Year End Planning with the Lame Duck Session and President-elect Trump

The election is over, so now we can start speculating as to what will happen in the lame duck session, and what a Trump-Pence Administration might mean for tax policy. We have put our collective wisdom together, and offer the following suggestions as we approach year end.

Lame Duck Session

With the Republican retention of majorities in both the House and the Senate, and Trump's victory, the Republican Congressional leaders have little reason to cooperate with the Democrats on pending matters, or otherwise show any motivation to pass legislation in this session. Congress does have to pass a government funding bill in this session. Currently, the government is only funded through December 9. Congress has the option to only fund through a date in this first quarter or for the entire fiscal year. The general view in Washington is that they will only fund through sometime in the first quarter, so that Republican leadership can influence the funding priorities when President Trump is in office and approve the bill.

Personal and Business Tax Rates

The Trump-Pence tax proposals published in September 2016 and the House GOP Blueprint released in June 2016 both propose to reduce the number of personal income tax brackets and to lower the top marginal rate to 33 percent. The two plans also contain retaining preferential rates for long-term capital gains.

The plans also call for reduced rates on business income, including pass through income from partnerships and S corporations. The Trump-Pence proposal recommends 15 percent rate on small business income, the House GOP Blueprint envisions a 25 percent rate. The existing top rate on business income flowing to an individual tax return is 39.6 percent, therefore, both proposals would offer significant tax relief to pass through business owners.

Other Provisions Impacting Individuals

There is also agreement between the two plans that both the Alternative Minimum Tax ("AMT") and the Net Investment Income tax ("NIIT") should be repealed. The complexity of the AMT has been criticized for years by the Republican Party. The 3.8 percent NIIT surtax was enacted as part of the Affordable Care Act, and has been targeted since inception, so it is not a surprise that both plans also contain the repeal of this tax.

The GOP Blueprint includes some broad language that they also intend to repeal "special-interest" provisions to improve the system and make it fairer. It is unclear what provisions this language targets. In the Trump-Pence proposal, there is a provision to tax carried interest income at ordinary income tax rates instead of the capital gain rate.

New Deduction Scheme

Both plans call for a new way of looking at itemized deductions. The Trump-Pence proposal is to keep the existing rules but to cap all itemized deductions at $100,000 for single filers and $200,000 for married filing joint ("MFJ"). The House GOP Blueprint is more transformative. It calls for elimination of the itemized deduction concept and retention of only the mortgage interest deduction and the charitable deduction.

Transfer Tax Scheme

The Trump-Pence plan and the House GOP Blueprint both call for the repeal of the estate and generation skipping transfer taxes. The Trump-Pence plan states that capital gains held until death and valued over $10 million will be subject to tax. It also says there will be special treatment of small businesses and family farms. The language is vague, so it is too early to tell exactly what these proposals mean in practice, as different groups have interpreted the proposal to mean different things. Additionally, the Trump-Pence plan proposes to disallow a deduction for contributions of appreciated assets into a private charity established by the decedent or decedent's relatives.

In terms of the gift tax, both proposals are unclear as to the impact. Some commentators have stated that the proposals also repeal the gift tax while others have said the proposals do not. We will have to wait for clarity on that issue. A repeal of the gift tax would have significant income tax implications, as individuals could transfer property at will to minimize the income tax on sales of property.

Insights

Given these potential changes, actions you may want to consider include:

- Deferring income recognition – with lower rates a distinct possibility, deferring income to 2017 seems prudent;
- Deferring generation of capital gains and other investment income subject to NIIT – both proposals promote the repeal of the NIIT;
- Accelerating the payment of state income taxes if itemized deductions are over $200,000 (MFJ);
- Accelerating the funding of charitable contributions if itemized deductions are over $200,000 (MFJ); and
- Reevaluating any planned transfer tax planning in light of possible repeal of the estate tax with your advisory team.

By all accounts, the next 12 months could be a very active period for tax policy. As such, we recommend that once the dust settles and there is new legislation in place, everyone review the new rules with their advisor to determine the specific impact and opportunities on their personal, business and transfer tax planning.