increase permanently and the applicable exemption amount really does drop permanently in 2013. In that event, the guidance would not arrive before 2013.

Professor Pinnell asked **"who cares" if there is a clawback?** The tax would be paid anyway in the estate if no gift had been made. He saw this as an issue in drafting the apportionment clause (that is, which heirs bear the estate tax?). But not a reason to avoid using the $5M exemption for gifts in 2011 and 2012.

Professor Pinnell suggested that for a surviving spouse with a QTIP trust, the best way to use the $5M exemption might be to transfer some of the income interest, thereby **accelerating the estate tax on the assets in the QTIP trust**. it works best if the QTIP beneficiary lives more than three years after transferring the income interest.

Professor Pinnell thought that "**portability**" is here to stay. Having this in the law will make it harder to convince people that they really need a living trust.

What is the **likelihood that the EGT regime will go to a $1M exemption and a 55% maximum in 2013**? Professors Jeffrey Pennell and Edward McCaffery think that the exemption amount will never drop below $5M, so the EGT regime will become a very specialized area. It will apply only to 1/7 of 1% of the population. Rates might go up and down over time, though. At the $5M/35% EGT regime, the taxes raise $11B, which Congress might decide is not worth debating and simply repeal. After the 2010 Tax Relief Act, Professor Pinnell advised the Dean at Emory that EGT should no longer be taught in the J.D. program. Professor McCaffery thought that estate planning will become a service that large investment advisory firms provide to their wealthiest clients as a loss leader. The rest of the world will file a new Form 706EZ to get automatic portability or to assure a basis step up at death. Both professors thought that a basis step-up at death is now the

American way and that there will never be a serious effort at a carryover-basis-at-death regime. Their advice to most estate planning attorneys is "retool" into fiduciary administration or trust litigation. Professor Pinnell said that the transition to elder care law is very difficult, but possible.

But … Professor Pinnell also said that it is entirely possible that there will be **no legislation** before 2013 to prevent the $1M/55% regime from returning.

Professor McCaffery also thought it possible that Congress will bat around the EGT exemption and rates every few years, just to shake campaign contributions out of the wealthy (favoring repeal) and the insurance companies and big wealth management firms (favoring a robust EGT regime). Cynically, but convincingly, he views this as a classic situation in which **Senators bait a small group of taxpayers**, who can't threaten the Senators' ability to get re-elected. He referred to his article SHAKEDOWN AT GUCCI GULCH: A TALE OF DEATH, MONEY AND TAXES. http://www.law.fsu.edu/faculty/2003-2004workshops/mccaffery.pdf (this is the lite, early version; there is also a longer, later version with more footnotes at 84 N.C. L. Rev. 1159 (2005-06)).

Steve Trytten suggested using a **fully integrated, trusteed IRA**, rather than the typical custodial IRA. This would allow the living trust and the IRA trust to be a single document, with a no-contest clause for the IRA, too.

Steve thought that **giving a Roth IRA to grandchildren** might be 20 times as valuable as leaving it to a spouse or children.

Steve also gave specific steps to deal with the **uncertain tax landscape**.

PS On Monday Sandra Brown, Chief of the Tax Division at the local U.S. Attorney's office, said that her office has requested records of all **transfers of real property in CA at a "zero" declared purchase price** for a couple of recent years. They are going to cross-check for gift tax returns. That's all she said. Might the IRS offer an FBAR-type settlement program, possibly threatening criminal tax sanctions for those who hold out? Seems like a good time for those donors to file a late Form 709 – if their advisors can find them before the IRS does.

William C. Staley
www.staleylaw.com
818-936-3490