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If you're a wealthy U.S. citizen or a wealthy Canadian who owns property in the United States or holds significant U.S. equities in your stock portfolio, you may want to be extra wary of who's pouring your eggnog at tonight's New Year's Eve party. That's because in less than 24 hours, the dreaded U.S. estate will resurrect itself from the grave. In other words, die before midnight tonight, no U.S. estate tax. Die on January 1, 2011 or later and your heirs may face an estate tax of 35%.

U.S. estate tax affects both U.S. citizens living in Canada as well as non-U.S. citizens who own U.S. situs property such as U.S. real estate or stocks in U.S. companies, even when held in Canadian brokerage accounts or registered plans. The estate tax repeal was originally announced back in 2001 as part of a broader tax reform package, which lowered the top tax rate on estates to 45% from 55% and increased the exemption to a high of US\$3.5-million in 2009.

When President Bush introduced the estate tax phase out and elimination legislation in 2001, it had a sunset clause in it meant to circumvent a U.S. Senate rule that could have allowed Senators to block the legislation if it increased the federal deficit beyond a ten-year term – resulting in an legislative expiry date of December 31, 2010. As a result, if nothing was done, then in 2011, the estate tax would come back in full force with a top rate of 55% and an exemption of only \$1 million. An infamous 2001 column by syndicated New York Times columnist Paul Krugman referred to the legislation as the “Throw Momma From the Train Act of 2001” predicting what might happen to wealthy American matriarchs in 2010 whose heirs might benefit by an opportunistically-timed death in the family.

At least five known billionaires have died in the U.S. in 2010 escaping the estate tax altogether: Dan Duncan (estimated net worth US\$ 9B), John Kluge (\$6.5B), Mary Janet Cargill (\$1.7 billion), Walter Shorenstein (\$1.1B) and, perhaps most famously, Yankees owner George Steinbrenner with a mere \$1.1 billion.

Earlier this month, however, the uncertainty ended when new legislation was signed into law on December 17, officially reinstating the U.S. estate tax beginning in 2011, at a rate of 35% and with a US\$5 million exemption.

Canadians who aren't U.S. citizens can't use the full exemption but must use a prorated exemption under the Canada-U.S. tax treaty which allows Canadian residents to prorate the US\$5 million exemption based on the fraction of their U.S. situs property (e.g. U.S. stocks or real estate) divided by their worldwide estate. Mathematically, this means that if your worldwide estate is under US\$5 million you will get a full exemption from U.S. estate tax and need not be concerned. Wealthy Canadians with a net worth of over US\$5 million, however, may wish to get specialized tax advice in 2011 – that is if they survive tonight's party.

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