

GSTT Exemption a Victim of 'Sloppy Drafting,' but It May Not Matter

POSTED ON MAR. 16, 2018

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Republicans rushing to enact the new tax law may have inadvertently excluded late allocations of generation-skipping transfer tax exemption from the benefit of the doubled gift and estate tax exemption.

At issue is the provision's effective date in the Tax Cuts and Jobs Act ([P.L. 115-97](#)). After doubling the gift and estate tax's basic exclusion amount from \$5 million to \$10 million in [section 2010\(c\)\(3\)\(C\)](#), the provision says that the changes "shall apply to estates of decedents dying and gifts made after December 31, 2017."

Although there's little doubt among practitioners that the new law concurrently raises the exclusion for generation-skipping transfers by way of [section 2631\(c\)](#), which matches the generation-skipping transfer exclusion amount to the amount listed in [section 2010\(c\)](#) in any given calendar year, it's less clear whether the additional exclusion amount can be used for late allocations of generation-skipping transfer exemptions.

Beth Shapiro Kaufman, a former attorney in Treasury's Office of Tax Legislative Counsel, observed that the effective date language in the 2017 tax law differs from that in another recent tax overhaul, the [American Taxpayer Relief Act of 2012](#). That provision is more explicit about the connection to generation-skipping transfers, indicating that the amendments made in that section apply to "estates of decedents dying, gifts made, or generation-skipping transfers after December 31, 2012."

Kaufman, now president of Caplin and Drysdale, gave Tax Analysts an example of how this uncertainty might come into play by describing a hypothetical taxpayer who set up a generation-skipping trust in 2012 and applied all of her remaining generation-skipping transfer exemption to the trust, but the exemption amount was only enough to give the trust an inclusion ratio of 75 percent. Post-TCJA, if the transferor wanted that trust to have an inclusion ratio of zero, she might wish to make a late allocation using the additional exemption amount, Kaufman said.

But, Kaufman continued, "the way the effective date was written, it is not clear that the [transferor] has the ability to make that late allocation, because in this situation, we neither have a decedent who has died after December 31, 2017, nor do we have a gift made after December 31, 2017."

When asked about this uncertainty during a panel at a February American Bar Association Section of Taxation meeting in San Diego, Catherine Hughes, attorney-adviser, Treasury Office of Tax Legislative Counsel, responded, "I'm not sure, and I'm anxious to have a look at it."

Intentional or Not

Nevertheless, Kaufman indicated that she thought there was no way Congress intended “to deprive taxpayers of the ability to use the additional GST exemption other than by making new gifts or by dying.” Most estate planners likely haven’t given this issue any thought, she said.

Kimberly E. Cohen of Ropes and Gray LLP likewise didn’t see an intentional move by the drafters of the new provision to exclude late allocations, telling Tax Analysts that it was probably “just sloppy drafting.” And Jeffrey K. Eisen of Mitchell Silberberg and Knupp LLP attributed the omission of the generation-skipping transfer language from the effective date to lawmakers “moving at light speed” to pass the bill.

Even assuming there was no congressional intent behind the provision’s lack of generation-skipping transfer language, Cohen said there’s a case to be made that including that language is unnecessary.

Section 2010(c)(3)(B) has allowed transferors to apply additional generation-skipping transfer exemption amounts resulting from inflation adjustments in a late allocation since 2011, Cohen said. If an individual made \$5 million in gifts in 2010 and used \$5 million in generation-skipping transfer exemption, then that person would still have \$590,000 of remaining exemption this year because of inflation, even without the exemption increase resulting from the TCJA.

“If you could only use the inflation adjustment and not the actual increase from \$5 million to \$10 million under 2010(c)(3), then that would make very little sense,” Cohen said, adding, “I’m not sure how you would even report that when making a late allocation.”

Absent a technical corrections bill or guidance issued by the IRS and Treasury, Eisen recommended keeping an eye on the instructions for Form 709, “United States Gift (and Generation-Skipping Transfer) Tax Return,” which describe the procedures for making a late allocation of an additional generation-skipping transfer exemption stemming from inflation. He said those instructions make clear that inflation adjustments can be applied as late allocations on prior gifts as long as a direct skip or a taxable termination hasn’t occurred yet.

“So to me, if those instructions don’t change next year, I think you’ll have your answer,” Eisen concluded.

Nothing Matters

Even if the provision is ultimately interpreted as prohibiting late allocations, practitioners said there’s still little reason not to make those allocations now.

James F. Hogan of Andersen Tax LLC, a former attorney in the IRS Office of Chief Counsel, said that he, as a practitioner, would advise transferors that there may be an issue with the effective date that could bar late allocations of the generation-skipping transfer exemption to pre-2018 transfers. But even if the worst case scenario occurs and that kind of transfer is barred, “the transferor is probably no worse off because the inclusion ratio would simply revert back” to what it was previously, he said.

“I don’t see a downside,” Eisen agreed. “If it turns out you can’t do it, the allocation is void. It’s not like it’s wasted,” he said. Eisen said that if he were inclined to advise a transferor to make a late allocation right now, he would go ahead and do it, expecting either the language would be fixed or the IRS and Treasury would clarify the issue.

Cohen also argued that it makes little sense for the IRS or Treasury to take a prohibitive stance, because there's no potential for abuse. She noted that the value of the trust assets are determined — and the allocation is made — at the time the allocation is filed.

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i DOCUMENT ATTRIBUTES

CODE SECTIONS	SEC. 2010 UNIFIED CREDIT AGAINST ESTATE TAX SEC. 2631 GST EXEMPTION
JURISDICTIONS	UNITED STATES
SUBJECT AREAS / TAX TOPICS	GENERATION-SKIPPING TAXATION ESTATE, GIFT, AND INHERITANCE TAXES TAX CUTS AND JOBS ACT INDIVIDUAL INCOME TAXATION
AUTHORS	JONATHAN CURRY
INSTITUTIONAL AUTHORS	TAX ANALYSTS
TAX ANALYSTS DOCUMENT NUMBER	DOC 2018-11827
TAX ANALYSTS ELECTRONIC CITATION	2018 TNT 52-3