



## Flood, Sheehan & Tobin, PLLC

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Dear Valued Client:

The beginning of 2013 brought some clarity to the federal gift, estate, and generation-skipping transfer tax laws (sometimes collectively referred to as “transfer taxes”) that we wanted to make you aware of as you consider or reconsider your estate planning goals and objectives.

A. Prior to January 1, 2013

You will recall that in 2011 we shared with you some of the key provisions of the Tax Relief, Unemployment Insurance, Reauthorization and Job Creation Act of 2010 (the “2010 Tax Act”) that affected federal transfer tax laws, namely:

- The federal estate and generation-skipping transfer (“GST”) taxes were realigned with the federal gift tax in 2011, so that transfers of less than \$5 million dollars (indexed for inflation beginning in 2012), were exempt from gift, estate, and/or GST tax whether made during life or at death. Transfers in excess of the exemption amount were subject to tax at a maximum rate of 35%. The indexed exemption amount last year of \$5,120,000 permitted transfers up to that amount to escape gift, estate, and GST tax. For capital gains tax purposes, a lifetime gift in the hands of the donee “carried” with it the donor’s cost basis in the property, while transfers at death were deemed to have a “stepped up” cost basis in the hands of the estate or beneficiary equal to the fair market value of the property on the decedent’s date of death.
- An individual’s exemption from gift and estate tax became “portable” in certain circumstances. A surviving spouse for the first time was permitted to use any unused portion of their predeceased spouse’s exemption, in addition to his or her own \$5 million exemption, to shelter excess transfers from tax during life or at death. Portability, however, was not made applicable for the exemption from GST tax.
- Finally, these transfer tax changes were scheduled to “sunset” on December 31, 2012, at which point, absent further legislation, the gift, estate and GST tax exemptions were to be reduced to \$1 million, with higher tax rates and no portability of exemption between spouses.

B. As of January 1, 2013

To alleviate the dreaded consequences of the “fiscal cliff” facing taxpayers as of the first of the year, the American Taxpayer Relief Act (“ATRA”) was signed into law on January 2, 2013. ATRA specifically prevented the law pertaining to transfer taxes from “sunsetting.” Instead, ATRA made permanent for 2013 and beyond the \$5 million dollar exemption (subject to indexing for inflation starting in 2012). It also preserved the concept of portability. The only change to the transfer tax laws was an increase in the rate of the transfer tax in excess of the exemption amount from 35% to 40%.

In 2012 there were no changes to the New Hampshire state law relating to gift and estate taxes. As such there continues to be no gift, estate, or inheritance tax in New Hampshire.

C. Some Preliminary Observations

Retention of the federal gift, estate, and GST tax exemptions and portability provides a welcome certainty that we have not had for many years. There is still talk in Congress of the desire to undertake long-term tax reform, but it appears, at least for the moment, that gift, estate, and GST taxes are stable. For the first time since 2001, the transfer tax laws do not have a termination deadline. The exemption amount for 2013, after indexing for inflation, is \$5,250,000.

Portability, while preserved, is still not automatic. In order to take advantage of this option, the executor of the estate of the first spouse to die must file a federal estate tax return and make an election on that return to permit portability, *even if an estate tax return would not otherwise be required*. There will be some time delays, expenses, and monitoring necessary to secure portability, and, therefore, we continue to recommend that clients who may have estate tax issues at death incorporate traditional tax planning provisions in their documents, rather than simply relying on portability.

Traditional tax planning methods, which permit both spouses to use their federal estate tax exemptions in many instances, will still offer advantages over portability. The opportunity to shelter appreciation in the value of the first spouse's assets between the deaths of the first spouse and second spouse, better protection of the inheritance from the surviving spouse's or other family members' creditors, the ability to control the ultimate disposition of one's assets, the opportunity to take advantage of one's GST tax exemption in order to transfer assets to grandchildren or further lineal descendants, and minimizing any state (e.g., Massachusetts, Vermont, or Maine) imposed estate taxes (for which there is presently no portability of exemption), are a few of the advantages still associated with traditional tax planning.

Therefore, it is wise to assess how best to organize your estate(s) to accomplish your dispositive goals, minimize or avoid all transfer taxes, minimize or avoid probate, *and* do so in the most cost-effective and efficient manner. For some of you, very simple wills and/or revocable trusts may be appropriate, while for others, asset allocation, traditional tax planning, and even irrevocable trust planning will still be prudent.

Finally, gift and GST tax exemptions continue to make lifetime gifts an attractive option for transfers to children and grandchildren, particularly if one desires to make a gift in a given year that exceeds or does not qualify for the current \$14,000 annual "present interest" exclusion.

If you would like to discuss how ATRA may impact your estate plan, or if your plan would simply benefit from being reviewed, please do not hesitate to contact us.

Although we anticipate continuing to provide information to our clients by letter regarding broad changes to the law, if you would also like to receive occasional e-mails from us about trust and estate matters, please visit our website, [www.fstlaw.com](http://www.fstlaw.com), and click the button labeled "Register for Email Updates."

Sincerely,

Flood, Sheehan & Tobin, PLLC