

Estate & Succession Planning Corner

Effective Gift Tax Return Filings

By Lawrence I. Richman

Probably, the most deceptively simple form for estate planning attorneys and accountants is Form 709, the federal gift tax return form. It is only five pages and the public policy behind the form encourages nonfiling: gifts of \$14,000 or less to individuals, gifts to charities and even the allocation of generation skipping transfer tax exemption need not be reported if the trust donee is a GST Trust as defined in Code Sec. 2632.

When a gift tax return is required to be filed, the challenge for practitioners is to file an accurate return. The accuracy of the return depends upon two things: First, the adequate disclosure of transfers during the year in accordance with Code Sec. 6501, and second, the correct reporting and use of the transferor's transfer tax exemptions. In preparing the return, practitioners typically deal with a series of knowns and unknowns.

The adequate disclosure rules constitute the knowns. These are spelled out in Reg. §301.6501(c)-1(f)(2) for gifts and Reg. §301.6501(c)-1(f)(4) for nongift completed transfers. These rules include requirements that (1) the transferred property be described; (2) the transferee be identified, including the relationship between the transferee and the taxpayer; (3) if a trust is involved, either a description or copy of the terms of the trust along with its EIN; and (4) with respect to the transferred property, a detailed explanation of how the property was valued which (a) for a publicly traded security requires the exchange and CUSIP number be disclosed and that the value be based on the mean between the highest and lowest values on the date of transfer and (b) for nonpublicly traded property requires either a qualified appraisal by a qualified appraiser or a valuation analysis that includes all the supporting data a qualified appraiser would use in preparing a qualified appraisal (*e.g.*, the valuation method, financial reports and valuation discounts including a description of the restrictions resulting in such discounts). If the return takes a position contrary to any revenue ruling or regulation (even if proposed or temporary), the taxpayer must so state.

Additional requirements apply to transfers subject to the special valuation rules under Code Secs. 2701 and 2702, such as identifying all equity holders who are related to the taxpayer. In order to meet the adequate disclosure requirements for gifts split by spouses, all required disclosure information need only appear on the return of the donor spouse. The benefit to the taxpayer of meeting these requirements is the ability to foreclose the possibility of a reassessment of gift tax



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once the statute of limitations has passed. Under Code Sec. 6501(a), that assessment period is generally three years. However, Code Sec. 6501(c)(9) states that there is NO limitations period for an unreported gift.

Accordingly, taxpayers often have wondered whether there truly is closure for a year in which there was adequate disclosure when reporting in prior years was either nonexistent or inadequate. The amount of exemption available in a current year or the amount of prior taxable gifts can represent the unknown or the unknowable. In many cases, errors arise in prior years' returns from good faith mistakes such as when the allocation of exemption in prior years is inaccurate because gifts were split between spouses and gift splitting was not allowable because the nontransferring spouse had an interest in the donee trust that was neither severable nor ascertainable.

At a time when so much is uncertain, it is important for taxpayers and practitioners alike to know when their gift tax return filings are effective and when any period for reassessment has terminated.

The recent¹ release of CCA 201643020 addresses the ability of the IRS to reassess gift tax due for properly reported gifts in a given tax year when unreported gifts from prior years would have resulted in the reporting of different information about prior years' gifts and an increased assessment of gift tax due. In CCA 201643020, the donor had filed gift tax returns for both the current year and prior years. Gift tax was paid for current year gifts. However, the current year gift tax return failed to report the prior years' gifts as required under Reg. §25.6019-3(a) resulting in the calculation and payment of less gift tax in the current year than should have been the case.

CCA 201643020 interpreted the extent to which the language of Code Sec. 6501(c)(9) that gift tax may be assessed at any time (*i.e.*, the NO statute of limitations rule) applies to prior reported gifts that were neither referenced nor reported on a current gift tax return that otherwise adequately disclosed a taxpayer's current gifts. The IRS noted that the three-year limitation period rule applies when two items are present. First, it only applies to a gift reported on a gift tax return. Second, it applies when that transfer is adequately disclosed on the return

or on an attachment to the return. Thus, the three-year limitations period applies when there is reporting and when there is adequate disclosure of completed transfers during the tax year. The CCA states that "Although it is arguable the Treasury Regulation §301.6501(c)-1(f)(1) is silent concerning the omission of prior taxable gifts, the clear language of Section 6501-(c)(9) precludes it from applying to a gift that was reported on the gift tax return even if prior years' gifts were omitted."²

Since in the matter before the IRS the gift was reported on a gift tax return filed for the year in which the gift was made, that fact determined the applicable assessment period and caused there to be no reassessment of gift tax due for the year even though gifts had not been reported in prior years and those unreported gifts would have resulted in an increase in the amount of gift tax due in the current year.

It is important to note that the CCA does not alter the rule regarding the reporting of incomplete gifts.³ Those rules provide that the adequate disclosure on a gift tax return of a transfer reported as a completed gift is subject to the general three-year limitations rule on assessments even if the transfer is ultimately determined to be an incomplete gift under Code Sec. 2511. In other words, if an incomplete gift is reported as a completed gift and is adequately disclosed on a gift tax return, the period for assessment of the gift tax will begin to run from the date of filing in accordance with Code Sec. 6501(b). Thus, once the period for gift tax assessment terminates, the transfer may only be included in the transferor's gross estate for estate tax purposes to the extent a completed gift otherwise would be so included. This is not the result if the transfer is reported as an incomplete gift whether or not adequately disclosed. For transfers reported as incomplete gifts, even if later determined to be completed gifts, the period of assessment does not run until three years after the transferor files a gift tax return with adequate disclosure reporting the transfer as a completed gift.

It also is worth noting that the reasoning of CCA 201643020 is consistent with that of LTR 201523003 released a little over a year earlier. That private letter ruling was of interest because it involved a husband and wife agreeing to gift split under Code Sec. 2513 and to split their allocation of generation skipping transfer tax exemption under Code Sec. 2652(a)(2) in a situation in which the wife's interest was not severable (thus precluding gift splitting) and in which the husband's transfer was subject to allocation of GST exemption under the ETIP provisions of Code Sec. 2632(c)(4). LTR 201523003 was significant because

it confirmed that once both the ETIP period and the period for reassessment have closed, the transfers as reported are effective.

At a time when so much is uncertain, it is important for taxpayers and practitioners alike to know when their gift tax return filings are effective and when any period for reassessment has terminated.

ENDNOTES

¹ CCA 201643020 (Oct. 21, 2016).

² CCA 201643020 (Oct. 21, 2016).

³ Reg. §301.6501(c)-1(f)(5).

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