


[Print](#) [Close](#)

## Will Congress Take a Pass on the Estate Tax and Send Us Back to 2001?

By Rodney P. Mock and Jeffrey E. Quijano

Published October 18, 2010 | FoxNews.com

Reaching into the graves of wealthy, dead taxpayers across the county to collect unpaid tax debts may seem reminiscent of a low-budget horror film, but it's not. In fact, after the November midterm elections, Congress may empower the IRS to do just that.

According to The Hill newspaper "one issue is how to stop the estate tax from returning to pre-2001 levels, which means estates worth more than \$1 million are hit with a tax that could be as high as 55 percent."

Indeed, although the 2010 federal estate tax repeal is now in its ninth month, Congress continues to consider retroactive estate tax legislation, which would invoke cryptic scenes of IRS estate tax collections and hysteria in the estate and financial planning communities.

Four billionaires have already passed away this year; these individual have a combined net-worth exceeding \$12.8 billion. Some congressional leaders estimate the U.S. Treasury will loose approximately \$14.8 billion in revenue alone from these and other wealthy individuals as a consequence of the current one-year repeal of the estate tax. Moreover, the Center on Budget and Policy Priorities estimates the total cost of a permanent repeal between 2012-2021 would add up to approximately \$1.3 trillion. With numbers like that on table, retroactivity remains up for debate as a way to recoup lost tax revenue.

Nevertheless, whether Congress enacts new legislation or simply does nothing, the zombie-esque estate tax will be back in 2011, and quite possibly, may rise from the grave with a vengeance in its pre-2001 form.

The Economic Growth and Tax Reconciliation Act of 2001 provides that in 2011 the estate tax shall revert to the prior 2001 law—a maximum rate of 55% (plus a 5% surcharge on certain estates) and \$1 million exemption amount. Thus, congressional inaction means a much wider swath of the country will be subject to the tax.

The dangling billion-dollar question is whether or not Congress will pass a retroactive estate tax bill before its next October recess or do it in a lame-duck session in November.

There are currently two such bills on the table. Earlier this year, Senator Bernie Sanders of Vermont introduced the Responsible Estate Tax Act which would reinstate the estate tax retroactively with new progressive tax rates for estates of decedents dying after December 31, 2009. The bill, however, has not left the Senate.

In November of 2009, Representative Earl Pomeroy of North Dakota introduced a bill that would permanently fix the estate tax at its 2009 levels by freezing the top estate tax rate at 45% and establishing a \$3.5 million exemption amount. -- This bill also has lost momentum and is lacking Congressional support.

Does this mean Congress will not pass any retroactive legislation? At the moment the answer is as clear as a foggy night. But one thing is evident: if retroactive legislation is enacted, Congress and the IRS can anticipate years of protracted litigation, with high net-worth estates asserting such action is unconstitutional.

"U.S. v. Carlton" is the United States Supreme Court case most often cited in the legal community's when it comes to discussing a retroactive estate tax supporting the position that Congress is authorized to enact such legislation. The case involved an estate's executor who claimed a deduction after the death of the decedent based on a section of the Internal Revenue Code that permits a deduction for the sale of stock to an employee stock ownership plan.

When Congress enacted the Code section, however, it only contemplated that the deduction would be used by business-owning stockholders who wanted to sell their companies back to

Advertorials By **SmarterLifestyles™**

 **San Luis Obispo : Discover the advantages of buying penny stocks. [Penny Stocks Expert]**

 **Finally! An all natural way to beat stress and anxiety for good. [Lumiday]**

 **Penny stocks that jump 500%+ sent straight to your email. [Penny Stocks Expert]**

ADVERTISEMENT

their employees after death, rather than liquidating, selling to outsiders, or having the corporation redeem the shares. Congress simply "forgot" to specify that the statute's application was limited exclusively to stock directly owned by the decedent "immediately before death."

Mr. Carlton, the estate's executor, was understandably unaware of Congress' silent intent, and utilized the deduction by purchasing the stock of a company after the decedent's date of death to generate a \$631,000 estate tax deduction.

To remedy the "loophole," Congress enacted curative legislation to fix its mistake. The problem with doing this, however, was the legislation was retroactive, and thus, Mr. Carlton's claimed deduction was disallowed in full, resulting in a substantial tax deficiency.

Before the Supreme Court, his counsel contended that Mr. Carlton had relied on the plain language of the statute when he claimed the deduction. Therefore, the legislation violated due process and was unconstitutional. The Court disagreed that the executor's detrimental reliance on the prior legislation was sufficient to establish a constitutional violation. It stated that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code," and noted that lack of notice of the retroactive legislation does not alone make it unconstitutional.

In the end, the Court reasoned that retroactive tax legislation satisfies constitutional due process requirements if the Congressional purpose for such legislation is neither illegitimate nor arbitrary and Congress acts promptly when enacting its legislation with only a modest period of retroactivity.

What "Carlton" indicates is that the Supreme Court is unlikely to apply the strict due process analysis to future taxpayer claims regarding the constitutionality of retroactive estate tax legislation. In fact, the Court appeared indifferent to taxpayer reliance on the existing tax legislation, and whether there is sufficient notice of any potential retroactive changes.

"Carlton" further suggests that Congress need only demonstrate it has a genuine purpose when enacting such legislation. With the present state of the economy, raising revenue for the U.S. Treasury presumably will suffice. And as for the timing of retroactive legislation, "Carlton" specifically stated that a one-year period of retroactivity is constitutional, as long as Congress acts "promptly."

Now that we are in October, however, if Congress does in fact enact a retroactive estate tax it will become increasingly difficult to credibly argue that it acted promptly with its "fix." And thus, as each month passes, it becomes increasingly likely that 2010's deceased billionaires have escaped the federal estate tax. But should Congress continue to ignore this tax into 2011, many more of us should fear the estate tax zombie in its 2001 form.

*Rodney P. Mock is an assistant professor at the Orfalea College of Business of California Polytechnic State University. Jeffrey E. Quijano is an attorney in the Las Vegas office of Fox Rothschild, LLP. Mock and Quijano are the co-authors of "The Bait-and-Switch Estate Tax" out this month from in Practical Tax Strategies -- WG&L (October, 2010).*

**Follow Fox News Opinion on Facebook and Twitter !**

 Print  Close

---

**URL**

<http://www.foxnews.com/opinion/2010/10/18/rodney-p-mock-estate-tax-treasury-congress-bernie-sanders-supreme-court/>

---

Home | U.S. | World | Politics | Health | Business | SciTech | Entertainment | Video | Opinion | Sports | Leisure  
Careers | Internships - FNCU | Fox Around the World | RSS Feeds  
Advertise With Us | Terms of Use | Privacy Policy | Contact Us | Email Newsroom | Topics

This material may not be published, broadcast, rewritten, or redistributed. © 2011 FOX News Network, LLC. All rights reserved. All market data delayed 20 minutes.