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Estate & Succession Planning Corner

Is the IRS Relaxing Standards for GST Allocation Relief?

By Lawrence I. Richman*



We all are familiar with the game of telephone. One person tells a story to another person who in turn retells the story to the next person who then retells the story to another person. By the time the story reaches the fourth or fifth person, it is markedly different in several important respects. The allocation of generation-skipping transfer tax (“GST”) exemption is a lot like the game of telephone in the sense that communication about whether, when and how GST exemption is allocated almost invariably involves many participants. First, there is the client who often thinks his or her trust is automatically GST exempt because the lawyer said the planning is designed to be GST exempt or because the trust has the acronym GST in its name. Then there is the lawyer trying to explain a transfer tax system that has one set of rules for transfers during lifetime (gifts) and at death (estates) and another set of rules for transfers that may provide benefits to more than one generation of people (the GST). Third is the accountant whose primary responsibilities usually involve income tax preparation and financial reporting and rarely requires him or her to delve into the nuances of the deceptively simple gift tax return form where much of the GST reporting is not made within the four corners of the printed form, but instead on schedules and statements independently drafted by the preparer. Finally, add investment counselors to the mix of advisers, and it is readily understandable that the making of a GST allocation to cause a trust to be exempt from a tax that might not be payable for many years may not be timely made. Thus, it is readily understandable that taxpayers and practitioners came to perceive the making of a GST allocation as a black hole with no way out, if there were a failure to allocate.

Congress responded by enacting Code Sec. 2642(g)(1) on June 7, 2001, directing Treasury to prescribe the “circumstances and procedures”¹ by which extensions will be granted to allocate and report GST exemption. By permitting Treasury to extend the time within which to make an allocation of GST exemption, this legislation allowed the IRS to grant Section 9100 relief to taxpayers.

Significantly, the Joint Committee on Taxation’s explanation of the legislative change states that “The Treasury Secretary is authorized and directed to grant extensions of time to make the election to allocate generation-skipping transfer tax exemption and to grant exceptions to the time requirement without regard

to whether any period of limitations has expired. If such relief is granted, then the gift tax or estate tax value of the transfer to the trust would be used for determining generation-skipping transfer tax exemption allocation.”² Section 9100 relief³ permits a late-filed transfer tax return to be treated as timely filed if a taxpayer demonstrates that he/she (1) acted reasonably, (2) in good faith and (3) the relief does not prejudice the interests of the government.⁴ Although these factors appear relatively simple to satisfy, the interpretation of those factors in the context of 2642(g)(1) relief has varied. A critical issue has been the government’s interpretation of what it means for its interest to not have been prejudiced. One would think that in the GST context it is unusual for the government’s interests to be prejudiced because a statute of limitations has expired or a GST payment is due since the actual GST event has rarely occurred at the time an allocation of GST exemption is made. However, were the meaning of prejudice to the government expanded such that the IRS would consider the government’s interests prejudiced because a gift or estate tax statute of limitations has expired, then the availability of 9100 relief for GST purposes would be severely limited because in many situations the failure to make an allocation of GST exemption is discovered several years after the reported transfer.

Thus, when Treasury issued proposed regulations under Code Sec. 2642(g)(1) in 2008, taxpayers were concerned about the ways in which Treasury evidenced a hardening of traditional 9100 relief standards by making gift and estate tax considerations potentially critical to GST allocation relief. The proposed regulations expressed concern about allowing taxpayers an extension of time to make a GST allocation if there is “intent to deprive the IRS of sufficient time to challenge ... the value of that property for Federal gift or estate tax purposes, or any other aspect of the transfer that is relevant for Federal gift or estate tax purposes.”⁵ Expanding the criteria for 9100 relief into areas which make obtaining Congressionally-mandated relief more difficult hardly seemed consistent with the stated intent of Congress.

In the recently released LTR 201847002, the IRS seems to be stepping back from considering factors extraneous to the making of a GST allocation in determining whether

taxpayers meet the 9100 relief standards of reasonableness, good faith and absence of prejudice to the government. The facts highlighted in LTR 201847002 demonstrate the reasonableness of the taxpayer in establishing the GST trust on the advice of attorneys, their good faith in duly informing their tax preparer of the creation of the trust and the fact that on account of a “lack of effective communication,”⁶ no gift tax return was filed on which an allocation of GST exemption was made. LTR 201847002 indicates that the gift to the trust was company stock, leading the reader to believe it was probably closely held stock and that there was some discount with respect to the valuation. Significantly, however, LTR 201847002 makes no mention of the taxpayer’s gift tax reporting position and, unlike the proposed regulations, gives no weight to whether the gift tax statutory period of limitations has run or if there is a valuation issue. Indeed, other than reciting dates as Date 1 or Date 2 and stating that the value of property for purposes of the GST (and the allocation of GST exemption) is the value of such property as finally determined for gift tax purposes, there is no mention of the intent of the taxpayer to allocate GST exemption to the transfer other than the intent apparent in the trust agreement.

LTR 201847002 expressly states that “a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional ... and the tax professional failed to make ... the election.”⁷ Thus, in the instant situation, the taxpayer was granted an extension to allocate GST exemption and allowed to value the property transferred to the trust at its value on the date of its original transfer.

As practitioners know, private letter rulings may only be relied upon by the taxpayer requesting the ruling. However, practitioners cannot help but look at the factors and circumstances noted by the government in establishing the basis for its conclusions. LTR 201847002 provides taxpayers with evidence that the government is NOT looking at factors extraneous to the GST, specifically not considering those extraneous factors enumerated in the proposed regulations, when granting 9100 relief to taxpayers seeking an extension of time under Code Sec. 2642(g) to make an allocation of GST exemption. All in all, a positive development for taxpayers.

ENDNOTES

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¹ Code Sec. 2642(g)(1).

² General Explanation of Tax Legislation Enacted in the 107th Congress by Joint Committee on Taxation at page 81.

³ Reg. §301.9100-3.

⁴ Notice 2001-50, 2001-2 CB 189.

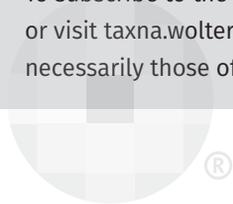
⁵ Proposed Reg. §26.2642-7(d)(3)(ii).

⁶ LTR 201847002 (Aug. 10, 2018).

⁷ *Id.*

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