

Are Death Taxes Really Gone?

by Charles E. Falk, January 2010

The headline said it all:

Lack of Estate Tax in 2010: Now Cheaper to Die?

With Taxes Gone, Will Death Be At A Premium?

Is this really true? Not so fast. The old saying that “if something seems too good to be true it probably is” may be at work here. There have been many reports that beginning in 2010 there would be no Federal Estate Tax for one year. During that time Congress would either permanently repeal the Estate Tax or the Estate Tax would come back in 2011 with a \$1 million exemption at the old top rate of 55%. Most estate planners predicted that the “no estate tax in 2010” would never see the light of day since Congress would not permit for one year a taxing structure that was an aberration to the structure that has been in place for almost one hundred years. As predicted, Congress in late 2009 began to take up legislation that would have repealed the no tax rule in 2010 and make the 2009 rates and exemptions permanent. In other words, the law would be changed to keep what was in place in 2009, a 45% maximum rate and a \$3.5 million exemption. However, the Republicans wanted a further reduction to a maximum of 35% and an exemption of \$5 million. Since no agreement was reached, 2009 ended with the one year estate tax abolition. Congress has said that it will take up this issue as soon as it returns from the Christmas recess. Does this really mean that someone who dies in 2010 *before* any changes are made will be exempt from the Federal Estate Tax? Not likely. First of all, there is no doubt that Congress will eventually do something and make it retroactive to January 1, 2010. Thus, the “no estate tax for 2010” will certainly be repealed. If the no estate tax law is repealed, can Congress tax decedents who die between January 1, 2010 and when the law is repealed? Most likely. The Courts have generally permitted such type of legislation. The late Professor Borris Bittker wrote about this in his six volume treatise, *Federal Taxation of Income, Estates and Trusts*:

Congress occasionally makes changes in rate schedules and substantive provisions applicable to all income for the year in which the amendments are enacted, including amounts received or accrued before enactment. In a few instances, entire revenue acts were enacted after the close of the year to which they applied. Since 1916, it has been settled that “current year retroactivity” (application of an amended statute to all transactions during the year of the change, whether they occurred before or after its enactment) is not an unconstitutional deprivation of property without due process of law, even though the taxpayer cannot alter or rescind preenactment transactions in light of the new rules and might have acted differently if the changes had been foreseen.

Thus, it is doubtful if someone stayed alive to 2010 beat the tax man that they succeeded.