2010 Estate Tax Retroactivity Still in Question
By Daniel D. Kopman, Esq. CPA

There is bantering in parlors everywhere about whether Congress can and will impose the federal estate tax retroactively for 2010, thus taxing many estates such as the behemoth Steinbrenner estate in connection with decedents dying in 2010. The temptation to recover otherwise lost tax revenue is great.

The issue arises out of what many view as a lack of foresight and cogent consideration by Congress at the time EGTTRA was passed early in the prior decade. A number of estate fiduciaries now are on tenterhooks awaiting guidance. Similarly, the uncertainty which persists places estate tax advisors in the unenviable position of shoulder shrugging when clients broach the issue. While many would consider retroactivity unfair and others would see it as downright un-American, precedent from our third branch of federal government portends a contrary view.

In *United States v. Carlton* 512 U.S. 26 (1994), a decision free of dissent, held that a law restricting a statutory estate tax deduction for sales or stock to a company Employee Stock Ownership Plan (ESOP) was indeed constitutional even through it applied to decedents dying before the law's enactment. As adopted in 1986, 26 U.S.C. 2057 authorized an estate tax deduction for half of the proceeds of the sale of certain securities by an estate executor to an ESOP. Late in 1986, Carlton acting as an estate executor purchased shares in a corporation and then sold them to a company's ESOP at a loss, thereby claiming a large Section 2057 deduction on his estate tax return. Subsequently, in December 1987, Section 2057 was amended to provide that eligibility for the deduction required that securities sold to the ESOP, of necessity, must have been owned by the decedent immediately before death. The Internal Revenue Service (IRS) denied Carlton's Section 2057 deduction.

In a judicial challenge, the District Court sided with the IRS, maintaining that retroactive application of the law to Carlton's decedent passed constitutional muster as it did not violate due process under the Fifth Amendment to the Constitution. The Court of Appeals reversed the decision of the District Court, holding, *inter alia*, that Carlton had reasonably relied to his detriment on pre-amendment law and, thus, disallowing his deduction based upon a subsequently enacted law failed to comport with due process and traditional notions of fair play.

Reversing the decision of the Court of Appeals, the Supreme Court found that retroactive application of the estate tax deduction required merely a showing that the need for the enactment was supported by legitimate legislative purpose furthered by rational means. As a first year Con-law student knows, these words mean liberality and deference to the legislative branch and, accordingly, when uttered by the Supreme Court, they are the death knell to any constitutional challenge.

An argument against retroactivity which depends for its reasoning upon distinguishing Carlton's retroactive disallowance of an estate tax deduction, on the one hand, and retroactive application

of the entire federal estate tax system in 2010, on the other, would likely fall on deaf judicial ears. Moreover, the precedential value of a pre-depression era 1928 Supreme Court case, *Untermeyer v. Anderson,* 276 U.S. 440 (1928) - in which the Court's ruling effectively set aside a retroactive gift tax- may be viewed as a bit of an anachronism now when, politics aside, our central government and the states alike, appear hell bent on grabbing for dollars to cover the gargantuan and logarithmically expanding deficits.

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