withersworldwide

Window of opportunity to save on taxes by implementing business succession planning

04 APRIL 2011

Edward A. Renn
PARTNER | US

CATEGORY:
ARTICLE

The 2010 Tax Relief Act provides family business owners a limited window of opportunity to implement family business succession or exit planning at a minimal tax cost. Under the new law, the gift, estate and generation-skipping transfer tax exemption is increased to $5 million per taxpayer ($10 million per married couple) and the tax rate applicable to transfers in excess of the exemption is 35%. Significantly higher exemptions and lower tax rates, combined with relatively low asset values and historically low interest rates, create unprecedented wealth planning opportunities. These opportunities, however, are fleeting as the benefits of the new law are scheduled to sunset on December 31, 2012 and certain currently available planning techniques may soon be legislated out of existence. Family business owners should view the benefits of the 2010 Tax Relief Act as something to "use or lose."

Family Business Succession Planning

The failure to plan and manage succession well is the greatest threat to the survival of the family-owned enterprise. We work closely with family business clients to develop and implement a customized Succession Plan utilizing wealth planning strategies designed to take full advantage of benefits of the 2010 Tax Relief Act. Each Succession Plan is also carefully coordinated with the company's business and strategic plan, as well as the family's estate plan.

The key elements of a considered Succession Plan include:

- **Ownership Structure** – A family business should implement an ownership structure that allows the family to maintain control of the business through generational transition. Developed as part of a proper Succession Plan, the appropriate ownership structure may include direct share ownership by family members or indirect share ownership through trusts or other entities. Depending on the family's objectives, it may also be appropriate to recapitalize the company to provide for voting and non-voting stock, effectively separating the economic and voting rights associated with share ownership.
- **Regulation of Share Ownership** – The Succession Plan of an enduring family business regulates share ownership issues through carefully developed shareholders' agreements. These agreements typically include restrictions on the transfer of shares both within and outside of the family, voting agreements and a mechanism (including valuation and payout policies) for redemption or crosspurchase of shares from family members with cash needs or who die, become disabled or no longer Window of Opportunity to Save on Taxes by Implementing Business Succession Planning wish to own an interest in the family business. Agreements among family members are subject to special IRS valuation rules requiring careful attention, as failure to comply may result in the agreement being ignored for gift and estate tax purposes.
- **Corporate Governance** – Corporate governance, including a strong board of directors, is an essential part of the development and implementation of a Succession Plan and is crucial to the success and durability of a family-owned business. In appropriate circumstances, some family businesses find that one or more independent directors with broad business experience offer objectivity, important connections and complementary skills to the board.
- **Family Governance** – Every member of the business owning family is a stakeholder (whether or not a shareholder, board member, manager or employee) and must have a clear understanding of his or her rights and responsibilities. Developing a framework through which each constituency is empowered to assert its legitimate interests promotes and maintains harmonious family relations and enables each generation to focus on its shared responsibility to ensure a stronger and more admired company in each succeeding generation. To achieve these objectives, the Succession Plan often involves the formation of a family council to keep informed about the business and advise the board and management on fundamental matters relating to the business.

Family Business Exit Planning

As the economy continues to improve, family business owners who are considering a sale of the business or who want to pass the business on to the next generation should seize this opportunity to achieve significant tax benefits and maximize the family's after-tax return through exit planning. We advise owners to transfer interests in the family business to the next generation(s) well in advance of a potential sale of the business utilizing wealth planning strategies designed to take full advantage of the 2010 Tax Relief Act.

We also advise family business owners in connection with the subsequent disposition of the family business. Our significant experience in advising on transactions involving family-owned businesses helps us to structure, negotiate and document the transaction to meet the family's needs and objectives, and to
minimize taxes.

Withers Bergman has a dedicated team of professionals focused on the needs of family owned businesses, both domestic and international. Our multi-disciplinary approach to advising family businesses and their owners combines our knowledge and experience in areas such as corporate structuring, family and business governance, tax and wealth planning, mergers and acquisitions, corporate finance and employment.

Authors

Edward A. Renn

PARTNER | NEW YORK, NEW HAVEN, GREENWICH

Private client and tax

+1 203 974 0343

edward.renn@withersworldwide.com