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QUARTERLY TAX UPDATE

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Wellspring Financial Advisors, LLC · Cleveland, Ohio

A sampling of recent tax developments, provided by an advisor, for advisors.

COURT CASES

Estate of Schaefer v. Commissioner, 145 T.C. No. 4 (7/28/2015). In case heard by the entire panel of U.S. Tax Court judges, the court held that in determining the value of the charitable remainder interest of a CRUT, and thus the charitable deduction, the possibility of limiting distributions to income is not to be taken into account. Arthur Schaefer created two charitable remainder unitrusts in 2006. Arthur retained the rights to distributions and upon his death, distributions would continue to his sons, one son named in each trust. The CRUTs would terminate at the later of the death of all life beneficiaries or a term of 20 years. Each CRUT was funded with nonvoting units of a family LLC.

The trusts called for unitrust distributions over a 20 year term of 11% and 10% of annual trust value, respectively, but distributions were limited to the lesser of that unitrust percentage or trust income. There was a make-up provision for distributing up to the amount of income if in the early years the income was lower than the percentage payout, otherwise known as a net income make-up charitable remainder unitrust (NIMCRUT).

Arthur died about a year after creating the NIMCRUTs. A federal estate tax return was filed but no charitable deduction was taken for the remainder interests of the CRUTs. Rather, the trusts were disclosed on Schedule G with values reduced for the portion of trust assets attributable to the charitable remainder interests. After audit the IRS adjusted the taxable estate upward on the position that the trust value could not be reduced nor a charitable deduction taken by the estate due to reducing value for the potential limitations to income of trust distributions. According to the IRS, Code Section 664 provided that an income limitation is not taken into account in valuing the life and remainder interests of a CRUT. The position of the estate was that the income interest is accounted for in valuing the term interest given to the decedent's children, thus potentially lowering the noncharitable term interest and increasing the value of the charitable remainder interest above the required 10% minimum.

At court the parties stipulated that the trusts established by Arthur did not meet the minimum 10% charitable remainder value unless the lower income distributions could be taken into account in valuing the life and remainder interests. Thus, the only issue before the court was whether Code Section 664 permits the taxpayer to use an income limitation in arriving at those values. The court found the statute and regulations to Section 664 ambiguous on this point and proceeded to analyze IRS revenue rulings and revenue procedures and legislative history on the issue. The court gave deference to longstanding IRS guidance on the point, specifically Revenue Ruling 72-395, 1972-2 C.B. 340 and Revenue Procedure 2005-54, 2005-2 C.B. 353, and referencing the committee reports to the 1969 legislation that brought the valuation rules of Section 664(e) into existence. The court concluded that the IRS is correct, that when valuing the remainder interest of a CRUT, a limitation of distributing income is not to be taken into account in valuing the charitable remainder interest. In this case, that conclusion caused both trusts to flunk the minimum 10% remainder interest test, and no reduction in trust value to be allowed on the estate tax return.

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Steinberg v. Commissioner, 145 T.C. No. 7 (9/24/2015). The Tax Court issued a decision favoring the taxpayer in a gift tax controversy, involving whether a taxable gift can be reduced by the mortality risk that the donees would have to pay estate tax under Code Section 2035(b). Under that statutory gross up rule, if the donor dies within three years of making a taxable gift, the donor's gross estate must be increased by the amount of any gift tax paid. The case follows a prior Tax Court opinion that had denied an IRS motion for summary judgment on the net gift case. See Steinberg v. Commissioner, 141 T.C. No. 8 (9/30/2013). The IRS had asserted that as a matter of law the value of a taxable gift cannot be reduced by the donee's liability for potential estate taxes under Code section 2035(b), when the donee agrees to pay any such resulting taxes. The new case follows a trial with valuation evidence.

89 year-old Jean Steinberg entered into a binding gift agreement with her daughters under which she gave them cash and securities, and in exchange the daughters agreed to assume and to pay, among other things, any estate tax liability imposed under Section 2035(b) in the event that Jean passed away within three years of the gifts. The gift agreement and formulas were negotiated over several months by separate counsel. In calculating the fair market value of the property transferred to the daughters for gift tax purposes, the donor reduced the fair market value of the gifted cash and securities by an amount representing the actuarial value of the daughters' assumption of the potential estate tax liability under Section 2035(b). The actuarial value of the potential estate tax was calculated using Jean's mortality risk for each year of the three year period.

The fair market value of the net gift was around $71 million (prior to reduction for gift taxes paid since the daughters agreed to pay the gift tax), and the reduction for estate tax exposure under Section 2035(b) was valued at $5.8 million. The IRS audited the gift tax return and disallowed the reduction of the gift value for the potential estate tax liability. Gift taxes of $1.8 million were assessed.

The first opinion (Steinberg I) stated that the Tax Court will no longer follow McCord v. Commissioner, 120 T.C. 358 (2003), which was reversed by the 5th Circuit in 2006. In McCord, the taxpayer had entered into a formula gift with his children, who agreed to pay any transfer taxes that resulted from gifts to them. On the gift tax return, the gift value was reduced by the actuarial value of the potential estate taxes that would be due as a result of the donor passing away within three years of the gift. In that case the Tax Court agreed with the IRS that "in advance of the death of a person, no recognized method exists for approximating the burden of the estate tax." In McCord, the Fifth Circuit reversed the Tax Court, finding it was allowable to consider the possible effect of estate tax liability due to a death within three years, for purposes of valuing the gift under a willing buyer-willing seller approach. But the Fifth Circuit concluded that the possibility of estate taxes actually being incurred was too speculative to be reduced to a monetary value to include in the value of the gift.

Therefore the present case (Steinberg II) proceeds to consider the value of the potential estate tax liability on the donees as a result of the gift agreement. The court agreed with the taxpayer that a willing buyer/willing seller approach was appropriate and would take into account the contingent liability of the estate tax liability. The court also agreed with the taxpayer that the mortality tables under Code Section 7520 applied, and disagreed with the IRS that individual health factors and circumstances of the donor should be accounted for, and that the contingent nature of the tax liability would preclude use of the tables.

The taxpayer introduced evidence on the value of the potential tax liability through an independent valuation report that had been obtained prior to filing the gift tax return. The appraiser used the IRS mortality tables to adjust the calculation of the contingent tax liability of the donees for the probability of the donor's death. The IRS was unable to convince the court that a more appropriate valuation method should be used.

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Davidson Case Settled. In a case that has received much attention in the tax and estate planning bar, a settlement has been reached in the U.S. Tax Court in Estate of Davidson v. Commissioner, T.C. No. 13748-13 (stipulated 7/6/2015). The case involved Bill Davidson, who shortly before his death in 2009 engaged in a variety of estate planning related transactions prior to the diagnosis of an illness. The taxpayer died within six months of the diagnosis.

There were several SCIN transactions completed in the planning. One set involved a "principal premium", where the face amount of the installment note was adjusted upward above the appraised value of the property sold, to account for the mortality risk in the notes. Another set of transactions involved interest rate adjustments, where the interest rate on the notes was increased to account for mortality risk. After death, the federal estate tax return did not include the outstanding promissory notes with the estate assets. A gift tax return was filed and the SCINs disclosed, but no taxable gift was recognized on the return on those transactions.

The IRS had assessed estate, gift and GST taxes in excess of $2.8 billion ($1.9 billion estate tax and $900,000 gift tax and GST tax) on the estate of the deceased. Although many issues went into that assessment, the matter before the court of interest to tax planners was the proper method for valuing a SCIN. Prior to the filing of the petition in U.S. Tax Court, the IRS had issued an administrative ruling as a result of the audit examination, which laid out its view of the tax treatment of the SCINs. See CCA 201330033 (7/26/2013).

The case involved three primary issues: (1) whether all or any portion of the transfers of the property from the decedent to the grantor trusts, in exchange for the SCINs, constituted taxable gifts; (2) how to determine the fair market value of the notes; and (3) if arguably the transfers in exchange for the SCINs were not gifts, determining the estate tax consequences of the cancellation of the notes upon death.

The IRS argued that the difference, if any, between the fair market value of the notes (if lower then the fair market value of the property transferred to the grantor trusts) is a deemed gift. Further, the IRS stated that the notes should be valued based on a method that takes into account the willing-buyer-willing-seller standard in the regulations to Section 2512. Also, that valuation should take into account the decedent's medical history on the date of the gift. The taxpayer used the tables under Section 7520 to value the SCINs and concluded that there was no taxable gift, i.e. the notes value equaled the transferred property value. The IRS disagreed that the Section 7520 tables, used for annuities and interests for life or a terms of years, are appropriate on the self-cancelling notes.

Further discussion in the CCA showed the IRS believes the SCINs lack the elements of genuine debt because there must be a reasonable expectation that the debt will be repaid. The taxpayer must show that the debtor grantor trust that issued the note has the ability to repay the amount of the note. Finally, the IRS concluded in the CCA there is no estate tax consequence associated with the cancellation of the notes with the self-cancelling feature upon the decedent's death.

The court settlement entry this summer shows a total agreed tax assessment of about $321 million, a vast decrease from what the IRS sought, although it is unclear what can be drawn from that result. The tax community will not get a reported case to lend clarity on what methods are acceptable in valuing a self-cancelling installment note.

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Estate of Pulling v. Commissioner, T.C. Memo. 2015-134 (7/23/2015). The Tax Court agreed with the taxpayer on a valuation case involving several contiguous parcels of real estate included in the taxable estate. The decedent owned three parcels in Collier County, Florida. He also owned a minority interest in a land trust that owned two other parcels of land in the same area. Those parcels had been gifted to the trust by the decedent prior to death. A group of friends, family and unrelated parties held the majority of the beneficial interests in the trust.

When valuing the parcels that had been transferred by gift in 2004 to the trust, the appraiser had approached the value on the basis that all contiguous parcels were one. On that basis the three parcels retained at the time were collectively valued at $2.37 million. The same appraiser was used for estate purposes after the date of death in 2005. For estate tax value the appraiser treated the three parcels in the estate as separate from those held in the trust. Due to issues of the irregular parcels with utilities access and dimensions, the three parcels were collectively valued at $940,000.

The IRS took exception to the lower valuation for estate tax purposes. The Tax Court held that only if it was reasonably likely that the parcels would in fact be used in a combined fashion should the prospective combined use be considered in setting value. There was evidence of the trust having rejected prior offers for purchasing the decedent's parcels, and the estate's minority interest in the trust was not sufficient to control a sale and purchase. The court agreed with the estate's valuation.

Webber v. Commissioner, 144 T.C. No. 17 (6/30/2015). The Tax Court followed IRS rulings on the "investor control doctrine" and agreed that the taxpayer had sufficient control and incidents of ownership of a private placement life insurance plan to be treated as the owner of the accounts within the policy for income tax purposes. Jeff Webber established a grantor trust that purchased private placement variable life insurance policies from Lighthouse Capital Insurance Co. in the Cayman Islands, on the lives of two elderly relatives. He and his family were the beneficiaries.

Premiums were paid to Lighthouse and placed in separate accounts for investment to support the policies. The investments were in venture capital startup companies with which Webber had personal knowledge and had invested in personally. Webber had the ability to direct the companies in which the separate insurance accounts were invested.

The IRS asserted that under Revenue Ruling 77-85, 1977-1 C.B. 12, Webber violated the investor control doctrine by retaining the power to direct the investments of the accounts within the insurance policies, the power to vote the shares of the companies in which the insurance funds were invested, and exercise other securities options. The result of the case was that the taxpayer was taxable on the income of the private placement insurance and not entitled to deferral of insurance policy income. However, the taxpayer was not liable for negligence penalties due to good faith reliance on tax professional advice.

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Estate of DiMarco v. Commissioner, T.C. Memo 2015-184 (10/1/2015). An income tax deduction was denied by the Tax Court to an estate that distributed estate funds to a charity. The Will of the decedent directed the executor to pay all estate expenses from the general estate and to distribute all of the remaining estate assets to the church "that he regularly attended", and that the pastor of that church would be his executor. Facts developed that he actually regularly attended two churches. Therefore, the pastors of the two churches applied to be appointed as co-executors. The Will did not specifically provide that gross income of the estate was to be permanently set aside or separated into distinct accounts.

Cousins of the decedent filed suit in probate court challenging the terms of the Will. Litigation matters ensued and ultimately a settlement was reached.

Date of death was in 2008. In 2010 the estate had over $330,000 of income. On the Form 1041 the estate claimed a charitable deduction for $315,000, though the amount had not yet been distributed to the churches, on the basis of the amount being permanently set aside for charitable contributions under Code Section 642(c).

The IRS denied the deduction on audit. The Tax Court agreed with the IRS that due to the estate being in the midst of ongoing and unresolved litigation over the validity and terms of the Will, the possibility that the amount set aside for charity could actually be distributed instead to noncharitable beneficiaries, or utilized for legal expenses, was not under the test in Reg. Sec. 1.642(c)-2(d) "so remote as to be negligible." Even though a settlement with the cousins had been tentatively reached at the time of filing the Form 1041, it had not been approved, and the court concluded that the unusual and uncertain terms of the Will caused the remote as to be negligible test to be failed. The Tax Court specifically followed its reasoning in Estate of Belmont, 144 T.C. No. 6 (2/19/2015).

Education Assistance Foundation for Descendants of Hungarian Immigrants in Performing Arts, Inc. v. United States, D.D.C., No. 1:11-cv-01573 (7/1/2015). The case involves the IRS revoking the tax exempt status of an organization, but carries charitable planning implications as well with respect to how finely tuned the mission of a client's family foundation can be. The taxpayer brought suit in the District Court of the District of Columbia after its exempt status was revoked. It had been established for the purposes described in the lengthy name of the organization. Its only source of funding was from the estate of Julius Schaller, which transferred over $2.5 million to the foundation under the terms of the estate documents. The estate claimed a charitable deduction on the estate tax return for that amount.

Thereafter, the foundation awarded three scholarships for financial aid to students. All three awards were to direct descendants of the deceased Mr. Schaller. In addition to revoking the tax exempt status the IRS disallowed the estate tax charitable deduction. The Service reasoned that the organization existed to serve the private interests of the Schaller family to a more than insubstantial degree. The District Court agreed with the government, finding that the organization was operated in a way that benefitted a single family, and the earnings of the organization cannot inure to the private benefit of any individual. Since the revocation was retroactive to inception and upheld, there should be no tax deduction for an estate bequest to a charitable organization.

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U.S. v. Marshall, No. 12-20804, 116 AFTR 2d 2015-_____ (5th Cir. 8/19/2015). The 5th Circuit Court of Appeals recently revoked its own prior decision and issued a new ruling in a long-running dispute between the IRS and the family of J. Howard Marshall II on unpaid gift tax and interest liabilities. After largely affirming a Texas federal district court's rulings that the transferees of indirect gifts by J. Howard were liable for the full unpaid gift tax and interest, the new ruling scaled that back to a liability capped at the amount of the total gift made.

The origin of the tax controversy is a redemption of J. Howard's stock in Marshall Petroleum, Inc. (MPI) back to the corporation, for less than fair market value. The IRS charged that the 1995 redemption resulted in an indirect gift to the other shareholders at the time, which included his son, his daughter-in law, two trusts for grandchildren, and a grantor retained income trust (GRIT) created by his ex-wife, Eleanor. J. Howard later died in 1995.

In 1984, Eleanor had created three charitable remainder trusts and the GRIT and funded them with her MPI stock. The CRATs later redeemed their stock back to the company for fair value, and are not an issue in the case. The GRIT held its MPI stock in 1995 at the time of J. Howard's redemption, and provided an income interest to Eleanor for a term of years and a remainder interest to their son, E. Pierce Marshall.

In 2002 the executor for the estate of J. Howard, Finley Hilliard, entered into a stipulation with the IRS in the U.S. Tax Court gift tax deficiency case, that there were taxable gifts of over $82 million made as a result of the 1995 stock redemption transaction, attributable to and allocated among the various family individual and trust donees. The Tax Court case against J. Howard's estate was final in 2008, finding taxes and interest due. The estate never paid the gift taxes.

Eleanor died in 2007. Her estate as her successor in interest thus became potentially liable for unpaid gift taxes of J. Howard under the transferee liability rules of Code Section 6324. But her son as executor of her estate and Finley Hilliard as trustee of her formerly revocable trust made other payments and distributions including distributions of personal property, payment of rents, and accounting and legal fees and other funds set aside for charitable organizations. In 2010, the government filed suit in U.S. District Court pursuing J. Howard's donees for his unpaid gift taxes on the 1995 gifts.

The estate and trust on behalf of Eleanor argued that she was not personally liable for the unpaid gift taxes because she did not own the stock, her GRIT did. Alternatively they argued that the gift tax should be collected from the remainderman of the GRIT, not her as income beneficiary, because the stock was corpus allocable to the remainder beneficiary. In the 2014 decision, the 5th Circuit ruled against the representatives of Eleanor on all arguments, and also agreed with the district court that her trustees were personally liable for the unpaid gift taxes and interest, due to paying out estate and trust monies to other parties before satisfying unpaid taxes.

In the current ruling revisiting the decision, a majority of the 5th Circuit panel hearing the case has revoked that 2014 ruling, and instead determined that the liability for tax and interest by the donees of the indirect gift is limited to the value of the gift made.

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Bosque Canyon Ranch, L.P., et al. v. Commissioner, T.C. Memo. 2015-130 (7/14/2015). Two limited partnerships based in Texas conveyed easements to large tracts of ranchland to the North American Land Trust (NALT). The easements followed a period where the operators of the partnerships raised capital through private placement memorandums marketing limited partnership units. BCR I and BCR II both claimed charitable deductions for the restrictive easements on their partnership tax returns, flowing the deduction through to the partners on the Forms K-1. The easements were valued at $8.4 million and $7.5 million respectively.

While the easements restricted use of the land from residential, commercial, industrial and agricultural purposes, the partnerships retained rights on the restricted land to raise livestock, hunt, fish, trap, harvest timber, and various other activities. Also, part of the investment terms of the limited partners contributing capital was that the limited partners would be granted "Homesite" five acre parcels within the ranchland, although not within the land portion that was subject to easement. The agreement between the partnerships and NALT included that, by further agreement, the boundaries of the Homesite parcels as a group could be modified, provided that the modification could not in NALT's "reasonable judgment" result in any material adverse effect on the land subject to the conservation easement, and the total area of land subject to restriction could not be diminished.

The IRS disallowed the charitable deductions for the conservation easements for all the limited partners in part because it viewed the capital contributions as a disguised sale of the Homesite parcels. The IRS also asserted that the easements were not "qualified real property interests" in the meaning of Code Section 170(h)(1) which requires a restriction in perpetuity, since the deeds permitted modification of the boundaries between the five acre parcels and the restricted property. Finally the IRS found that the documentation furnished to NALT at the time of the deeds, regarding the reserved rights of the partners to utilize the property, was incomplete.

The Tax Court agreed with the IRS on all arguments and upheld the disallowance of charitable deductions. On top of that the court agreed with the imposition of the 40% gross undervaluation penalty, as the easements were worth zero and the amount claimed was more than zero.

Voss v. Commissioner, 116 AFTR 2d 2015-5128 (8/7/2015), rev'g 138 T.C. 204 (3/5/2012). The estate planning process often includes considerations on how to title property. Titling of real estate can have implications as well for income tax purposes. The Ninth Circuit Court of Appeals has reversed a Tax Court decision on the issue of imposing the home mortgage interest limitations on unmarried co-owners of property. In the case, the court agreed with the taxpayers that that the deduction limitations of Code Section 163(h) (interest expense on $1 million of acquisition indebtedness and $100,000 home of equity indebtedness) should be applied on a per taxpayer basis, not a per property basis.

In the case two unmarried men co-owned two houses as joint tenants. Mortgages as well as home equity lines of credit were taken on both properties, and they were both liable on all the debts. On audit the IRS limited the interest expense deduction in total to the interest attributable to the Section 163(h)(3) limitation. The IRS followed its reasoning published in CCA 200911007 (3/13/2009). The Tax Court had agreed with the IRS on the limitation to a per residence basis. In reversing the Tax Court to apply the deduction limit on a per taxpayer basis, the appellate court used its own interpretation of the wording of the Code section. The result is that the total mortgage interest expense deduction limitation was doubled.

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LEGISLATION AND TREASURY REGULATIONS

Tax Law Including in Highway Fund Extension. Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, P.L. 114-41 (7/31/2015). An urgent matter before Congress this summer was the expiring funding of federal expenditures on roads and highways. Looking around for offsetting revenue raisers while temporarily extending highway funding, Congress included some tax provisions.

Included with the tax law changes were new Code Section 1014(f) and Section 6035. The combined effect of these statutory additions is a required basis consistency standard, where basis in an asset acquired from a decedent may not exceed the value of the asset as determined for federal estate tax purposes. The new law also imposes a reporting requirement on administrators of estates regarding basis in assets received by heirs. Effective for estate tax returns filed after July 31, 2015, the administrator must file with the IRS and the recipients of estate assets, the value used for estate tax purposes. The IRS is directed to develop forms to be used for that reporting.

However, the IRS later issued Notice 2015-5, I.R.B. 2015-36 (9/8/2015), responding to the immediate effective date of the highway transportation funding bill. The IRS has granted additional time for taxpayers to begin complying with the basis consistency reporting requirements. In the Notice, the IRS states that for required basis reporting notification to the IRS and the heirs under Code Section 6035, those notices will not need to be filed prior to February 29, 2016. During that time the IRS expects to issue guidance on complying with the new basis consistency and reporting rules and develop prescribed forms for doing so.

Regulations on Transfers of CRT Term Interests, Reg. Sec. 1.1001-1 and Reg. Sec. 1.1014-5 (T.D. 9729 8/11/2015). Treasury has issued final regulations addressing rules for determining basis when a term interest holder in a charitable remainder unitrust transfers that interest in a sale or other disposition. The issue drew focus when the IRS issued Notice 2008-99, 2008-47 IRB 1194, labeling as a "transaction of interest", methods being used by taxpayers to fund a CRUT with low basis assets, recognize a charitable deduction on the taxpayer's income tax return, and later sell the unitrust interest with gain on that sale offset by basis.

The IRS later issued proposed regulations in 2014 to provide a special rule under Code Section 1001(e) for determining basis in a term interest of a CRT, whether a CRAT or a CRUT. Under those regulations the basis of the term interest is determined without regard to the inside basis of the trust assets, and the term holder's basis would be the portion of adjusted uniform basis assignable to that interest, reduced by the portion assignable to that interest of the amount of trust undistributed net ordinary income and by the trust undistributed net capital gains. The new final regulations adopt the provisions of the proposed regulations without change.

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IRS RULINGS AND ANNOUNCEMENTS

Invalid Gift Splitting Election. PLR 201523003 (6/5/2015). The IRS issued a private ruling analyzing the effects of a gift to trust by one spouse, and GST exemption issues with the gift. Husband created a trust for the benefit of his spouse and descendants, with income and principal distributions among the beneficiaries in the discretion of an independent trustee. In the same year as the gifts to that trust, husband created two GRATs, both of which would pay the balance to the family trust upon termination.

Husband and wife filed Forms 709 with gift splitting elections. On the gift tax returns they elected out of the automatic allocation of GST exemption to the family trust, and affirmatively allocated GST exemption to a portion of that trust (it is unexplained why not to the entire trust). When the first GRAT terminated, husband filed a gift tax return reporting the transfer from the GRAT to the family trust, but did not allocate GST exemption to the family trust. When the second GRAT term expired, the taxpayers filed gift tax returns to allocate GST exemption. Two additional GRATs were created in later years and both husband and wife filed gift tax returns in those years with a gift splitting election, with no GST exemption allocation.

The taxpayer requested rulings from the IRS on the status of gift splitting elections and GST exempt status of the family trust. The gift splitting elections by husband and wife in the years the family trust received funding raised an issue, since the wife's beneficial interest in discretionary distributions was not "susceptible of determination", not severable from the other beneficial interests. On this point the IRS refers to the provisions of Regulation Section 25.2513-1(b)(5) and Revenue Ruling 56-439, 1956-2 C.B. 605. Thus the gift splitting election would not ordinarily be effective. Since the statute of limitations had expired on assessing tax on the years involving the first funding of the family trust and creation of the first two GRATs, the IRS concludes pursuant to Code Section 2504(c) the gift splitting election for those years is irrevocable. For later years however where the taxpayers funded the family trust with the wife as a beneficiary, and where the statute of limitations was still open, the IRS concludes that for the gift splitting elections for any open years, husband can amend his gift tax return to remove the ineffective gift splitting election.

With respect to the GST exemption allocations, the taxpayer must be the transferor of property to the trust in order to allocate GST exemption to the trust. Code Section 2631(a). Ordinarily the wife would not qualify as a transferor to the family here, because of the ineffective gift splitting election. The IRS concludes that for the closed tax years where the statute of limitations had run, husband and wife must be treated as the transferors of one-half each of the entire property transferred to the family trust in the closed years, and the GST exemption allocations were effective. Unlike the issue of the spouse being a discretionary beneficiary of the family trust for gift tax gift splitting purposes, the IRS observes that the status of the wife as a beneficiary does not affect the ability to allocate GST exemption. Since wife was treated as a transferor to the trust under the gift splitting rules, the wife was a transferor of one-half the gift, and could allocate GST exemption. For open years where the statute of limitations had not run, the gift splitting election is not effective and husband can filed an amended gift tax return reporting the transfers to the family trust as made solely by him and make an allocation of his GST exemption to that effect.

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