

Taking Advantage of the Current Gift and Estate Tax Exemption

The current \$5,120,000 gift and estate tax exemption is set to expire on December 31, 2012. With time running out as the year winds down, Tarter Krinsky & Drogin has counseled clients about making gifts of securities portfolios, business interests and art work to their descendants or to trusts for their descendants' benefit before year-end.

As a reminder, at the end of 2010 the United States Congress passed legislation that created an approximate \$5,000,000 gift and estate tax exemption for years 2011 and 2012. However, this law will sunset on the last day of 2012, and in 2013 the exemption will revert back to \$1,000,000. It is unlikely Congress will act before then to increase the exemption for 2013 and beyond.

There are many who believe Congress will eventually act in 2013, but that any increase will be somewhere near or below \$3,500,000. Even if one believes this scenario, then there is certainly still motivation for persons with means to make significant gifts before year-end. Any such gift will remove the asset from one's estate, leaving all future appreciation and income on that asset to a younger generation.

Some ways to use the expiring 2012 gift tax exemption are:

- **Outright gifts** to descendants and other beneficiaries.
- **Gifts in trust** for descendants and other beneficiaries. The trust can have "Grantor Trust" status for the grantor, which means all income, and capital gains will be attributable to and paid by the Grantor during his or her life time. This way, additional tax-free gifts will be achieved without the need to use any additional exemption for those payments.
- **Outright gift to a non-citizen spouse.** This may be a good year to make a full or partial gift of a residence (primary or secondary) to a non-citizen resident spouse. Many US citizens with non-citizen spouses do not realize that the purchase of a jointly owned home with the US citizen spouse's assets may be a taxable event for gift tax purposes with a tax due on transfer. This year such a transfer to a non-citizen spouse will not trigger a gift tax if total lifetime gifts made remain below the limit.
- **Transfer the entire \$5,000,000 exemption amount into a trust for the benefit of your spouse.** Some clients are reluctant to make transfers to children now. By transferring to a trust for the benefit of a spouse, the beneficiary spouse can receive all of the income during his or her lifetime and a non-interested trustee can draw on the principal of the trust for the spouse if needed. The assets will not be included in the spouse's estate on death and with proper planning can pass to children and grandchildren without transfer taxes.
- **Transfer life insurance policies** with cash values to trusts. In the past, some clients were reluctant to make such transfers believing that they may have "wasted" large portions of their gift and estate tax exemptions if the policies were not kept in force until death. This is a good time to analyze whether this is a good use of the exemption.
- **Funding existing Life Insurance Trusts.** Clients with existing life insurance trusts may want to

make large contributions to the trusts in 2012, thereby eliminating the need to make annual gifts, which require the annual withdrawal notices (“Crummey Letters”).

- **Gifts to same sex spouses or partners.** Right now there is no federal tax recognition of same sex spouses, so assets that pass to the spouse on death do not enjoy the marital deduction. Transfers of up to \$5,120,000 can be made before December 31. This opportunity may disappear by year-end, depriving such couples of the ability to pass assets to each other on death without a large estate tax.

If you are thinking about making gifts, don't wait until December 1, 2012. Appraisals may need to be obtained, documents to effectuate transfers prepared and formal transfer papers filed in a county clerk's office. This must all be in place well before your children text you a “Happy New YearJ” from their smart phones. **Don't waste this opportunity!**

Discussing your options with Tarter Krinsky & Drogin's Trusts and Estates attorneys before gifting can help you make the best decisions. Please do not hesitate to call us with any questions you may have.

Andrew R. Ben-Ami
Partner
212.216.8025
abenami@tarterkrinsky.com

Stephen L. Ferszt
Partner
212.216.1101
sferszt@tarterkrinsky.com

Lester A. Greenberg
Counsel
212.216.8033
lgreenberg@tarterkrinsky.com

Frank H. Klein
Counsel
212.216.1105
fklein@tarterkrinsky.com

Joann T. Palumbo
Counsel
212.216.8015
jpalumbo@tarterkrinsky.com

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TARTER
KRINSKY &
DROGIN^{LLP}
ATTORNEYS AT LAW

New York Office: 1350 Broadway, New York, NY 10018 • Tel: 212. 216. 8000 • Fax: 212. 216. 8001
New Jersey Office: 475 Wall Street, Princeton, NJ 08540 • Tel: 609. 683. 9494 • Fax: 609. 683. 7490
www.tarterkrinsky.com