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Inside this Issue: Tax Symposium

California Income Taxation of Trusts and Estates 6

Richard S. Kinyon, Esq., Kim Marois, Esq., and Sonja K. Johnson, Esq.

The authors present a detailed examination of the principles of California fiduciary taxation. Focused on the treatment of irrevocable, non-grantor trusts, the article also includes a brief overview of California's taxation of the income of estates and administrative trusts and a technical guide to complying with California income tax reporting and withholding requirements.

Allocating Generation-Skipping Transfer Tax Exemption 22

Beth Shapiro Kaufman, Esq., and Megan E. Wernke, Esq.

Practitioners can easily and inadvertently make improper and imprudent generation-skipping transfer tax exemption allocations as a result of the complexity of the law and deficiencies in the form provided by the IRS for making the allocations. This article provides a practical, step-by-step examination of the allocation of generation-skipping transfer tax exemption on Form 709, and identifies best practices to avoid common allocation errors.

A Proposal to Modify the Disclaimer Timing Requirements of Internal Revenue Code Section 2518 29

Trent S. Kiziah, Esq.

A review of the timing requirements for making a qualified disclaimer under Internal Revenue Code section 2518, including discussion of the authorities requiring that a qualified disclaimer be made within nine months of the creation of the interest, even when the interest created is contingent and non-possessory. The author puts forth a proposal to modify section 2518 to allow for a qualified disclaimer to be made within nine months of the date on which the interest becomes indefeasibly vested in the beneficiary.

So You Want to Be a Foreign Grantor Trust: Special Rules 37

Nancy E. Howard, Esq.

This article explains the benefits of foreign grantor trust status—including the taxation of the grantor (and not the trust beneficiaries) on the trust income, the avoidance of severe throwback rules applicable to U.S. beneficiaries of foreign trusts, and attribution of passive foreign investment company (PFIC) stock to the non-U.S. grantor as opposed to U.S. beneficiaries of the trust—and how planners can use foreign grantor trusts to assist their clients. The author examines the qualification requirements, addresses selected issues, and identifies some areas where practitioners should exercise caution.

U.S. Transfer Tax System and the Non-U.S.-Citizen Spouse 45

Cynthia D. Brittain, Esq.

The author notes the transfer tax impediments to transfers from a U.S. spouse to a non-U.S.-citizen spouse, and also reviews the opportunities available to transfer significant assets to a non-U.S.-citizen spouse in a tax-advantaged way.

From the Chair....................................... 3

From the Symposium Managing Editor 5

From the Editor-in-Chief......................... 4

Tax Alert.. 49

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ALLOCATING GENERATION-SKIPPING TRANSFER TAX EXEMPTION

By Beth Shapiro Kaufman, Esq., and Megan E. Wernke, Esq.**

Advisors to taxpayers with estates larger than the $5.43 million exemption often plan carefully to reduce the imposition of the generation-skipping transfer ("GST") tax. However, generous exemptions and careful estate planning are for naught if clients and their advisors fail to properly and effectively allocate their GST exemption on the Form 709, *U.S. Gift (and Generation-Skipping Transfer) Tax Return*. (References herein to Form 709 or the Instructions are to Form 709 and the related Instructions for use in connection with gifts made during calendar year 2014.)

Unfortunately, the Form 709 is not well adapted for GST reporting, particularly in the context of gifts to trusts. In addition, when the Form 709 was updated to reflect the deemed allocation rules at IRC sections 2632(b) and 2632(c), the revisions were not nearly extensive enough, making the return cumbersome to use. Combined with the complicated underlying law, it is no surprise that estate planners, return preparers, and their clients regularly make improper and imprudent GST exemption allocations.

And of course, because each year's Form 709 builds on GST exemptions allocated in previous years, an error in identifying or reporting allocated GST in one year can lead to a cascade of errors and improper allocations in future years, culminating in potentially incorrect estate tax returns.

This article focuses on the mechanical process of properly allocating the GST exemption on the Form 709 and identifies best practices to avoid common allocation errors. The authors assume a basic familiarity with the substantive principles of the GST tax and set forth the law only as necessary to illuminate specific points.

I. THE GST EXEMPTION

The GST tax is imposed on each "generation-skipping transfer" passing to a "skip person" (defined as a person two or more generations below the transferor, or a trust with only skip persons as beneficiaries or with no beneficiaries where no distributions may be made to non-skip persons)[1] by gift or bequest, either directly or in trust. There are three categories of GSTs: direct skips, taxable terminations, and taxable distributions. A direct skip is a transfer either directly to a skip person or to a trust that has only skip persons as beneficiaries.[2] Thus, a direct skip can occur whether the transfer is in trust or outright. A taxable termination occurs when a trust previously had both skip person and non-skip person beneficiaries and then—due to a death or other event or provision of the trust—non-skip persons no longer have an interest in the trust.[3] Finally, a taxable distribution occurs when property is distributed to a skip person from a trust that has both skip persons and non-skip persons as beneficiaries, unless it is a taxable termination or direct skip.[4]

The GST exemption can be allocated at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions).[5] With respect to direct skips and certain transfers to "GST trusts," allocations are deemed to have been made without the donor's action, unless the donor "elects out" of such treatment.[6] For a timely allocation of GST exemption (including deemed allocations), the transferred property to which the allocation is made is valued as of the date of the gift for the purpose of determining how much GST exemption must be allocated to produce an inclusion ratio of zero.[7] Late allocations of GST exemption must be applied to the value of the transferred property as of the date of the allocation, unless the taxpayer elects to use the value on the first day of the month in which the allocation is made.[8] Both deemed allocations and manual allocations are irrevocable after the due date of the return.[9]

In addition to the GST exemption, there is also an "annual exclusion" found at IRC section 2642(c). This exclusion differs in key respects from the gift tax annual exclusion. The annual exclusion from GST tax applies only to gifts that are direct skips, excluded from the gift tax under the annual exclusion[10] or under the medical/educational exclusion,[11] including those made outright or to a trust that (a) is for the primary benefit of a single individual "skip person" beneficiary, (b) provides that no income or corpus is payable to anyone other than that beneficiary during the beneficiary's lifetime, and (c) is includible in the beneficiary's estate if the trust does not terminate prior to his or her death.[12] Many trusts crafted to comply with the gift tax annual exclusion will not pass this test. For example, neither a *Crummey* trust with multiple beneficiaries nor a *Crummey* trust that gives the single beneficiary a non-testamentary limited power of appointment over the trust assets will qualify for the GST annual exclusion.

II. FILE RETURNS EVERY YEAR AND INCLUDE ALL GIFTS ON THE RETURN

The authors recommend filing a gift tax return every year in which a gift was made in trust and listing on the return all gifts, even when not strictly required to do so.

By law, a return must be filed for any calendar year in which the donor makes one or more gifts other than (a) transfers that are excluded from the amount of gifts by reason of the annual exclusion or medical/educational exclusion, (b) transfers for which a marital deduction is allowed (other than gifts to qualified terminable interest property ("QTIP") trusts, for which an election must be made on the return, or (c) certain transfers that qualify for the gift tax charitable deduction.[13] If a return is required, only gifts "included in computing taxable gifts" are reported.[14] Therefore, the donor is not required to report gifts to a donee who receives from the donor during the year total gifts of no more than $14,000.[15]

For example, if Client gave $14,000 to each of four *Crummey* trusts for her grandchildren as part of her regular estate planning in January 2014 and made no other gifts that year, she need not file a Form 709. However, if she made an additional gift of $100,000 in March 2014 to one of her grandchildren to enable that grandchild to buy a house, she has a return obligation. All gifts to the new homeowner ($114,000) should be listed on the Form 709, but the gifts to the trusts for her other grandchildren need not be.

The authors recommend going above and beyond these requirements. In addition to the obvious statute of limitations benefits, this approach helps prevent common errors, including errors resulting from the differences between the annual exclusions from gift tax and GST tax.

Schedule A is the foundation of the Form 709 and should include all taxable gifts, whether subject to the GST tax or not. Schedule D then builds on Schedule A to determine the GST tax consequences of the taxable gifts. If the instructions for the Form 709 are followed but no additional steps taken, many gifts qualifying for the gift tax annual exclusion would not be reported on Schedule A, and their GST tax implications might be missed. For example, if an "annual exclusion" gift to a trust with potential future GSTs does *not* qualify for the GST annual exclusion, most likely there will be a deemed allocation of GST exemption to the gift; if the instructions to Form 709 are followed, there may be no record whatsoever of the gift because it would not be included in Schedule A of the gift tax return and thus would not be copied over to Schedule D.[16] Thus the omission of a non-taxable gift from Schedule A can cause major issues for later return preparers and estate planners who rely on previously filed Forms 709 as evidence of clients' remaining GST exemptions. In the less typical situation where there is no deemed allocation of GST to the gift, return preparers are unlikely to remember to attach a Notice of Allocation if the gift is not reported on Schedule A of the Form 709. This failure could lead to inadvertently subjecting the trust to the GST tax in the future. All of these problems can be avoided by including all gifts in trust on the Schedule A, even if not required to do so, to prompt coordination of reporting on Schedule D.

III. PROPERLY CATEGORIZE DIRECT SKIPS AND INDIRECT SKIPS

Part 1 of Schedule A should list gifts subject only to gift tax. Part 2 should list gifts that are direct skips and thus currently subject to GST tax. Part 3 should list gifts that are "indirect skips," gifts not currently subject to GST tax but that may later incur such tax. In practice, categorizing gifts into the proper Part is far from straightforward.

One common mistake is that gifts made to a trust for the benefit of a non-skip person are incorrectly listed in Schedule A as gifts made directly to the donee, with no mention of the trust arrangement. This can make it difficult for later reviewers relying on the Form 709 to spot potential GST tax problems.

A second very common error is the assumption that any gift to a trust is an "indirect skip" that should be listed in Part 3. As noted above, a trust that has only skip persons as beneficiaries is itself a skip person, such that transfers to the trust are direct skips—currently taxable generation-skipping transfers—that should be listed in Part 2. Direct skips have GST exemption automatically allocated to them.[17] Allocation to a direct skip is usually a good use of GST exemption because it avoids immediate imposition of a GST tax. Nevertheless, if for some reason the taxpayer does not want exemption automatically allocated to the direct skip, the donor can "elect out" of the automatic allocation on the gift tax return on which the gift is reported. Failure to list the transfer in Part 2 will obscure all of these issues.

Finally, a third common error occurs when gifts to a trust with potential future GST tax consequences are listed in Part 1. Despite its title ("Indirect Skips"), Part 3 should list not only gifts defined in IRC section 2632(c) as "indirect skips" (that is, transfers to "GST trusts" that may have future taxable terminations and taxable distributions), but also gifts to trusts that are not technically "GST trusts" but nonetheless "may later be subject to GST tax."[18] If there is any possibility that a trust can make a distribution to a skip person, the trust should be listed in Part 3. This is true even if the trust is for the primary benefit of (and likely to pay out entirely to) a non-skip person.

For example, assume Client has funded a short-term asset-management trust for the benefit of her child, a young adult. The trust will terminate when the child reaches age 35. Client does not yet have grandchildren, so GST issues are not on her radar,

but the trust contains commonly-used language giving the child a limited power of appointment over the trust assets and providing that if the child does not exercise her power, the assets will pass outright to the child's descendants as the primary contingent remaindermen. This trust is not a "GST trust," but it should be listed in Part 3 because of the potential for trust assets to be distributed to the client's future grandchildren.[19] Depending on client's other assets and plans, this trust may not be an appropriate recipient of GST exemption, but that does not change the identity of a gift to the trust as a gift that "may later be subject to GST tax."

Listing a gift in Part 3 does not require that GST exemption be allocated to it. However, listing the gift in Part 3 is an important reminder to consider the wisdom of making an allocation of GST exemption (for example, if the client has plenty of exemption) and to confirm that no deemed allocation of exemption will apply.

IV. PROPERLY ACCOUNT FOR DEEMED ALLOCATIONS TO DIRECT SKIPS

Schedule D of the Form 709 reconciles the filer's allocated and remaining GST exemption and calculates the GST tax currently payable. Recall that GST tax is paid by the donor only on direct skips that are not GST exempt, and direct skips have deemed GST exemption allocation unless the donor "elects out" of such treatment. Although this seems simple enough in theory, the Form 709 is not set up intuitively to incorporate these rules.

To determine the tax owing on direct skips, the direct-skip gifts listed in Part 2 of Schedule A are copied over to Part 1 of Schedule D at their full value (after taking into account gift splitting), and Column C is then used to subtract the GST annual exclusion, if any, to reach a "net transfer" amount in Column D. This net transfer amount should then be copied over to Part 3 of Schedule D, where the amount of "GST Exemption Allocated" is entered in Column C and used to determine an inclusion ratio and, ultimately, GST tax owed for each gift. Of course, having to complete Column C limits the utility of the deemed allocation rules for direct skips[20] and in fact creates room for the introduction of errors.

The authors suggest filling out Part 3 of Schedule D (and Column C in particular) as if there were no deemed GST allocations to direct skips. First, determine if the direct skip is in fact the best use of a client's exemption. While the preparer's first inclination will be to allocate GST exemption to all direct skips in order to avoid the immediate imposition of tax, it might be preferable to pay GST on an outright gift to a grandchild, for example, if the client intends to fund a dynastic trust next year. If the decision is made not to allocate GST exemption, enter a zero in Column C and then take the prescribed steps to "elect out" of the deemed allocation: check the box next to the appropriate gift in Schedule A, Part 2, and attach a statement to the return describing the election.[21] Second, determine the amount of GST exemption to be allocated and make any applicable disclosures. For cash gifts, this step is easy enough, but if valuation of the gift could possibly be an issue, a disclosure and formula clause should be incorporated. Although the authors do not believe the entry of an incorrect value in Column C should override the deemed allocation rules, the IRS may disagree.[22] Moreover, awareness of the valuation issue (and thus the uncertainty regarding the amount of GST exemption remaining) will be helpful to the client's future estate planners and return preparers. Thus, footnoting the entry is recommended, with a disclosure statement as follows:

> *The GST exemption allocated is the amount the taxpayer believes to be necessary to make the inclusion ratio for such transferred property zero. The entry should be construed to allocate the smallest amount of GST exemption that will produce an inclusion ratio of zero for such transferred property. This is a formula election that will change if values are changed on audit. The taxpayer is not electing out of the IRC section 2632(b) deemed allocation.*

V. ACTIVELY MANAGE DEEMED ALLOCATIONS TO INDIRECT SKIPS

The "indirect skip" gifts listed in Part 3 of Schedule A are not incorporated into Schedule D and instead are handled entirely through deemed allocations, Notices of Allocation for manual allocations, and IRC section 2632(c)(5) election statements. Recall that Part 3 will include entries for both "GST trusts" (to which exemption is deemed allocated) and non-GST trusts (to which no deemed allocation applies), and many gifts may not fall clearly into one category or the other.

The preparer is instructed to place a checkmark in Column C if an election is currently being made with respect to a transfer as per IRC section 2632(c). A statement must be attached to the return with respect to each such election. There are many types of elections that can be made pursuant to IRC section 2632 (most of which are applicable only to transfers to a GST trust), including any one or combination of the following:[23]

- Elect out of deemed allocations to a GST trust for one or more prior-year transfers subject to an estate tax inclusion period (ETIP) made to a specified trust or trusts;

- Elect out of deemed allocations to a GST trust for one or more (or all) current-year transfers made to a specified trust or trusts;
- Elect out of deemed allocations for one or more (or all) future transfers made to a specified GST trust or trusts;
- Elect out of deemed allocations for all future transfers to all GST trusts (whether or not in existence at the time of the election);
- Elect to treat a trust as a GST trust for any or all current-year transfers, any selected future transfers, and/or all future transfers, thereby having deemed allocations made (unless and until electing out of particular deemed allocations pursuant to the above); and
- Terminate any, all, or some of the above elections for any current-year transfer, future transfer, and/or prior-year transfer subject to an unexpired ETIP.

The authors recommend placing "N/A" in Column C next to each gift made to a non-GST trust to make clear that the deemed allocation rules will not apply. If it is unclear whether a trust receiving a transfer is a GST trust, determine the client's preferred treatment, placing a check mark in Column C regardless, and then attaching either an election to be treated as a GST trust or an election out for all transfers to the trust, as appropriate to carry out the client's wishes. Treasury Regulation section 26.2632-1(b)(4)(iv) provides a number of examples of language to be used for making IRC section 2632(c) elections. The authors recommend that the election to treat a trust as a GST trust also include a specific statement regarding how the deemed allocation rules are to apply. For example:

> *The taxpayer elects to treat as a GST trust each trust listed below, and elects to have the automatic allocation provisions of Section 2632(c) apply to all transfers made by the taxpayer in [insert year] and at any time thereafter to such trusts: [list trusts].*[24]

If the deemed allocation regime or election made with respect to previous-year transfers is no longer preferred, this can also be managed prospectively through statements attached to the return. The Treasury Regulations are clear that elections "out" can be made under IRC section 2632(c) in the year the trust is funded or in a later year, regardless of whether a transfer was made to the relevant trust in that later year.[25] All such elections are purely prospective, however: they cannot affect any manual or deemed allocation for a year for which the return's due date has already passed or GSTs that have already occurred before the election becomes effective.[26]

The amount of any exemption allocated to an indirect skip through deemed allocation is listed on Schedule D, Part 2, Line 5. The amount of any exemption manually allocated to an indirect skip in a Notice of Allocation is then listed on Schedule D, Part 2, Line 6.

VI. EXHIBIT HEALTHY SKEPTICISM OF PAST FORMS 709

As estate planners and return preparers, we all rely on past Forms 709 to inform us about clients' remaining gift tax exemption and the deemed allocation status of trusts previously settled. However, as should be obvious from the foregoing, errors abound in Forms 709. As such, a healthy skepticism is one of the most important items in your toolbox in dealing with previously filed Forms 709. Although previous allocations are irrevocable once the due date for that year's Form 709 has passed, prospective elections can be made with respect to indirect skips to ensure proper treatment going forward, and the GST Exemption Reconciliation at Part 2 of Schedule D can be corrected to prevent further mistakes going forward.

VII. USE THE CLIENT'S INCREASED EXEMPTION

Many clients have trusts that have an inclusion ratio between one and zero (i.e., are only partially exempt) because they were settled during a time when the available GST exemption was lower. Suppose the client made a gift of $6,000,000 to a dynastic trust in 2008, when the GST exemption was $2,000,000, and her spouse agreed to gift split; both allocated their full exemptions.[27] That trust would have an inclusion ratio of 1/3, meaning that one-third of any distribution to a skip person would be subject to GST tax. Assume that no distributions have been made and the assets of the trust are now worth $12,000,000. The trust has a 1/3 inclusion ratio so it will take an additional allocation of $4,000,000 of GST exemption to give the trust a zero inclusion ratio.[28] The client and her spouse now (in 2015) have a combined $6,860,000 of GST exemption available.[29]

The client's GST exemption is allocated to her prior-year gift by attaching a Notice of Allocation to the Form 709. The amount of the GST exemption allocated using the Notice of Allocation is then listed on Schedule D, Part 2, Line 6. If gift splitting, each spouse should attach a Notice of Allocation to a current return allocating his or her GST exemption to the portion of which he or she is treated as transferor. If valuation of the trust assets could possibly be an issue, a standard

formula clause, such as this one, should be included on the Notice of Allocation:

> *Taxpayer allocates to the trust listed above the smallest amount of the Taxpayer's GST Exemption necessary to produce an inclusion ratio (as defined in Section 2642(a)) for the trust that is closet to or, if possible, equal to zero. This is a formula election that will change if values are changed on audit."*[30]

In order to use the value of the trust assets on the first day of the month in which the late allocation is being made, the following language should be used:

> *The taxpayer hereby elects pursuant to Treasury Regulation section 26.2642-2(a)(2) to treat the allocation of GST exemption as having been made on the first day of the month during which this allocation is made. For purposes of this election, the applicable valuation date for this allocation is [insert month] 1, 2015."*[31]

Note that using the value of the gifted property on the first day of the month does not change the effective date of the allocation, which is the actual day the allocation is made. Thus, for example, if there is a taxable distribution made on May 18, an allocation made on May 25 using a May 1 valuation date will not be effective to allocate GST exemption to shelter the May 18 distribution from GST tax.

The procedure is less clear when the taxpayer wishes to allocate the additional indexed GST exemption available in 2015 to a gift made in 2014. Assume the client made a gift of $5,400,000 in 2014 to a dynastic trust. At the time the gift was made, the client had GST exemption available of $5,340,000. If she were to allocate all of that exemption to the dynastic trust on her 2014 Form 709, the trust would have an inclusion ratio of approximately .011, meaning that 1.1 percent of any distribution to a skip person would be subject to GST.

However, by the time the client is preparing her 2014 gift tax return, the GST exemption has increased again due to indexing and she actually has $5,430,000 of GST exemption available. There is no question that she should be entitled to use some or all of the additional $90,000 of exemption granted under the indexing provision by applying it to her 2014 gift;[32] the only questions are (i) on what date will the allocation be effective, (ii) to what value must the exemption be applied, and (iii) how should the allocation be made?

First, the normal rule for a timely allocation is that it relates back to the date of the gift.[33] Here, the Treasury Regulations give support for the position that the allocation of GST exemption on the timely 2014 Form 709 "is effective as of the date of any transfer" in 2014, except that $60,000 of the GST exemption amount that is needed to give the trust a zero inclusion ratio was not available to the taxpayer until January 1, 2015. It seems unlikely that the allocation of the additional exemption could be effective on any date in 2014 when the client did not actually have that exemption until January 1, 2015. Another possible effective date for the allocation of the additional exemption resulting from the inflation adjustment would be the date of the allocation, but this position is actually contrary to the Treasury Regulations. Under the Treasury Regulations, only a "late allocation" is effective on the date of its filing.[34] However, assuming that the client is filing the Form 709 on or before its due date, the allocation of the additional GST exemption for 2015 to the 2014 gift would not be a "late allocation" under the definition in the IRC and Treasury Regulations and the late allocation rules would not be applicable.[35] Therefore, the authors believe the best answer is that the allocation of the increased exemption is effective as of January 1, 2015. It did not take any action of the client to make the additional exemption available on January 1, 2015; IRC sections 2631(c) and 2010(c)(3)(B) provided for that, and Revenue Procedure 2014-61 confirmed it. The only impediment to the effectiveness of the allocation of $60,000 of GST exemption as of the date of the transfer was that it was not available, not any untimeliness of the donor. That impediment was removed by operation of law on January 1, 2015, arguably making that the effective date of the timely allocation of the 2015 additional GST exemption to the 2014 transfer.

Second, having established that an allocation of GST exemption to a 2014 gift on a timely-filed gift tax return is not a "late allocation," the IRC and Treasury Regulations indicate that the proper value to use is the date of gift value. That conclusion could be considered problematic as it does not align with the effective date of the allocation, which is believed to be January 1, 2015. In the absence of authority on this question, the taxpayer should recognize that the IRS may take the position that the value on the effective date of the election—January 1, 2015—should be used, and exemption may need to be allocated to any appreciation that occurred between the date of the gift and January 1, 2015.

Finally, the Form 709 instructions do not address how donors are to allocate the annual additional GST exemption amount to a gift in the immediate prior year. In the absence of IRS instructions, the following technique is recommended, with the objective of making the intention of the client abundantly clear.

Continuing with the above example, the client will include with her 2014 gift tax return a Notice of Allocation in which the $5,340,000 of GST exemption available in 2014 is allocated to the 2014 dynastic trust. The authors recommend attaching a second, separate Notice of Allocation to the 2014 gift tax return, which would be used solely to allocate up to $60,000 of additional 2015 exemption to the 2014 dynastic trust.[36] The second Notice of Allocation should clearly indicate that it is the additional exemption that is being allocated on the return, and contain an explanation that the taxpayers are entitled to use that additional exemption any time on or after January 1, 2015, because $5,430,000 *is* the GST exemption amount in effect as of January 1, 2015. The following language can be used for that purpose:

> *Pursuant to Section 2613(c) and Section 3.33 of Revenue Procedure 2014-61, the taxpayer's exemption from GST is $5,430,000 as of January 1, 2015. The purpose of this Additional Notice of Allocation is to allocate part of the additional $90,000 of GST exemption available to the Taxpayer on January 1, 2015, due to indexing of the GST exemption amount, to the [name of trust] dated [insert date], 2014.*

The standard language for formula allocation should also be amended to take the position that the effective date of the $60,000 of additional exemption allocated to the 2014 gift is January 1, 2015. That can be accomplished by including the following underlined language in the standard formula clause:

> *Taxpayer allocates to the trust listed above the smallest amount of the Taxpayer's GST Exemption necessary to produce an inclusion ratio (as defined in Internal Revenue Code Section 2642(a)) for the trust that is closest to or, if possible, equal to zero <u>as of the earliest date on which this allocation is effective, believed by the taxpayer to be [insert date of gift or if you wish to be more conservative, the date the exemption became available]</u>. This is a formula election that will change if values are changed on audit. Based on values as shown on this return, the amount of GST exemption allocated to this transfer is the amount shown above.*

If the taxpayer has already filed the prior-year gift tax return, it is not recommended to file a second return for that year allocating only the additional newly-available exemption because the IRS may construe that second return to be an amended return that supersedes the first gift tax return filed.[37] A safer procedure would be to actually amend the earlier return and restate all of the gift and GST tax information initially reported on a second amended return filed before the due date (as extended).

If the value of the gifted property has declined by the time the gift tax return is ready to be filed, it may be in the taxpayer's interest to make a late allocation. If so, the allocation of the exemption should be delayed until after the due date of the gift tax return, so that the allocation will be a "late allocation" and it will not be effective until made (or on the first day of the month if the required election is made).

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1 IRC section 2613(a).

2 IRC sections 2612(c) and 2613(a).

3 IRC section 2612(a).

4 IRC section 2612(b).

5 IRC section 2632(a).

6 IRC sections 2632(b) and 2632(c).

7 IRC section 2642(b)(1).

8 IRC section 2642(b)(3); Treas. Reg. section 26.2642-2(a)(2).

9 IRC section 2631(b); Treas. Reg. sections 26.2632-1(b)(1)(ii), 26.2632-1-1(b)(2)(i), 26.2632-1(b)(4)(i). The term "manual allocation" is used to refer to any allocation that is affirmatively made by the taxpayer on the gift tax return (as compared to a deemed allocation).

10 IRC section 2503(b). The 2015 annual gift tax exclusion amount is $14,000. A gift of a future interest does not qualify for the annual exclusion. IRC section 2503(b)(1).

11 IRC section 2503(e). To qualify for this exclusion, the payment must be made directly to an educational organization as tuition or directly to a medical provider.

12 See IRC section 2642(c)(2) (allowing transfers to certain trusts to qualify for an automatic zero inclusion ratio); Treas. Reg. section 26.2612-1(a) (defining when a gift in trust is a direct skip).

13 IRC section 6019; Treas. Reg. section 25.6019-1.

14 IRC section 6019; Treas. Reg. section 25.6019-3(a).

15 See IRC section 2503(b)(1) ("the first [$14,000] of ... gifts to [any] person shall not, for purposes of [defining a "taxable gift" under] subsection (a), be included in the total amount of gifts made during such year"); see also Instructions for Form 709 (2014), at page 7 ("*Gift splitting not elected.* If the total gifts of present interests to any donee are more than $14,000 in the calendar year, then you must enter all such gifts that you made during the year to or on behalf of that donee, including those gifts that will be excluded under the annual exclusion. If the total is $14,000 or less, you need not enter on Schedule A any gifts (except gifts of future interests) that you made to that donee.").

16 The instructions for Schedule D instruct the return preparer to put "all of the gifts you listed in Part 2 of Schedule A, in the same order and showing the same values" in Part 1 of Schedule D.

17 See IRC section 2632(b).

18 Instructions to Form 709, at page 10.

19 Note that if the child dies after the trust is funded, the death will cause a taxable termination to occur. The deceased parent rule of IRC section 2651(e) applies only to a trust's funding when the parent "is dead at the time of the transfer" and the asset will not be part of the deceased parent's estate. See IRC section 2651(e)(1)(B).

20 The deemed allocation rules were designed to prevent errors by automatically allocating exemption to transfers to which most taxpayers would want to allocate exemption.

21 See Treas. Reg. section 26.2632-1(b)(1); see Instructions to Form 709, at page 10. The following is a recommended statement: "The taxpayer elects *not* to have the automatic allocation provisions of Section 2632(b) apply to [describe portion] of the following transfer: [describe transfer]."

22 Treasury Regulation section 26.2632-1(b)(1)(i) states, with respect to a lifetime direct skip, that a "transferor may prevent the automatic allocation of GST exemption by describing on a timely filed [Form 709] the transfer and the extent to which the automatic allocation is not to apply" or by timely filing a "Form 709 accompanied by payment of the GST tax (as shown on the return with respect to the direct skip)." Compare Treasury Regulation section 26.2632-1(b)(2)(ii), which pertains to indirect skips from a GST trust: "[T]he transferor may also prevent the automatic allocation of GST exemption with regard to an indirect skip by making an affirmative allocation of GST exemption on a Form 709 filed at any time on or before the due date for timely filing ... of an amount that is less than (but not equal to) the value of the property transferred as reported on that return . . . ."

23 Treas. Reg. sections 26.2632-1(b)(3), 26.2632-1(b)(2)(ii), 26.2632-1(b)(2)(iii)(E).

24 This sample language is based on language suggested in Harrington, et al., *Generation-Skipping Transfer Tax* (Thomson Reuters/Tax & Accounting, 2d ed. 2001, with updates through Oct. 2014) (online version), App. A, Gift Tax Return No. 7 (hereinafter referred to as "Harrington, et al.").

25 Treas. Reg. section 26.2632-1(b)(2)(iii)(B).

26 Treas. Reg. section 26.2632-1(b)(2)(iii)(D).

27 Throughout the examples in this section it is assumed that the children of the donor are beneficiaries of the dynastic trust so that the gift to the dynastic trust is not a "direct skip." On the ability of gift-splitting couples to allocate both spouses' exemptions, see IRC section 2652(a)(2).

28 A Form 709 filed in 2015 would be "late" with respect to the allocation of GST exemption to a 2008 gift. See IRC section 2642(b)(3); Treas. Reg. section 26.2642-2(a)(2).

29 $3,430,000 each ($5,430,000 less the $2,000,000 each used in 2008).

30 This sample language is based on Harrington, et al., *supra,* App. A, Gift Tax Return No. 1.

31 This sample language is based on Harrington, et al., *supra,* App. A, Gift Tax Return No. 2.

32 The Instructions for Form 709 (2014) are actually quite confusing on this point. At page 17, they discuss the annual increase in the exemption. The instructions state, "In general, each annual increase can only be allocated to transfers made (or appreciation occurring) during or after the year of the transfer [*sic*]." Assuming the last word of the quoted sentence was intended to be "increase," the example that follows, which states that a donor cannot assign the 2014 increased exemption to GSTs completed through 2005, makes sense. In other words, if the event that triggered a GST tax to be due has already occurred, the donor cannot allocate additional exemption to it now and avoid the tax. The instructions then follow with, "However, if in 2005 [when the exemption was $1,500,000], the donor made a $1,750,000 transfer to a trust that was not a direct skip, but from which generation-skipping transfers could be made in the future, the donor could allocate the increased exemption to the trust, even though no additional transfers were made to the trust." In this second example, there is no discussion of such allocation being applicable only to the growth in the trust.

Both examples are then followed by the confusing instruction to "Enter on line 1 of Part 2 the maximum GST exemption you are allowed. This will not necessarily be the highest indexed amount if you made no generation-skipping transfers during the year of the increase." Given that the second example, however, explicitly allows you to use the highest indexed amount against prior gifts in trust, this admonishment makes no sense.

In any case, it is clear under IRC section 2613(c) and Revenue Procedure 2014-61 that $5,430,000 in GST exemption is currently available as of January 1, 2015, and the quoted second example above makes clear that indexed exemption can be applied to prior-settled trusts.

33 Treas. Reg. sections 26.2632-1(b)(1)(ii) and 26.2632-1(b)(4)(ii).

34 Treas. Reg. section 26.2632-1(b)(4)(ii).

35 Of course, if the allocation is made on a return filed after October 15, 2015 (the due date for a timely filed return, including a valid extension), it is clearly a late allocation and the rules governing late allocations apply.

36 If you wish to take the more conservative position that the effective date of the election is January 1, 2015, and the gifted property appreciated between the date of the gift and January 1, more than $60,000 of additional exemption may need to be allocated. For example if the original gift in 2014 was valued at $5,400,000, timely allocation of the $5,340,000 exemption resulted in an inclusion ratio of 0.011. If the trust property appreciated by 10 percent between the date of the gift and January 1, 2015, the January 1, 2015, value would be $5,940,000. Applying the 0.011 inclusion ratio to the January 1, 2015, value, it would take an allocation of $65,340 of additional exemption to bring the inclusion ratio down to zero.

37 Treasury Regulation section 26.2632-1(b)(4)(ii) states that if "more than one timely allocation is made, the earlier allocation is modified only if the later allocation clearly identifies the transfer and the nature and extent of the modification." Nevertheless, because of the way the IRS Service Center processes gift tax returns, a taxpayer can reduce the possibility of processing errors by completely amending the return (and so indicating on the second timely-filed return).