



Millionaires Seek Trust Shelter as Bush Tax Cuts May End

By Sophia Pearson & Ellen Rosen - Dec 12, 2012

These are hectic days for trusts and estates lawyers, as they make house calls, work nights and fly overseas to meet rich clients before Bush era tax cuts expire.

“To say we’re busy is the understatement of the year,” said Martin Kalb, chairman of the global tax group at Greenberg Traurig LLP. “I’ve been practicing for 35 years, and I’ve never seen it like this.”

Unless Congress and President Barack Obama decide otherwise, top rates for estate and gift taxes will rise to 55 percent from 35 percent on Jan. 1, with lifetime exemptions falling to \$1 million per person from \$5.12 million.

For bequests to non-spouses, an estate valued at less than \$5 million won’t be taxed if the owner dies this year. Next year, the amount greater than \$1 million will be taxed, as things stand now. Money and property in any amount left to a surviving spouse isn’t taxed.

Obama and House Speaker John Boehner have been meeting regularly in an effort to reach a compromise on taxes.

The president has repeatedly vowed he will insist on raising rates on the wealthy. As a result, many are scrambling to make gifts, either outright or through trusts, to spouses, children, grandchildren and others before the year ends.

“On Jan. 1 the coach will turn into a pumpkin,” said Gideon Rothschild of New York’s Moses & Singer LLP

Many people with more than \$10 million of net worth had a wait-and-see attitude before the Nov. 6 election, because they thought Mitt Romney was likely to become president, said Dennis Belcher, a partner at McGuireWoods LLP in Richmond, Virginia.

Squeezing Work

“We are in effect squeezing two years of work into two months, notwithstanding the fact that we had contacted people and let them know what was going on,” Belcher said.

Those who waited may find it hard to hire lawyers because trust creation is time-intensive, involving counseling on their goals and finances, and not just generating documents.

Edward Koren, a partner at Holland & Knight LLP in Tampa, Florida, said in a telephone interview that three people who he didn’t know called him last week.

“I turned them all down,” he said. “I have to tolerate a failure to act by ongoing clients but not someone who calls out of the blue.”

Robert Lawrence of Cadwalader, Wickersham & Taft LLP, said, “We’re looking for relationships. This isn’t a one-off thing. A private client is unique because the lawyer becomes a counselor to the family.”

Alphabet Soup

The work isn't easy, involving choices from an "alphabet soup of trust techniques," said David T. Leibell, a Wiggins and Dana LLP partner in Greenwich, Connecticut, who writes a monthly column for Trusts and Estates Magazine.

A client needs to identify a trustee, perhaps a family member or a trusted banker or lawyer, said Kalb of Greenberg Traurig. Decisions are needed on whether the trust will make distributions and at what stages. He said that in a time crunch such as this, the process could be completed in two weeks. It normally takes much longer.

"Many clients coming to us today, we're advising them that unless it's a simple plan we cannot implement it by year end," Kalb said last week.

Even for the very affluent, wealth is often in the form of businesses, homes and artwork, the attorneys said. That means appraisals.

Calls from potential clients have skyrocketed, said Curtis Kimball, national director of wealth management valuations with the appraisal firm Willamette Management Associates in Atlanta.

Appraisal Clients

Kimball is booked through December for new clients and must defer some appraisals until 2013. A specialist in valuing privately held companies and intellectual property, he is fielding requests in the coming weeks for values of companies in the real estate and timber industries as well as a best-selling author's literary property, he said.

"There are a lot of nervous wealthy people out there," Kimball said.

When an appraisal cannot be completed before year-end, one strategy involves funding a trust with cash or securities this year and swapping out the cash for an equivalent value of another asset after it's appraised.

Kalb is advising some clients who are interested in estate planning and still need an income stream from gifted assets on how to establish spousal lifetime asset trusts, or SLATs.

"They want to make use of getting rid of \$5 million in assets but they are in an economic position where they may need the cash flow from those assets," Kalb said.

Cash Flow

One spouse's \$5.12 million exemption is transferred into a trust that names the other as a discretionary beneficiary, along with heirs. The trust can be funded by assets that generate income, such as stock in a closely held business with cash from dividends used for distributions, he said.

Spouses who choose to set up separate trusts naming each other as beneficiaries risk rejection by the U.S. Internal Revenue Service if they're created with too nearly identical terms, said James R. Ledley, a partner at Kleinberg, Kaplan, Wolff & Cohen PC in New York.

The "two trusts must not be reciprocal," he said.

Clients are also funding trusts using real estate, such as primary residences and second homes, said Amy Heller, a McDermott Will & Emery LLP New York partner.

They must pay rent or create a qualified personal residence trust to keep the right to live in the property.

Otherwise the residence may be included in their estate at death, “undoing a lot of the planning you set out to do,” Heller said.

Gay Couples

Affluent gay couples are using the higher gift tax exemption, said Georgiana Slade, a Milbank Tweed Hadley & McCloy LLP partner. The federal Defense of Marriage Act keeps them from taking advantage of the unlimited marital deduction.

DOMA bars federal recognition of same-sex marriages even if a state recognizes them. That means transactions easy for married heterosexuals, like adding a spouse to the title of a home, can have gift-tax implications, she said.

The U.S. Supreme Court agreed last week to decide next year whether the federal marriage act is constitutional.

One of two cases the court will review involves an 83-year-old New York resident, Edie Windsor, who is fighting a \$363,000 estate tax bill imposed after the 2009 death of her spouse, Thea Clara Spyer.

Windsor and Spyer were married in Canada in 2007, a marriage the U.S. Court of Appeals in Manhattan concluded would be recognized under New York law. Had they been a heterosexual couple, Windsor’s inheritance wouldn’t have been taxed.

Long Weeks

The “fiscal cliff” time pressure has prompted many lawyers who specialize in the area to work seven-day weeks. Fees for creating trusts can range from as low as \$10,000 to more than \$100,000, depending on the complexity of the trust and the time constraints.

“If anyone calls me next week, my fees will be significantly higher, because people will be working 24/7,” Rothschild of Moses & Singer said last week. “If they still want me, they will have to sign a waiver that I cannot guarantee getting the work done by Dec. 31 but they will still pay me.”

Others say if they explore a gift with a client who ultimately decides not to proceed, the client may not be charged.

“It’s easy to convince someone out of fear to make a gift, but is that the right thing to do?” said Belcher of McGuireWoods. “If I talk someone out of it, after hours spent working on it, do you then send a bill? You don’t.”