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## Expiring Income Tax Benefits With Estate Planning Lessons

The current Internal Revenue Code contains more than 3.4 million words (or for the technically savvy, more than 24 megabytes) and if printed on letter-sized pages, would fill more than 7,500 pages. It contains thousands of income tax provisions, some of which are set to expire at the end of 2009. Highlighted below are a few selected income tax provisions set to expire prior to 2010, which also offer estate planning lessons for benefits that are not expiring in 2009.

### First-time home buyer credit

A taxpayer who has not owned a home during the previous three years may claim an income tax credit of up to \$8,000 for the purchase of a principal residence prior to December 1, 2009. The credit is phased out for higher incomes. For married taxpayers, the law tests the home ownership history of both the home buyer and his or her spouse. If either spouse has owned a principal residence during the previous three years, neither spouse qualifies for the first-time home buyer tax credit. However, unmarried joint purchasers may allocate the credit amount to any buyer who qualifies as a first-time buyer, such as may occur if a parent jointly purchases a home with a son or daughter. Thus, if you or a potential joint purchaser would qualify for the credit and are planning to buy a principal residence, consider closing the sale by November 30 of this year.

The estate planning lesson from this income tax benefit is two-fold. First,

there are opportunities for transferring real property while values remain at historic lows. You might consider creating a qualified personal residence trust, or QPRT, where the home owner transfers the residence to a trust, reserving the right to live in the residence for a term of years, after which it passes on to remainder beneficiaries. The transfer of the residence may be accomplished for the reduced gift tax cost of only the remainder interest. If the value of the real estate is low, extra leverage is obtained in the transfer. Second, interest rates remain very low. You might consider making a low interest rate loan for purchasing a residence to a child who will qualify for the credit. Assuming that real estate will appreciate in the future, you will have transferred a valuable asset to a child in a manner that also produced an income tax credit for the child. That is a win-win proposition.

### Deduction for Qualified Tuition and Related Expenses

A taxpayer may claim an above-the-line income tax deduction of up to \$4,000 for qualified tuition and related expenses paid for enrollment or attendance of the taxpayer, his or her spouse or a dependent at an eligible institution of higher education prior to tax years beginning in 2010. The deduction is phased out at higher incomes. Eligible institutions are any college, university, vocational school or post secondary educational insti-

tution eligible to participate in financial aid programs administered by the U.S. Department of Education.

With respect to estate planning, paying for a child's or grandchild's tuition does not count against your annual gift tax exclusion of \$13,000 per donee for 2009 or the \$1,000,000 lifetime gift tax exclusion, if the payment is made directly to the institution. Thus, paying such expenses is essentially a gift tax free transfer. Further, you can consider setting up section 529 plans, the contributions to which do qualify for the annual gift tax exclusion, to pay for college tuition. 529 plans can be front loaded with up to five years worth of gifts, potentially removing \$130,000 from the estates of a married couple.

### Individual Retirement Accounts

The minimum required distributions from individual retirement accounts for taxpayers over age 70 1/2 are suspended for the 2009 calendar year. This will allow funds to remain in a plan longer with income tax free growth (assuming it grows). In 2009, a taxpayer may also exclude from income IRA distributions of up to \$100,000 if paid directly to a charitable organization by the IRA trustee.

There are any number of estate planning options with an IRA. Since it is included in the owner's estate for estate tax purposes and has income tax



consequences to the beneficiaries when distributed, you might consider satisfying any charitable bequests you intend to make with an IRA. If you are leaving your IRA to a non-charitable beneficiary, you will generally want to do so in such a way that the distributions can be stretched out over as long a period as possible, to allow the funds to remain inside the IRA growing in a tax deferred environment. Trusts are often used to ensure that goal. You should consult with your estate planning attorney to be sure you have correctly named a designated beneficiary for your IRA.

### Conservation Easement Charitable Deduction

Conservation easements are agreements transferring certain development or use rights of a landowner on real property to another party so that the landowner and subsequent owners cannot exercise those rights. It is a way to protect and preserve real property for generations. The restrictions placed on the property decrease its value. The value of the easement is the difference between the value of the property before the restrictions were placed upon it and the value of the property after the easement was granted. Donating a conservation easement to a charitable organization can result in an immediate

income tax deduction. For donations of qualified conservation easements prior to January 1, 2010, donors may deduct the value of the easement up to 50% of the donor's adjusted gross income. Farmers and ranchers can deduct up to 100% of their adjusted gross income. Any excess deduction can be carried forward for up to 15 years. Next year, the deduction will once again be limited to 30% of adjusted gross income with a 5 year carry forward. The income tax deduction can be worth millions of dollars. Sirote & Permutt recently obtained a taxpayer victory in a seminal case in the United States Tax Court, preserving a \$28.7 million conservation easement charitable income tax deduction. In some states, such as Georgia, the conservation easement may also qualify for a conservation use assessment of the property for ad valorem tax purposes.

The same reduction of value by a conservation easement for income tax

purposes also reduces the value of the property for estate planning purposes. A reduced fair market value may enhance the ability to make gifts of the property during the landowner's lifetime and reduce the value of the property in the owner's estate. The tax code allows an executor to exclude 40% of the value of the land subject to a conservation easement, up to \$500,000. An estate may also take an unlimited charitable deduction for a donated conservation easement, including an easement donated after death, as long as no income tax charitable deduction is taken with respect to such post-death grant.

Consider whether you can take advantage of any of these last chance opportunities for income tax purposes in 2009, while learning an estate planning lesson related to these expiring income tax provisions that may have even longer lasting benefits. ☐



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Leigh practices in the areas of Estate Planning and Tax Law. She received her LL.M. in Taxation from The University of Florida School of Law, her J.D. from The University of Alabama School of Law in 1986 and her B.A. from Birmingham-Southern College in 1982.