

CAN THE ESTATE TAX CHEAT DEATH?

THE END IS NEAR (NO IT IS NOT)

AND: CELEBRITY ESTATE THEME PARKS

By Robert L. Moshman, Esq.

Another turning point, a fork stuck in the road Time grabs you by the wrist, directs you where to go...

THIS IS NOT HAPPENING

By the time you read this, perhaps Congress has already intervened and delivered the great anti-climax everyone has been anticipating for years.

Congress has a history of last-minute tax actions and even allowing deadlines to pass and taking retroactive tax actions. Retroactive tax laws are extremely uncool. Taxpayers need to be respected enough to be given a set of rules so that they can plan ahead. When a tax rule is changed retroactively, two contradictory sets of rules end up applying to the same time period. This is a paradox, which is inherently dangerous.¹

In the context of estate taxation, retroactive changes may give rise to valid constitutional claims. There is a fundamental unfairness of having people act in reliance on a law that applies to a particular time frame and then retroactively collect taxes by exploiting the inability of deceased persons to make additional changes.

Yes, a decade can really sneak up on you, but it would be especially indefensible for Congress to resort to a retroactive reinstatement of the estate tax when its demise and resurrection have been anticipated since 2001. For example, one year ago, this publication anticipated this end game as follows:

"The Surreal Repeal"

"When Congress repealed the estate tax in 2001, the estate tax was not actually repealed immediately. It was going to phase out over time.

"First of all, "repeal" is such a strong term. What they really meant to say was, "have a period of increasing exemption levels over 8 to 10 years, keep everybody guessing, and then retain the estate tax at the last minute during 2009."

"Secondly, Congress doesn't do simple repeals. That is so state legislature. Creative draftsmen at the federal level produced a repeal that arrives after 8 years in 2010, but then reverts back to 2001 estate tax levels in 2011. Like a ten-year experiment with a reset button in case things didn't work out.

"Although the estate tax repeal was immediately declared dead on arrival by many leading estate planning professionals, considerable time has passed since 2001 and still we remain on course, marching toward the estate tax repeal. However, Congress has lacked sufficient votes to make the repeal permanent and that possibility has now encountered another shift in the political balance of power. This shift is definitely not in the direction of estate tax repeal."²

So make the best of this test, and don't ask why It's not a question, but a lesson learned in time.



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LET'S NOT DO IT

In 2008, Presidential candidates for both parties supported the continuation of the estate tax in 2010 with differences mainly on exemption levels.

One year later, Congress has still not taken any action. Going strictly by the law on the books, the estate tax would be repealed at the end of 2009, but only for one year. The estates of decedents dying during 2010 would not be subject to estate tax. But then, in 2011, the estate tax would return and go retro to the laws of 2001 with a \$1-million exemption and the 55% top estate tax rate.

In March, Senator Max Baucus (D-Mont.) introduced legislation to continue the \$3.5 million exemption and current estate tax rates beyond 2009.

In June, Senator Baucus was asked whether the Senate Finance Committee would find the time to address the estate tax. "We have to," he told Bureau of National Affairs, "I'm not going to let it be zero next year."

In October, Democratic Leader Steny Hoyer was quoted as saying, "We would like to bring to the floor in the next few weeks, if not next week, a bill to deal with the estate tax issue."

The outcome appears inevitable, yet at the time this is published, with time in 2009 running out, one has to consider the various outcomes.

SEVERAL SCENARIOS

- #1: INTERCEPTION: In this version, Congress acts proactively and retains the status quo of the estate tax as of 2009. This could have been done at any time over the last eight years, but if Congress fits this measure into their schedule in the final 6 weeks of 2009, that's still more proactive than any actions taken in 2010.
- #2: RESURRECTION: In this approach, the estate tax repeal actually arrives on January 1, 2010 and continues for some time. It affects the estates of about 1% of decedents who die during a brief period before Congress tries to retroactively reinstate the estate tax as it existed during 2009.
- #4: STAIRWAY TO HEAVEN: In this scenario, the estate tax goes to sleep and never wakes up. Repeal arrives and Congress never gets its act together to reinstate the tax. Twelve months later, Congress still can't agree on an estate tax but is not willing to go back to the 2001 tax either, so it enacts some kind of state death tax credit with more emphasis on taxing gifts and inheritances. Alas, all that glitters is not gold. This is neither simpler nor fairer.
- #5: THE BOBBY EWING SPECIAL: This outcome is so crazy and onerous that Congress actually wrote it into the current tax code and is supposed to happen for real unless Congress takes action. We have a 10-year phase in of an estate tax repeal, then a year of zero estate tax for the repeal itself, but then, after only one year, we go back to the \$1-million estate tax exemption and a top rate of 55% like it was 2001 all over again. This could only gain support if it made people ten years younger for real.³
- #6: FANTASY ISLAND: There are a few of the faithful who are still burning a candle for the complete repeal of the estate tax. Legislation to this effect, H.R. 1960, was proposed as recently as last spring with 17 co-sponsors including Dan Burton, (R-Indiana). This is an increasingly unpopular club for an idea whose time has passed. Historically, our nation opposes death taxes when there is financial prosperity and peace; there has been neither since September 11, 2001. As a practical matter, the votes needed to sustain an estate tax repeal haven't existed since then. That's a political and social reality.⁴
- #7: A FAIR SYSTEM THROUGH 2035: Here's the wildest scenario of all: Congress establishes a reasonable system and leaves it alone for 25 years. The estate and gift tax are reunited into the familiar unified transfer tax system. The state death tax system returns to provide state uniformity.

A top transfer tax rate of 35% coordinates with income tax rates and allows the U.S. to be more internationally competitive in retaining a wealthy tax base. The trust income tax schedule is expanded to be comparable to that of a head of a household.

Imagine a fair and purposeful tax that makes sense and which can remain in place for an entire generation of sound estate planning. And then you may as well go to the window and imagine rainbow donkeys flying by.

BLAME IT ON BYRD

Why did this happen? A key reason has to do with arcane rules for the Congressional budget process. The Byrd rule is named for Senator Robert Byrd. This rule originated in 1985 and was made permanent in 1990. It affects the budget reconciliation process by requiring a super majority for provisions that alter tax revenues beyond 10 years.

Lacking the 60 votes needed to make the tax repeal permanent, the majority enacted the estate tax with a 10-year sunset provision to avoid this parliamentary rule.





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It's something unpredictable, but in the end it's right. I hope you had the time of your life.⁵

TECHNICAL REFERENCES

- 1. For a dramatic illustration of the dangers of paradox see, e.g., Millennium (1989) with Kris Kristofferson and Cheryl Ladd.
- 2. Moshman, A New Context For Expatriation, The Estate Analyst (November, 2008).
- 3. Bobby Ewing was killed off of the TV show Dallas so that actor Patrick Duffy could pursue his acting career. This move was bad for both the actor and the show. So the entire 1985-1986 season of Dallas was written off and Bobby Ewing stepped out of a shower as though nothing had happened. It was just a bad dream. The estate tax could also step out of a shower, alive.
- 4. A summary of the history of the federal estate tax can be found on the IRS website. Look for an 11-page article entitled, The Estate Tax: Ninety Years and Counting by Darien B. Jacobson, Brian G. Raub, and Barry W. Johnson. The modern estate tax of the United States can be traced back to the Revenue Act of 1916 but had predecessors in 1797, 1862, and 1898. Death taxes arrived to finance wars. Along the way, the top estate tax rate has gone from 10% in 1916 to 77% during World War II, and is at 45% for 2009. Many of the more recognizable features of the estate tax were added along the way. The marital deduction was added in 1948 and became unlimited in 1981. Estate and gift taxes were unified in a system that allowed for generation-skipping transfer taxes in 1976. Qualified terminable interest property arrived in 1988 and soon became a staple of basic estate planning.
- 5. Dedicated to the Federal Estate Tax, 1916 2009-ish, may it rest in peace (or not). Lyrics to "Good Riddance," by Green Day.

CELEBRITY ESTATE THEME PARKS

How successful will Michael Jackson's estate be in maintaining future revenues? Will it develop a tourist destination such as Graceland? Could it even create an entertainment theme park?

Sometimes new or obscure artists become popular after their deaths. (James Dean, Emily Dickinson, Franz Kafka, Vincent van Gogh). Some recognized talents or stars become superstars after their deaths (Marilyn Monroe, J.S. Bach).

J.R.R. Tolkien's work was generating millions of dollars in annual book sales and then became a \$6 billion industry after the successful movie trilogy (\$2.8 million in box office and the rest from DVDs and merchandise). Now the Tolkien estate is seeking its 7.5% of those revenues.

Will a superstar like Michael Jackson go super nova posthumously? As demonstrated annually by the Forbes list of top-earning "dead celebrities," the earning potential of an artist or well-known person isn't precluded by death. In fact, there may be more posthumous opportunities for merchandising after death than in life.

Several variables need to be in place. The celebrity would need broad demographic appeal and a body of work that can be marketed repeatedly to new generations, such as Elvis Presley. Control over intellectual properties is a key element; owning rights to her work allowed J.K. Rowling to become a billionaire. A relentless business operation is needed.

Michael Jackson's estate faces various debts at its inception but may turn into a financial juggernaut over time. The earning potential for his music and movies is at a peak and could be harnessed and managed for many years. During that time, cash flow may remain more positive than during life when living expenses outpaced income. A lavish Neverland theme park could be a commercial focal point.

But not all musical stars have duplicated the appeal of Graceland which is the most visited private home after the White House and has over half a million visitors annually.

Breaking into the entertainment destination market is not easy for a musical act. There are currently more than 400 theme parks in the United States, not to mention all kinds of smaller attractions. Enjoy tulips and wooden shoes? Head to Dutch World in Michigan. Really into legos? Try LegoLand in California. Nickelodeon Universe theme park is located inside the Mall of America in Minnesota.

Conway Twitty was one of the most successful country music acts of all time with 40 number one country hits and 15 other crossover hits. In 1982 he opened Conway Twitty City, which became one of the premier tourist destinations of Tennessee. But after his death, Twitty's children battled the estate for 14 years and lost and then filed an action against Sony, which had purchased musical rights from Twitty prior to his death in 1993.





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The 14-year delay in marketing the estate to fans may have done irreparable harm to development of the estate's intellectual properties. Twitty City was sold to Trinity Broadcasting, which operates a Christian music venue there now. The importance of having a coherent estate plan that provides clear management direction over intellectual properties is critically important.

The Hard Rock Theme Park had a Magical Mystery Tour Bus go on a six city tour to promote the opening of its 55-acre park in Myrtle Beach South Carolina. The park opened in April 2008 and closed in September 2008. [Note: Led Zeppelin, The Ride, was a roller coaster synchronized to "Whole Lotta Love."] The park was sold and reopened as Freestyle Music Park in 2009.

Another musical theme park is planned for somewhere in the desert between Phoenix and Tucson, Arizona and would feature areas for each decade of rock music – the 50s, 60s, 70s and 80s) with interactive thrill rides. So far the park exists only on paper. Not to be critical, but locating a theme park in a remote desert may not be best choice.

There is at least one successful model for a celebrity theme park. Dollywood, co-owned by Dolly Parton, was a pre-existing theme park that was renamed when the singer became a co-owner in 1986. The park has been expanded since then and now has 2.5 million visitors annually. It provides rides and varied themes to appeal to a broad audience. Neverland may succeed with such a formula.

Robert L. Moshman is an attorney specializing in estate planning and administration in New York and New Jersey and has also served in local government as the Mayor of West Milford, New Jersey. Along with the Estate Analyst, he has been writing articles about estates, financial planning and investments for 25 years. He is not affiliated with Aston Asset Management LLC and his views do not necessarily reflect those of Aston.

