

ESTATE PLANNING**THE AMERICAN TAXPAYER RELIEF ACT OF 2012 STABILIZES FEDERAL ESTATE, GIFT AND GENERATION-SKIPPING TRANSFER TAX LAW**

by *Judy Fertel Layne and Henry M. Grix*

The American Taxpayer Relief Act of 2012 (the “2012 Act”)—actually passed by Congress on January 1, 2013—brings welcome stability to federal estate, gift and generation-skipping transfer tax law which has been in near-constant flux since 2001. The 2012 Act provides an inflation-adjusted estate, gift and generation-skipping transfer tax exemption of \$5 million for each individual. This means that a married couple may shelter \$10 million, as adjusted for inflation after 2011, from estate, gift and generation-skipping transfer taxes. Although the 2013 inflation adjustment has not been officially announced, it is expected to be \$5.25 million. For transfers in excess of the exempt amount, a flat 40% tax rate applies. The 2012 Act preserves the exemption applicable in 2011 and 2012, but increases the tax rate from 35% applicable during those years.

If Congress had not acted, the \$5.12 million exemption from estate and gift tax applicable in 2012 would have “snapped back” to \$1 million on January 1, 2013, and the top marginal rate for transfers of \$3 million or more would have been 55%. Furthermore, the generation-skipping transfer tax exemption—unlike the estate and gift tax exemption—would have been an inflation-adjusted figure projected at about \$1.3 million.

Portability Is Made Permanent

The 2012 Act also preserves “portability,” another taxpayer friendly feature that was introduced into law in 2010 but that was due to expire after 2012 if Congress had not acted. Portability allows a surviving spouse to use, during life or at death, his or her deceased spouse’s unused estate and gift tax exemption. This concept may simplify estate planning for many married couples. For example, husbands and wives may no longer be required to sever joint assets or to establish separate trusts in order to secure full use of each spouse’s exemption. It should be noted, however, that portability does not apply for generation-skipping transfer tax purposes. Furthermore, current IRS procedures require that an estate tax return be filed when the first spouse dies in order to preserve his or her unused exemption for later use by the surviving spouse.

Some Estate Planning Implications of the 2012 Act

Although laws always are subject to change, the absence of “sunset” provisions in the 2012 Act affords clients and practitioners greater certainty about estate planning than has been possible for the past decade.

Estate planning documents often include tax-driven formula provisions dividing a client’s assets between spouse and descendants based upon the applicable estate tax exemption. Given the wide swings in the exemption amount in recent years, clients should review their current estate plans to be sure that the current exemption amount will be distributed among their loved ones as intended.

Until the exemption amount is exceeded, no estate, gift or generation-skipping transfer tax is payable. The permanent extension of the

unified, inflation-adjusted \$5 million exemption affords individuals and couples in a position to do so, the opportunity to make significant lifetime gifts that will appreciate in the hands of future generations without incurring immediate gift tax.

IRA Charitable Rollover Retroactively Restored

The 2012 Act also includes a two-year extension of the “on-again, off-again” IRA charitable rollover provision that lapsed on December 31, 2011. Significantly, this extension allows eligible gifts made during January 2013 to be treated as 2012 donations. The retroactive extension also permits IRA distributions made to the taxpayer in December 2012 to be transferred to charity in January 2013 and eligible for the rollover. Thus, taxpayers have the month of January to take advantage of these opportunities for 2012 income tax purposes. Taxpayers should be mindful that the charitable rollover extension is scheduled to expire again on December 31, 2013.

Increase to Annual Exclusion

2013 brings other good news for taxpayers unrelated to the 2012 Act in the form of an increase to the annual exclusion from gift tax. This year, an individual can gift up to \$14,000 to an unlimited number of recipients without incurring any gift tax or using up any exemption from estate and gift tax. A married couple, together, can gift \$28,000 to an unlimited number of recipients.

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