

WHAT EVERY ATTORNEY AND CPA NEEDS TO KNOW TO PREPARE AND REVIEW GIFT AND ESTATE TAX RETURNS

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#1 KNOW YOUR STARTING POINT

- Analyze Prior Gift Tax Returns
- Prior Gift Tax Exemption Used
- Prior GST Tax Exemption Used
- Deceased Spousal Unused Exemption
- Was Gift Tax Previously Paid?

#2 WHEN IS A RETURN REQUIRED?

- **Gift Tax Return, Form 709**
 - 04/15 of year after gift (use Form 4868 or 8892 for extension)
 - if donor passes, then earlier of
 - Form 709 due date OR Form 706 due date (with extensions)
- **Estate Tax Return, Form 706**
 - 9 months after death (use Form 4768 for 6 month extension)
- **Generation Skipping Trust Returns : due by 04/15**
 - Can be extended by filing Form 7004, automatic six (6) months
 - 706-GS(T) – trustee calculates and pays tax for trust terminations
 - 706-GS(D-1) – trustee reports taxable distributions to beneficiary
 - 706-GS(D) – skip person distributee calculates and pays tax due
 - not necessary where inclusion ratio is zero
- **If weekend/holiday, then next day not a weekend/holiday**
- **Caution:** returns are often required even when no tax is due

#3 IF FILING A RETURN, MAKE IT COUNT!

- Statute of limitations is generally 3 years for IRS to challenge a return except for substantial omissions or items that are not adequately disclosed
 - substantial omissions = 6 year SOL : charitable contributions
 - undisclosed gifts = No SOL
- Treasury Regulations § 301.6501(c)-1(f)
 - describes the disclosure for gift and non-gift completed transfers necessary to commence SOL
- Disclosure Statements, Form 8275 and 8275-R
 - positions that may be contrary to the Code or Regulations
 - filed to avoid portions of the accuracy-related penalty, economic substance penalty, and preparer penalties that may be attributable to unreasonable positions
 - Section 2704 Proposed Regulations : statement
- For gift tax returns reflecting spousal split gifts; adequate disclosure satisfied by consenting spouse if donor spouse's return satisfies the disclosure requirements

#4 ANNUAL EXCLUSION AND CRUMMEY RIGHTS

- Annual Exclusion: \$14,000 per donor, per donee
 - present interest – outright gift to donee, with dominion and control of property
- Future Interest – where gift if made to a trust
 - where donee does not have outright ownership of property
 - review trust agreement to determine if Crummey withdrawal right
 - the withdrawal right can be limited
 - writing where donor excludes person from withdrawal
 - \$5,000 or 5% of trust value (5 x 5 power)
 - lapsing rights
- Remote contingent remainder beneficiaries
 - Cristofani may apply

#5 GIFTING-SPLITTING OPPORTUNITIES AND ERRORS

- Both spouses must be U.S. citizens
- Split gift election must be made on the first return filed
 - regardless of whether it is filed timely or late
- The election cannot be revoked unless it is made on a return filed prior to the due date of the original return.
- All gifts must be split if the election is made
 - unless there are gifts that are prohibited from being split
- Gifts to a trust in which the consenting spouse has an interest cannot be split
 - unless the interests of the non-spouse beneficiaries, or the consenting spouse's interest, are ascertainable
 - Lifetime credit shelter trust / SLAT
 - Crummey withdrawal rights

#6 THE SECTION 2642(C) GENERATION SKIPPING TRANSFER TAX ANNUAL EXCLUSION

- Transfer must be a direct skip
- For transfers to a trust:
 - trust must have only one (1) beneficiary
 - trust must be includible in the beneficiary's gross estate for estate tax purposes (e.g. beneficiary has testamentary general power of appointment)
- Transfer must qualify for the annual exclusion
- Ordering of gifts in a calendar year is critical

#7 AUTOMATIC ALLOCATION OF GST EXEMPTION TO LIFETIME TRANSFERS

- Section 2632(c) provides for the automatic allocation of taxpayer's unused GST exemption for indirect skips
 - transfers made to GST Trusts
- A "GST Trust" is a trust that could have a generation-skipping transfer with respect to the transferor
 - unless the trust meets one of the six exceptions, delineated in the Code
 - exceptions generally relate to non-skip beneficiaries receiving certain percentages, CLAT/CRAT/CLUT series
- Applies whether a gift tax return is filed and regardless of whether the transfer qualifies for the annual exclusion
- Can elect out of or into automatic allocation
 - Form 709, Schedule A, Part 3 for the current and for all future transfers
- Do not rely entirely on automatic allocation
 - make an election

#8 LATE ALLOCATIONS OF GST EXEMPTION DURING LIFE

- Allocation of GST exemption to a trust AFTER the due date for timely reporting a transfer to the trust
 - effective as of the filing date (rather than contribution date)
 - amount of allocation is based on values as of date of filing the late allocation
 - can elect to value the trust assets for allocation purposes as of the 1st day of the month
 - can only be made as to the portion of the trust which the taxpayer is the transferor for GST purposes
 - consider making late allocation where:
 - the gifted assets have decreased in value; OR
 - distributions have been made to non-skip persons

#9 RELIEF TO ALLOCATE OR FAILING TO ELECT OUT OF AUTOMATIC ALLOCATIONS

- If exemption not timely allocated, then a donor can obtain relief by requesting extension of time
- Section 2642(g) prescribes procedures where extensions will be granted:
 - to make a timely allocation of GST exemption (even when technically late)
 - to make election out of Section 2632 automatic allocation of GST exemption
- Treasury Regulations Section 301.9100-3 – must show:
 - taxpayer acted reasonably and in good faith; and
 - grant of relief will not prejudice the government's interest
- It appears that the Service is generous in granting relief, but a request for PLR relief can be expensive to complete

#10 RETROACTIVE ALLOCATIONS AND THE PREDECEASED ANCESTOR RULE

- Retroactive allocation of GST exemption to a trust is available where a non-skip beneficiary:
 - who is related to the transferor;
 - below the transferor's generation; AND
 - predeceases the transferor
- The amount of GST to retroactively allocate:
 - can be based on the original contribution(s) value(s)
 - must be made on timely filed return for the year of the non-skip beneficiary's death
- Predeceased ancestor rule:
 - allows for GST tax to be avoided by permitting a related donee to move up a generation when his parent is deceased at the time a transfer is subject to gift or estate tax

11 FILING ESTATE TAX RETURNS FOR PORTABILITY

- Portability election is deemed to be made simply by timely filing a completed the Form 706
 - unless the executor opts out
 - the election is irrevocable
- Can get 9100-3 relief for missed portability filings if the estate was not large enough to require a 706 under Section 6018
- Cannot get 9100-3 relief for a missed portability filing for returns that are otherwise required to be filed under Section 6018
- Reporting requirements are generally the same as returns for taxable estates
 - meaning appraisals may be necessary
 - reduced requirements for marital and charitable deductions
- Analyze the impact of taking deductions covered by Section 642(g) on the Form 706 versus the Form 1041

#12 NEW BASIS REPORTING REQUIREMENTS FORM 8971 AND SCHEDULE A

- Effective for estate tax returns filed after July 31, 2015
- Section 6035 : estate's executor, where Form 706 is required to be filed, required to furnish:
 - does not apply to portability filings
 - file within the earlier of 30 days of the return due date or file date;
 - to the IRS and each beneficiary acquiring property from the estate;
 - a statement identifying the value of the asset inherited, as reported on the Form 706
- File supplemental Form 8971 when asset values change
- Section 1014(f): basis for income tax purposes must not exceed the value reported on the decedent's Form 706
- Penalties : §§ 6662 (beneficiary income tax : 20% accuracy); 6721 & 6722
 - within 30 days (\$50); after 30 days (\$260); intentional disregard (\$530); > \$5MM receipts ???
- Inconsequential Errors/Omissions are never:
 - Taxpayer's TIN; beneficiary's surname/address; asset value
- Power of Attorney, Form 2848 : fiduciary is taxpayer; matter is "civil penalties;" year or period is decedent's date of death in YYYYMM format