

# **The Vote is In and Your Taxes Will be Going Up. Now is the Time to Plan!**

## **Biden's Tax Plan:**

While nothing is certain at this time and a lot will depend on the Senate races in Georgia, the tax proposals in Washington include significant estate, gift and income tax increases.

### **Gift & Estate Taxes:**

- The current gift and estate tax exemption of **\$11,580,000** for gift, estate, and generation skipping transfer taxes will revert to **\$3,500,000** for estate taxes, and as low as **\$1,000,000** for gift taxes.
- Appreciated assets no longer would get a step up in basis at death.
- Discount planning for families will be eliminated.
- Grantor Retained Annuity Trusts (GRATs) will need to have a term of at least 10 years and provide a gift of approximately \$500,000.
- Assets in intentionally defective grantor trusts will be includible in the grantor's estate and distributions from the trust will be considered taxable gifts.

### **Income Tax:**

- The current 37% top marginal tax rate will revert to 39.6%.
- The preferential 20% maximum income tax rate on long term capital gains and dividends will be eliminated for taxpayers with annual income over \$1,000,000 bringing the effective tax rate to 39.6%.
- Itemized deductions including charitable deductions will be capped at the 28% bracket.

- Carried interest for hedge fund individuals would be taxed as ordinary income.
- IRC § 1031 so-called like-kind exchanges would be eliminated.
- Any of these changes enacted during 2021 likely will be retroactive to January 1, 2021 and such retroactive application of these taxes has been held to be constitutional.

### **Plan Now:**

It is very important for you to consider planning now.

1. Consider gifting assets utilizing your current \$11,580,000 gift tax exemption. The failure to take advantage of this before the end of the year could cost a family \$8,080,000 in unnecessary estate taxes computed as follows in the case of a married couple:

Current combined exemption (\$11,580,000 x 2)	\$23,160,000
Proposed combined exemption (\$3,500,000 x 2)	<u>\$7,000,000</u>
Lost exemption	\$16,160,000
Federal estate tax 40% and Massachusetts estate tax 10%*	<u>x50%</u>
Unnecessary estate tax	\$8,080,000

\*There is no Massachusetts Gift Tax, but there is a Massachusetts estate tax of up to 16%.

2. When contemplating giving, be sure to stay in control by gifting discounted assets such as nonvoting interests in S corporations, limited liability companies or perhaps limited partnership interests, all of which are valued with a discount to net asset value between 25% to 40%. You will retain the voting power, but these discounts will be eliminated under possible tax reform.

3. For those who wish to retain the ability to access assets after gifting, consider a so-called Domestic Asset Protection Trust (either New Hampshire or Delaware) or utilizing a Spousal Lifetime Access Trust (SLAT). In utilizing a SLAT, each spouse sets up an irrevocable SLAT for the other. If a DAPT is used, the donor can be a discretionary beneficiary.

**Income taxes:**

You should consider selling assets before the end of 2020 to take advantage of the favorable 20% long term capital gain rate. In the event your transaction cannot close before December 31, 2020, suggest a tax adjustment clause should the buyer be unable to proceed whereby the buyer would be responsible for paying any incremental income tax attributable to the buyer's delay.

**Using a DISCLAIMER to Unwind the Transaction if the Law Does Not Change:**

While it is important to undertake the gifting strategy before the end of the year, the transaction can be undone within nine months of the effective date of the gift by using a disclaimer.

If the donee disclaims the gifted assets within nine (9) months, then the transaction can be reversed with no adverse income, gift or estate tax consequences.

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***Business Valuation Specialists & Business Advisors***

***15 Wall Street, Post Office Box 141, Foxboro, Massachusetts 02035-0141***

***Telephone: (774) 719-2236 • Fax: (774) 284-4228***

***• Mobile Telephone: (508) 878-8390***

***[E-mail: adams.r@foxboro-consulting.com](mailto:adams.r@foxboro-consulting.com)***

***• On the Web: <http://www.foxboro-consulting.com>***

**Our Director of Business Valuation & Advisory Services, Ronald J. Adams, CPA, CVA, ABV, CBA, BCA, CFF, CGMA is “Certified in Financial Forensics”, and holds the **CFF** accreditation & designation in Financial Forensics through the American Institute of Certified Public Accounts (AICPA)**

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