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High Net Worth Family TAX REPORT

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$5,120,000 Lifetime Gift Tax Exemption Expiring Soon

We recently circulated this article as a Special Client Alert. The resetting of the lifetime gift-tax exemption back to $1 million from $5,120,000 scheduled to take place on Jan. 1, 2013, is so important, however, that we are republishing our article to ensure that as many of our readers as possible have the opportunity to review it.

History. To understand the impending deadline, a little history is in order. Former President George W. Bush signed a number of tax cuts into law in 2001 and 2003. The "Bush Tax Cuts" would have expired on January 1, 2011, but Congress and President Barack Obama, after a contentious debate at the end of 2010, extended the Bush Tax Cuts until January 1, 2013. The extensions included a new element, an unexpected increase in the estate tax, gift tax, and generation-skipping transfer tax exemptions to $5 million in 2011 and $5,120,000 in 2012.

Effect of Increase. Because of this increase, an estate having a net value of $5,120,000 or less is completely exempt from the estate tax (this tax-free result applies to the estate of a decedent who dies in 2012 and who did not make significant lifetime gifts). In addition, the increase in exemption allows individuals (regardless of the size of their estate) to make gifts during their lifetime of up to $5,120,000 before December 31, 2012, without incurring a gift tax. This tax exemption for lifetime gifts is in addition to, and does not include, smaller annual gifts of up to $13,000 or certain direct payments to schools or healthcare providers, exempted under a separate exemption. Finally, the increased generation-skipping transfer tax exemption permits these gifts to benefit grandchildren and more remote descendants.

The increased exemptions apply only until December 31, 2012. Unless Congress and the President take action, the extensions expire and, as of January 1, 2013, the new exemptions and rates are as follows:

- The estate and gift tax gift tax exemptions fall to $1 million;

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- The generation-skipping transfer tax exemption falls to $1 million adjusted for inflation from 2001, currently estimated to be approximately $1,340,000; and
- The tax rate on transfers above the exemptions increases from 35 percent to 55 percent.
- In the simplest terms, an individual can make a large gift in 2012 without owing any gift tax, **while the same gift in 2013 would result in a large gift tax liability.**
- There are two consequences and benefits to the current situation:
  - **First, a gift in 2012 represents what could be a one-time opportunity to transfer wealth to children or other beneficiaries without paying a gift tax and to accomplish multi-generational planning without paying generation-skipping transfer tax.**
  - **Second, these gifts can save estate taxes by removing the post-gift appreciation on and income from the gifted asset from an estate.**

<u>No One Knows What Will Happen.</u> Governmental gridlock in 2010 permitted an unexpected one year repeal of the estate tax, and the government lost billions of dollars in revenue.

No one predicted what happened in 2010, and no one can predict what will happen this year. If no legislative actions occur relating to estate, gift, and generation-skipping transfer taxes, the scheduled changes will take effect on January 1, 2013, and the opportunity to make large tax-free gifts may not occur again.

<u>Some Cautions.</u> Appreciated property transferred by gift does not receive an income tax basis increase to fair market value, as does property that is included in a decedent's estate at death. Part of the estate tax savings will eventually be "paid back" through higher income taxes when the donee sells the property that was the subject of the gift or through forgone depreciation deductions. The capital gains tax rate, however, has almost always been lower than the estate tax rate, so a significant savings is still likely. Also, gifts of cash do not present this basis issue.

A second concern is the possibility of "clawback" (*i.e.*, an added estate tax that takes back some of the tax-free benefits of 2012 gifts). The gift tax and estate tax work on a unified basis. On a decedent's estate tax return, the taxable gifts he made during his lifetime are added at their date-of-gift value to the other assets of his estate. The estate tax is computed on this combined amount. The estate is then allowed a credit against the estate tax for gift tax that the decedent paid and the credit equivalent amount of his lifetime exemption.

If a person makes a gift in 2012 to use his $5,120,000 lifetime exemption, but in the later year of his death the exemption is only $1 million, some uncertainty exists about what credit equivalent amount will be subtracted to determine his estate's tax liability. In order for the current $5,120,000 exemption to work properly, the estate would have to be allowed a credit in the amount of the tax payable on $5,120,000 in the year of the decedent's death. Some concern exists, however, that the credit may be limited to the estate tax payable on $1 million or other lifetime exemption amount in effect in the year of the decedent's death. As a result, a significant part of the 2012 gift ultimately would be subjected to estate tax. This issue has never arisen before because, until now, the amount of the lifetime exemption has never been reduced from its previous amount.

Nobody knows today how this computation will work and the current law clearly was passed without any consideration of a possible clawback of the tax benefit of gifts using the current gift tax exemption. Congress is aware of this issue. H.R. 3467, the Sensible Estate Tax Act of 2011, introduced last November, contains language to prevent a clawback. Even if a clawback were to occur, however, any income earned on and any appreciation in the value of the gifted property between the date of the gift and date of the donor's death would still escape estate taxes.

<u>Conclusion.</u> Without a crystal ball, all we can know is that those who are able to do so should consider 2012 gifts. As with all estate planning transactions, you should discuss these matters with your professional advisors, and determine whether these gifts are appropriate in your financial and family circumstances. Because planning and implementing large gifts take time, however, you should start now to avoid hasty, last-minute decisions that may prove to be counterproductive.

Court Approves Defined Value Clause for Gift Where Excess Value Retained by Donor

The U.S. Tax Court has held for the first time in *Wandry v. Commissioner* (Tax Court, March 26, 2012), that a donor may make a non-cash gift of a stipulated dollar amount and retain any portion of the transferred property value in excess of the stated dollar amount the donor gave away. Gifts of property other than cash have been problematic because the donor cannot be sure how large a gift he has made until the Internal Revenue Service audits his gift tax return and either accepts the value claimed, or establishes a higher value (and resulting gift tax liability).

A donor may wish to give away units in a family limited liability company that are worth $5,120,000 in order to use his lifetime gift tax exemption in 2012 before the exemption amount reverts to $1 million next year. The donor would normally get an appraisal of the units and make a gift of the number of units that are worth $5,120,000 based on that appraisal. He would then have to wait for the IRS to audit his gift tax return. If the IRS established a higher value upon audit, the donor would owe gift tax on the value in excess of $5,120,000 – an unexpected (and unpleasant) consequence. As a result, the donor may act too conservatively and gift fewer units to provide a gift-tax cushion.

A number of years ago, a donor had the idea to address this problem by giving away property but providing, as a condition of the gift, that any of the transferred property that gave rise to a gift tax must be returned to the donor. The donor essentially attempted to describe the gift as a fixed dollar amount.

In the *Procter* case, the U.S. Court of Appeals for the 4th Circuit in 1944 held that a gift structured in this manner violated public policy for several reasons, including that it would effectively prevent the IRS from challenging the value of the gift. Other courts followed this reasoning in the *Ward* and *Harwood* cases. In Harwood the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the U.S. Tax Court , although without the issuance of an opinion. (Case law from the Ninth Circuit governs cases involving taxpayers who live in California).

In another series of cases (*McCord*, *Estate of Christiansen*, *Estate of Petter*), taxpayers prevailed, because instead of providing that the donor retained any excess value amount, they gave any excess value to charity. The Ninth Circuit approved this approach in the *Petter* case. For some donors, however, including a charity in what was intended to be a family gift arrangement presented unacceptable complications.

Now, in the *Wandry* case, the U.S. Tax Court has decided that the gift of property equal to a fixed-dollar amount does not violate any public policy and therefore is permitted. The court noted that the role of the IRS is to enforce the tax laws, not merely to maximize tax receipts. The court distinguished the earlier cases such as *Procter* on the basis that in those cases, the gift was worded in manner such that the donor "took back" any value determined to be in excess of the value he intended to give away. The donor structured the gift in *Wandry* differently, simply giving away a number of units the value of which was equal to a fixed dollar amount. The gift was simply described by dollar value rather than by number of units, and no condition subsequent that could cause a part of the gift to revert to the donor. The court distinguished a "formula value" clause as different from a "savings clause."

The IRS may still decide to appeal the *Wandry* decision to the U.S. Court of Appeals for the 10th Circuit, (the taxpayers lived in Colorado). While the Tenth Circuit previously has not addressed this exact issue, it did approve a similar clause in connection with a sale of property in the *King* case.

If you are considering making a significant gift in 2012 to use your lifetime exemption and do not wish to transfer any excess value amount to a charity, you may want to use the *Wandry* formula approach. Gifts using this kind of formula value clause normally should be made to a grantor trust so the donor continues to report any income from the transferred property on his income tax returns. This will avoid the need to file amended returns if the number of units the donor originally believed equaled the gifted value subsequently must be changed because the value of the units is changed upon audit.

More Family Limited Partnerships in Court

Several recent cases have addressed tax issues related to family limited partnerships or limited liability companies. Using these popular forms of entities, if properly structured, assets can be transferred to a partnership or limited liability company and interests in the entity can be given away or sold to other family members at a significant discount from the underlying asset value because of the minority, illiquid, and non-controlling nature of the interest transferred.

In *Estate of Beatrice Kelly* (Tax Court, March 19, 2012), the taxpayer created about as good a factual record as seems possible. Following her husband's death, Mrs. Kelly was diagnosed with Alzheimer's disease and needed help managing her assets (she owned 27 parcels of real estate, two rock quarries, and a post office). Her children petitioned the court to become her legal guardians. They also learned that her will did not divide her estate equally among them and entered into an agreement to divide her estate equally, excluding specific gifts not involving any of the four of them. For the children as guardians, managing the properties was difficult – they had to petition the court for approval of virtually anything they wanted to do. Holding the properties, especially the rock quarries, in Mrs. Kelly's name presented liability concerns as well.

To address these problems, Mrs. Kelly and three of her four children (the fourth was largely incapacitated and not involved in the decisions) developed a plan to create a management corporation, KWC Management (KWC), and a limited partnership for each of three of the children. Mrs. Kelly funded each partnership with an equal amount of assets. A fourth limited partnership was created to hold the interests in the quarries. KWC was the general partner of and held a 1 percent interest in each of the partnerships. Mrs. Kelly then made gifts of limited partnership interests in the various partnerships to the children. She retained assets of $1.1 million, and no distributions from the partnerships were used to pay her living expenses. Each of the three children worked for KWC, the general partner entity, in connection with the management of the partnerships' assets.

When Mrs. Kelly died, she still owned some limited partnership interests and also owned 100 percent of the stock of the general partner, KWC. The IRS took the position that the assets of the partnerships should all be included in Mrs. Kelly's estate for estate tax purposes under IRC Section 2036. Property transferred by a decedent during life is brought back into the decedent's estate under IRC Section 2036 if the decedent retains the possession or enjoyment of, or the right to receive the income from the transferred property during his lifetime, or retains the right to designate the persons who possess or enjoy the property or the income therefrom. An exception exists for transfers that are bona fide sales for adequate consideration.

Courts have determined that, in order for transfers to limited partnerships to qualify for the bona fide sale exception, the decedent must have made the transfer in question for significant non-tax reasons and received a partnership interest that is proportional to the assets transferred. In this case, the taxpayer prevailed on all grounds. The court found that the transfer was motivated by non-tax reasons, including insuring that Mrs. Kelly's assets were shared equally by her children, providing a management structure for the assets in light of her incapacity and providing some liability insulation from the risks of operating the quarries.

The court also found that the decedent did not retain the enjoyment or income from the assets. The IRS argued that there was an implied agreement among the parties that the decedent would continue to receive the income from the partnerships. Even though the decedent continued to own 100 percent of the entity that was the general partner, the court found that her ability to receive management fees through that entity was limited by the terms of the partnership agreement and the fiduciary duty provisions of the applicable state law.

The facts of this case provide an excellent template for the creation of a family partnership. The partnerships were formed well in advance of the decedent's death; no "death bed transfers" occurred. The limited partners, as employees of the corporate general partner, were also actively involved in the management of the partnerships, a condition made necessary by the incapacity of the decedent. Of course, while this factor will not be present in all cases, involving the limited partners in the business of the partnership to the extent possible is advisable.

The extensive litigation of these issues also indicates some very clear trends – including that taxpayers almost always win when the factual record is good, and they almost always lose when it is not.

In another case, *Estate of Clyde Turner, Sr.* (Tax Court, August 30, 2011), the U.S. Tax Court addressed a new aspect of family limited partnership cases. The court had held in a prior case that assets the decedent transferred to a family limited partnership would be included in his estate for estate tax purposes because he had retained a prohibited interest in those assets. After losing that case, the decedent's executors decided that since the estate had been increased by the amount of assets transferred to the partnership, the marital deduction available to the estate should also be increased. The executors' reasoned that the decedent's will used a pecuniary formula marital deduction, and under the formula the decedent's wife was entitled to receive an amount that would reduce the tax on the decedent's estate to zero. Since the estate was now larger and subject to tax, the executors argued that the marital deduction should be increased by the amount necessary to reduce the tax to zero.

The problem the court had with this argument was that, in order to receive a marital deduction with respect to a particular asset, the asset must be transferred to the decedent's spouse and that had not occurred. After transferring the assets to the partnership, the decedent had transferred partnership interests to his children – they did not pass to his wife. The decedent's will did not control the disposition of these interests because he gave them away before he died. Since the assets brought back into his estate by IRC Section 2036 did not pass to his wife, the court did not permit a marital deduction with respect to those assets.

Finally, in *Estate of Joanne Harrison Stone* (Tax Court, February 22, 2012), the court held that the transfer of real property to a family limited partnership qualified for the bona fide sale exception to IRC Section 2036 upon the death of the transferors. The principal non-tax reason for the transfer was to insure that the property would not be subject to partition actions, as would be the case if the property was transferred to the decedent's children in undivided interests upon the death of the decedent. This case was unusual in that the decedent did not claim any valuation discounts in connection with her gift of limited partnership interests to her children and other family members. The court pointed to the lack of a claimed discount as a factor in reaching the conclusion that the decedent had significant non-tax reasons for transferring assets to the partnership. With no discount taken on the gifts, the only tax benefit the decedent obtained from the partnership was that any appreciation in the value of the partnership assets between the date of the gifts and the date of her death was not subject to estate tax in her estate. This would have also been the case if she had simply given the real property directly to her children.

Internal Revenue Service Releases Form 8938, Statement of Specified Foreign Financial Assets Just in Time for 2012 Filing Season

We previously circulated a Special Client Alert to make our readers aware of the possible need to file the new Form 8938 with their Federal income tax returns beginning with the 2011 tax year. You must file the form if you own certain "specified foreign financial assets" – a broader reporting requirement than the one requires the filing of Form TD F 90-22.1 (FBAR) if you have foreign bank accounts. Form 8938 does not replace the FBAR form, which you must still file by June 30 each year if you have foreign bank accounts. We are including this reminder of the new requirements because many taxpayers obtained extensions of time to file their 2011 Federal income tax returns. Obtaining an extension for filing your Federal income tax return automatically extends the due date for filing the Form 8938. The Special Client Alert is available at www.loeb.com/internalrevenueservicereleasesform8938.

U.S. Tax Court Addresses Residence Interest Deduction for Unmarried Couples

In *Sophy v. Commissioner* (Tax Court, March 5, 2012), the U.S. Tax Court addressed the application of the $1 million limit for deducting interest expense on a home mortgage. Although personal interest is not generally deductible, interest on up to $1 million of debt can be deducted if the proceeds of the debt were used to purchase, construct, or substantially improve the taxpayer's primary residence and one other dwelling used as a residence by the taxpayer. Interest on

an additional $100,000 of debt can be deducted as "home equity" indebtedness if the loan is secured by the residence.

If unmarried taxpayers purchase a residence as co-owners, are they limited to interest on $1.1 million of debt, or do they each get that amount for a total of $2.2 million? The IRS has always taken the position that, regardless of the number of owners, the limitations are determined on a per-residence basis, so that co-owners would only be able to deduct interest on total debt of $1.1 million – $550,000 each. IRS first made its position on this issue known in 2009 when it issued *Chief Counsel Advice 200911007*. In the *Sophy* case, the U.S. Tax Court agreed with the IRS and limited each individual taxpayer to a deduction of interest on debt of $550,000.

IRS Moves Against Incomplete Gift Strategy

For a long time, a popular tax-planning strategy has involved the use of an "incomplete gift." Treas. Reg. Section 25.2511-2(b) provides that a gift may be incomplete if the donor retains any power over its disposition. In order to take advantage of this regulation, a donor would transfer property to an irrevocable trust but retain a limited power of appointment exercisable in his will to name other beneficiaries of the trust. Properly structured, these trusts avoided treatment as grantor trusts and were instead treated as separate taxpayers.

One popular use of this approach was to create a trust in a state that did not impose income tax on trusts, such as Delaware. If appreciated assets were transferred to that trust, the taxpayer may have been able to avoid paying any state income tax upon the eventual sale of those assets – although the assets of the trust would still be included in the donor's gross estate for estate tax purposes because the donor retained the ability to control the disposition of these assets. In addition, the distribution of any assets to the beneficiaries of the trust during the lifetime of the donor would result in a completed gift. This kind of trust provided only a state income tax advantage.

In *ILM 201208026* (February 24, 2012), the IRS challenged this approach in connection with a trust in which the donor retained no right other than a testamentary limited power of appointment (*i.e.*, the donor was not within the class of discretionary beneficiaries of trust distributions). The IRS asserted that because the disposition of the assets could only be altered at the death of the donor, only the value of the remainder interest in the assets constitutes an incomplete gift. The value of the life or term interest is fixed and the donor cannot change it, so it is a completed gift in the year of the transfer to the trust. The respective values of the life and remainder interests are normally determined actuarially and depend upon the donor's age at the time of the gift. In this case, however, the valuation provisions of IRC Section 2702 applied, and since the interest was not a qualified interest, it's value was zero. The entire transfer was a completed gift.

Since a large number of these trusts have been created, this issue will certainly reach the courts. Many advisors believe that the IRS's position is wrong and courts will eventually reject it.

S Corporation Found to Have Underpaid Employment Taxes by Paying Too Little Wages

Many taxpayers have tried to limit their exposure to payroll taxes by creating an S corporation that pays them income attributable to their personal services. The taxpayer causes the corporation to pay him only a very small salary that is subject to payroll taxes. The balance of the earnings are passed through under Subchapter S as dividends, which are not subject to payroll or self-employment taxes. The S corporation does not depend on paying deductible compensation to reduce its own taxable income because it's generally not subject to federal income tax.

The IRS became aware of this strategy a number of years ago and announced that it would impose additional payroll taxes if an S corporation paid its shareholder-employees an unreasonably low salary. In *Watson P.C. v. United States* (February 21, 2012), the U.S. Court of Appeals for the Eighth Circuit affirmed a district court finding that the salary paid by the corporation was too low because it did not adequately reflect the value of the services performed by the shareholder-employee. *Watson* is not the first of these cases and likely will not be the last. Taxpayers have been warned that the IRS is aware of this strategy and will not permit its use. In addition, in 2010, the House of Representatives passed legislation that would have stopped this

technique, but the Senate failed to pass the bill. Congress may eventually pass legislation prohibiting this practice if these cases continue in the courts.

Failure of Donee to Include Required Information in Gift Acknowledgement Letter Results in Loss of Charitable Deduction

A recent U.S. Tax Court case serves as a reminder of the importance of obtaining a proper acknowledgement letter from any charity to which you make a gift. For any charitable gift of more than $250, the taxpayer must receive a contemporaneous written acknowledgement of the gift from the charity. Among other things, the acknowledgement must state whether any goods or services were provided to the taxpayer in connection with the gift, and if they were, the value of these goods or services.

In *Marshall Cohan v. Commissioner* (Tax Court, January 10, 2012), a limited liability company of which the taxpayers were members transferred certain rights of first refusal over property to a charitable organization in a bargain-sale transaction. The acknowledgement from the charity listed some – but not all – of the consideration provided to the donor. The IRS argued, and the court agreed, that because the acknowledgement failed to list all of the consideration the donor received, the requirements to receive a deduction had not been satisfied. The court disallowed the entire deduction.

Both the IRS and courts strictly enforce the requirements for the written acknowledgement. You must secure a conforming acknowledgement for all charitable gifts over $250. In addition, if you make expenditures on behalf of a charity (such as hosting an event at your home), you need the charity to acknowledge those expenditures.

Ruling Reminds Us that Not All Litigation Recoveries Are Taxable

The IRS recently issued a private letter ruling that reminds us that not all amounts recovered in litigation are subject to income tax. In *PLR 201152010* (December 30, 2011), the taxpayer had attempted to purchase assets from a unit investment trust. Another party interfered with the transaction and, as a result of that interference, the unit holders of the trust did not approve the sale. In order to purchase the assets, the taxpayer had to agree to pay a higher purchase price. After completing the purchase, the taxpayer sued the interfering party in the original transaction, and the court found in favor of the taxpayer, awarding damages in the amount of the additional price the taxpayer had to pay as a result of the interference.

The IRS ruled that this recovery represented a nontaxable return of capital that reduced the income tax cost basis of the purchased assets. The income tax status of litigation recoveries depends on the nature of the taxpayer's claims in the litigation. In this case, the taxpayer claimed it had to pay more because of the defendant's interference, and the IRS concluded that the recovery was really just an adjustment of the purchase price paid for the assets and should not be treated as taxable income.

This ruling highlights a very important tax planning point related to litigation: If you are a plaintiff, the nature of the causes of action stated in your complaint will govern the income tax consequences of any judgment or settlement you receive. As was the case here, not all claims give rise to recoveries that are taxable. For individuals, the Internal Revenue Code provides that the plaintiff's legal fees related to a variety of claims also are deductible "above the line" in computing adjusted gross income. Those fees would be deductible without regard to the alternative minimum tax, the itemized deduction phase out, or the 2 percent floor on miscellaneous itemized deductions. The opportune time to do your tax planning is *before* you file your complaint.

Power to Substitute Life Insurance Policy in Trust Does Not Cause Trust Assets to be Included in Trust Grantor's Estate

The proceeds of life insurance may be included in the gross estate of the insured for estate tax purposes under IRC Section 2042 if the insured's estate is the named beneficiary of the policy or the insured has any incidents of ownership with respect to the policy. In *Rev. Rul. 2011-28* (December 1, 2011), a taxpayer set up a trust and the trust became the owner of a policy of insurance on the life of the taxpayer. The trust provided that the taxpayer could cause the trust to transfer the policy to the taxpayer, provided that the taxpayer transferred to the trust other assets of equivalent value. The IRS ruled that this power did not constitute a prohibited incident of ownership on the part of taxpayer.

The IRS has previously ruled that the ability to substitute trust assets for other assets of equivalent value does not cause the trust assets to be included in the taxpayer's gross estate under IRC Section 2036, which includes assets transferred during life by a decedent over which he retained certain prohibited benefits or controls. The IRS has now ruled that this power of substitution also does not run afoul of the specific Code section that determines when the proceeds of a life insurance policy are included in a decedent's gross estate for estate tax purposes.

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