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Providing Trusted Counsel in Matters Involving Estates, Trusts, Taxation, Elder Law, Estate Litigation and Business and Tax-Exempt Entities

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Estate Tax Deal Crumbles This Week

Democrats Balk at Tax Decreases for the Wealthy


Sen. Baucus

According to our tax advisory sources on Capitol Hill, Senate negotiators said on May 18th that a deal to cut estate taxes is on the verge of collapse after a majority of the Democratic caucus expressed concerns about voting for an expensive tax cut for wealthy families. "There is no agreement on the estate tax in either substance or process. None whatsoever," Senate Finance Committee Chairman Max Baucus (D-Mont.) told reporters, countering news reports that a deal was imminent.

Senate Minority Whip Jon Kyl (R-Ariz.) had previously announced that talks with a bipartisan group of negotiators on the estate tax had brought them close to an agreement that would (i) eliminate the chances of a retroactive estate tax increase (back to 2009 rates for persons dying in 2010) and (ii) eventually cut the estate tax rate while raising the exemption levels. Lobbyists had said they believed the deal would result in a top tax rate of 35 percent with a $5 million exemption level for individuals ($10 million for couples), with both figures indexed for inflation.

The Joint Committee on Taxation has estimated that the tax cut would cost the federal government $332 billion over the first 10 years, while extending the 45 percent tax rate and $3.5 million exemption level of 2009 would cost $253 billion. The pay-as-you-go budget law exempts an extension of the 2009 estate tax levels from a requirement that the tax cuts be paid for, but the Senate would need to find an additional $80 billion in offsets if it chooses to adopt the lower 35 percent tax rate and $5 million exemption level. Aside from the fiscal challenges, such a legislative maneuver would be met with taxpayer litigation challenging the constitutionality of retroactively implementing a tax regime in a year of repeal.

Animated' Talks in Democratic Caucus


Sen. Kyl

Sen. Bob Casey (D-Pa.) described a May 18th caucus discussion about the estate tax as "animated," calling the group of 59 Democrats and independents "split" on how to move forward. "I think it would be a big mistake when everybody is yelling about spending and deficits to have very wealthy people get off the hook," Casey said. "We did a lot of that in the eight years prior to [2009]. A lot of wealthy people did really well and others paid the freight."

Kyl said even though the agreement—reached with Baucus, Finance Committee member Blanche Lincoln (D-Ark.), and ranking member Charles Grassley (R-Iowa)—would have garnered the support of more than 60 senators, he was told the estate tax deal would not proceed because it lacked enough support from Senate Democrats.

The requirement to get at least half of the Democrats to sign on to a bill before it can proceed "is a standard we haven't seen yet," Kyl said, expressing disappointment. "We had an agreement on the substance of the proposal, subject only to certain offset limitations; other than that, we were in agreement," Kyl said before the Senate Republicans' weekly luncheon. "I'm not sure that that agreement still exists."

Asked about whether he prefers a retroactive proposal, or one with a choice for 2010, or an option to prepay, Kyl would only say that he believed there was an agreement one week ago and "that may not be the case anymore."

Vehicle, Timing Up in the Air

Kyl also said a legislative vehicle and the timing for consideration of new legislation are still up in the air and negotiations are continuing. Casey said most of the Democratic caucus is concerned about what will happen with the estate tax and "there are some who would probably agree with Sen. Kyl, but I think it's a small number." While Casey said lawmakers are not yet at a point where they are "drawing lines" over the estate tax issue, he said he has a problem with providing a significant tax cut to the roughly 2,000 estates per year that pay the estate tax. "The idea that we're going to give an incredible economic advantage to less than 1 percent of the population is really offensive to me, to understate it dramatically," Casey said.

Based on this report, it seems reasonable to anticipate that the 2001 Tax Act will indeed "sunset" at the end of this year, leaving us with an estate tax exemption amount of $1 million per taxpayer. However disappointing, at least we will have some predictability. We will continue to monitor developments in Washington and pass along the more significant ones through year's end. This December 31st may be the one time that a sunset is not a beautiful thing.

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