



Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A.
800 North Magnolia Avenue, Suite 1500
P.O. Box 2346 (ZIP 32802-2346)
Orlando, FL 32803

Orlando
Fort Pierce
Viera

407-841-1200
407-423-1831 Fax
www.deanmead.com

MARK W. TERRELL
407-428-5142
mterrell@deanmead.com

November 2008

Year End Estate and Tax Planning and Discussion of Anticipated Tax Policy Under President-Elect Obama

Mark W. Terrell, Esq.
Christine L. Weingart, Esq.

As the end of the year approaches, bringing with it an anticipated change in administration at the federal level, it is a good opportunity to consider certain tax planning techniques. This article is divided into two parts: (1) a discussion of year end tax planning all taxpayers may consider utilizing; and (2) a discussion of issues to be considered by taxpayers contemplating a change in tax policy under the Obama administration.

I. Year End Tax Planning Tips.

- A. **Annual Gifting.** You can gift up to \$12,000 per person (\$13,000 next year) tax-free without having to use any of your \$1 million lifetime unified credit. A husband and wife can elect to split gifts between them, thus allowing them to gift up to \$24,000 per person tax-free. In addition, there is an unlimited exclusion from gift tax for payments of tuition (not books, fees, etc.) and medical expenses. However, payments must be made directly to the educational organization or medical provider to fall under the exclusion.
- B. **Charitable Gifting.** Charitable contributions are often times tax deductible. A good candidate for charitable contributions is appreciated stock owned for more than one year. The amount of the contribution is equal to the fair market value of the stock, and there is no tax on the difference between the basis and the fair market value. If you own stock that has a fair market value that is lower than its basis, consider selling the stock to recognize the loss and contributing the cash proceeds instead. Keep in mind that if you make a cash donation, you have to substantiate it with a letter or receipt from the organization, a cancelled check or a bank statement showing the donation. Any documentation must include the name of the charitable organization as well as the date and amount of the contribution.
- C. **Qualified Charitable Contributions.** As part of the recent bailout bill, Congress has extended Section 408(d)(8), which allows for IRA distributions of up to \$100,000 (\$200,000 for married couples) to be made directly to most public charities ("Qualified Charitable Contributions"). These distributions must be made on or after the IRA

beneficiary reaches 70-1/2 years of age and prior to January 1, 2009. What makes a Qualified Charitable Contribution unique is that unlike other distributions from an IRA, a Qualified Charitable Contribution is not included in your gross income for the year of distribution, nor does it count towards your annual charitable deduction limits. In addition, Qualified Charitable Contributions are considered distributions for the purpose of meeting the annual minimum distribution requirements applicable to IRAs.

- D. **Deferring Gain/Taking Losses.** Consider not selling stocks with gain until January to defer recognition. Likewise, sell stocks with losses before the end of the year to reduce any other gains you may have. Remember that capital losses offset capital gains, even short-term capital gains, and up to \$3,000 of any remaining capital losses can be deducted against ordinary income. The balance of any capital loss will carry over to next year. Also, keep in mind that the favorable long-term capital gains tax rates only apply to property held for more than one year. If you are thinking about selling, be mindful of the length of time that you have held the investment. Short-term capital gains are taxed at your ordinary income rates.
- E. **Retirement Contributions.** Make the maximum contribution to your retirement arrangements (401(k), IRA, etc.). The maximum compensation to be taken into account for plan limits is \$230,000 for 2008. The following are the 2008 contribution limits for different retirement arrangements:

Type of Plan	Contribution Limit	Additional Contribution if Over Age 50
IRA	\$5,000	\$1,000
SIMPLE	\$10,500	\$2,500
401(k)	\$15,500	\$5,000
SEP IRA	\$46,000	---

II. **Tax Planning in Light of Potential Change in Tax Laws Under the Obama Administration.** In addition to the usual tax planning suggestions discussed above, individuals and business owners face additional decisions to make in anticipation of the January 20th Inauguration of President-Elect Obama. Nobody can say for sure what changes will be made to the tax code under the new administration. However, this article addresses certain anticipated changes based on President-Elect Obama's tax policy prior to his election.

- A. **Estate Planning Considerations.** President-Elect Obama proposes to freeze the estate tax exemption amount and tax rate at their 2009 levels, thus avoiding the one-year scheduled repeal of the estate tax in 2010. The estate tax exemption would be \$3.5 million per person, or \$7 million per couple, and the top estate tax rate would be set at 45 percent. There are no proposed changes to the gift tax.
- B. **Potential Changes in Ordinary Income and Capital Gain Tax Rates.** President-Elect Obama proposes to reinstate the top two individual income tax rates at their pre-2001 levels of 36 and 39.6 percent. He proposes to increase the capital gains rate to 20 percent

for taxpayers in the top two tax brackets. He would also reinstate for high-income taxpayers the personal exemption phase-out and itemized deduction limitation. Recent information suggests, however, that President-Elect Obama may allow the current top individual rate of 35 percent and capital gain rate of 15 percent to continue through December 31, 2010, when they are set to expire automatically.

Many clients are asking whether they should sell assets currently qualifying for the 15 percent capital gain rate now in anticipation of the increased rates. The first issue to consider is whether, if the Obama administration passed tax legislation in the spring, the new rates would be retroactive to January 1. Although legally it appears that this could be done, no administration has ever made tax rate increases retroactive.

One option which could be taken now is to sell capital gain assets in exchange for an installment obligation. Because the decision as to whether to elect out of the installment method does not need to be made until the filing of the tax return, with applicable extensions, this would give you time to see what, if any, tax rate changes are made before committing to a tax strategy. Income from sales reported under the installment method is taxed at the rates in effect in the year the income is received and reported. Therefore, the tax effect of installment reporting is sensitive to changes in tax rates. If you are considering accelerating gain by electing out of the installment method, you should also consider the credit-worthiness of the payor of the installment note, since adverse tax consequences could occur if you have already reported the gain but do not end up collecting the full amount of the installment note, as well as the time value of money (which is discussed below).

If you have made previous sales under the installment method, another option to consider in anticipation of a future increase in tax rates would be to trigger the deferred gain and recognize the future income by disposing of the installment obligation. Before taking such an action, you should consider both the credit worthiness of the payor of the installment note and the time value of money (you will be paying taxes on all of the gain in the year of sale rather than as you collect payments on the installment obligation.)

III. Conclusion. The substance and timing of major tax legislation is in doubt, and will continue to be in doubt until the current economic climate and President-Elect Obama's strategy become more clear. However, you should consider your particular facts and discuss all possible actions with your tax advisor to determine whether to take advantage of any of the planning strategies discussed above.

About the Authors:

Mark Terrell is a member of Dean Mead's Estate and Succession Planning Department. Christine Weingart is a member of Dean Mead's Tax Department.

About Dean Mead:

Dean Mead provides full-service legal representation to businesses and individuals throughout Florida. The firm has 50 lawyers practicing in Orlando, Fort Pierce and Viera. For more information, visit www.deanmead.com.