

Conference Agreement	
Double Estate Tax Exemption	-83
No Change in Basis Step-up or down	

Estate, Gift, and GST Tax

Chapter 12

Rev. Proc. 2017-58 (October 20, 2017)

12-2

Gift and Estate Tax Exclusions

3

	2017	2018
Gift Tax Annual Exclusion	\$14,000	
E & G Basic Exclusion Amount	\$5,490,000	

4

	2017	2018
Gift Tax Annual Exclusion	\$14,000	\$15,000
E & G Basic Exclusion Amount	\$5,490,000	\$5,600,000

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*Rev Proc 2017-34
(6/09/2017)*

12-2

Permanent Simplified
Procedure For Obtaining
Extension To Make Estate
Tax Portability Election

Background

Only if an estate that is “small” enough so it is not required to file Form 706 (except for the portability election), can obtain **PLR relief for a late portability election under Reg. 301.9100-3.**

7

Rev Proc 2017-34

Provides a **permanent simplified method (no fee) for small estates to obtain an extension of time to make the portability election.**

8

1) Executor must file a
"complete and properly
prepared" Form 706 on
or before the later of:

- January 2, 2018; or
- the **second annual anniversary** of the decedent's date of death.

9

2) Top of Form 706:

**"FILED PURSUANT TO
REV. PROC. 2017-34
TO ELECT
PORTABILITY UNDER
§ 2010(c)(5)(A)."**

10

Example 1

11

- Predeceasing Spouse (S1) dies on January 1, 2014, survived by Surviving Spouse (S2).
- S1's gross estate consists of cash in bank accounts held jointly with S2 with rights of survivorship in the amount of \$2,000,000 (no prior gifts).

12

S1 Dies 1/1/2014

Gross Estate	2 mil.
- <u>Marital Ded.</u>	<u>2 Mil.</u>
= <u>Taxable Estate</u>	<u>0</u>

13

No
Form 706
is required
so
Form 706 is
Not filed.

14

S2 Dies 1/30/2014 and Form 706 is filed on 10/30/2014

Taxable Estate	8,000,000
-Basic Excl. Amt.	<u>5,340,000</u>
= Balance	2,660,000
	x 40%
= Estate Tax	<u>1,064,000</u>

S2's
Gross

S2's
5.34
Exempt

15

Per Rev. Proc. 2017-34,
"S1's executor files a
complete and properly
prepared Form 706 on
behalf of S1's estate on
December 1, 2017,
reporting a DSUE
amount of \$5,340,000."

16

Problem:

By Dec. 1, 2017, the 3 year S of L on refunds has expired on Oct. 30, 2017 for S2's estate (Form 706 filed Oct. 30, 2014)

17

To recover the estate tax overpayment, S2's executor must file a claim for refund of tax by October 30, 2017 (the end of the S of L period) "even though a Form 706 to elect portability has not been filed on behalf of S1's estate by that date."

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“Such a claim filed on Form 843, Claim for Refund and Request for Abatement, in anticipation of the filing of the Form 706 by S1's executor will be considered a protective claim for credit or refund of tax.”

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“Accordingly, as long as the Form 843 is filed on or before October 30, 2017, the Service can consider and process that claim for credit or refund of tax once S1's estate is deemed to have made a valid portability election and S2's estate notifies the Service that the claim for credit or refund is ready for consideration.”

20

Form 843

Taxable Estate	8,000,000
-Basic Excl. Amt.	<u>5,340,000</u>
-DSUE	5,340,000
Balance	0
Previously Paid	1,064,000
Refund	1,064,000

5.34
DSUE

S2's
5.34
Exempt

21

12-4

Example 3 (Potential Trap and Solution)

22

- The facts relating to S1 and S1's estate are the same as in Example 1.
- S2 makes a gift to Child of \$6,000,000 on December 1, 2014.
- S2 has made no prior taxable gifts.

23

On April 15, 2015, S2
files a Form 709
claiming an applicable
exclusion amount of
\$10,680,000:

S2's AEA of **\$5,340,000**
+
DSUE of **\$5,340,000**

24

“As a result, the Form 709 reports no tax due and S2 tenders no gift tax.”

25

- S1's DSUE amount is not available until the election is made.
- Once made, the portability election is retroactive to S1's DOD.

26

“Because S2 files the Form 709 before S1's estate makes the portability election, S2's claimed application of the DSUE amount will be denied and gift tax on the transfer will be assessed.”

27

“To recover that gift tax once the portability election has been made by S1's estate, S2 must file a claim for credit or refund of tax (protective or otherwise) within the time prescribed in §6511(a) for filing a claim for credit or refund.”

28

Estate of Sower

149 TC No. 11

(Sept. 11, 2017)

IRS May Audit First Spouse's Estate Tax Return as a Result of Portability Election

29

Facts

- H died in 2012 and elected portability of the DSUE of \$1,256,033
- In 2013, IRS sent H's estate a closing Letter 727.

“Estate Tax Closing Document” – Letter 627

31

“[The Commissioner] will not reopen or examine this return unless *** [notified] of changes to the return or there is: (1) evidence of fraud, malfeasance, collusion, concealment or misrepresentation of a material fact; (2) a clearly defined substantial error based upon established Internal Revenue Service position; or (3) a serious administrative error.”

32

- W died in 2013.
- IRS audited both H and W's Form 706s and reduce the DSUE from \$1,246,033 to \$282,690.

33

- W's estate objected to the IRS auditing H's estate.
- The Tax Court **rejected all nine arguments of W's estate.**

34

Tax Court Holdings (1 and 2 of 9)

- 1) IRS acted within the authority granted by section 2010(c)(5)(B) when IRS examined H's estate tax return to determine the correct DSUE amount.

35

- 2) "[A] letter stating that the estate tax return of a predeceased spouse has been accepted as filed is not a closing agreement under I.R.C. sec. 7121.

36

So what the heck is a "closing agreement"?

37

- **Form 866**, Agreement as to Final Determination of Tax Liability.
- **Form 906**, Closing Agreement on Final Determination Covering Specific Matters.
- ~~**Letter 627**, Estate Tax Closing Document~~

38

Closing ~~Document~~

39

Courts have bound the IRS without Forms 866 or 906 where the only agreement was letters of offer and acceptance following negotiations.

See *Treaty Pines Invs. P'ship v. Comm'r* (5th Cir. 1992)

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12-17

Notice 2017-12
(Jan. 30, 2017)

IRS Account Transcript
Can Substitute For Estate
Tax Closing Letter

41

IRS notes that **neither** a
closing letter nor
transcript transaction
code
"421" prevent an
examination of Form 706
to determine the DSUE of
the surviving spouse.

42

PLR 201707007
(2/17/2017)

12-7

Taxpayer Friendly Ruling
on Income, Gift And
Estate Tax Aspects Of
Funding A Trust Pursuant
To Divorce.

43

Per a negotiated
divorce agreement, H
will transfer **half of his
stock in Company** to a
trust for W **in exchange
for her relinquishment
of all marital rights and
property.**

44

Husband will transfer the shares to the trust “within six years after the entry of the final judgment of divorce.”

45

“This arrangement is to be formalized in a legally binding property settlement agreement between Husband and Wife prior to the transfer of Company shares to the trust.”

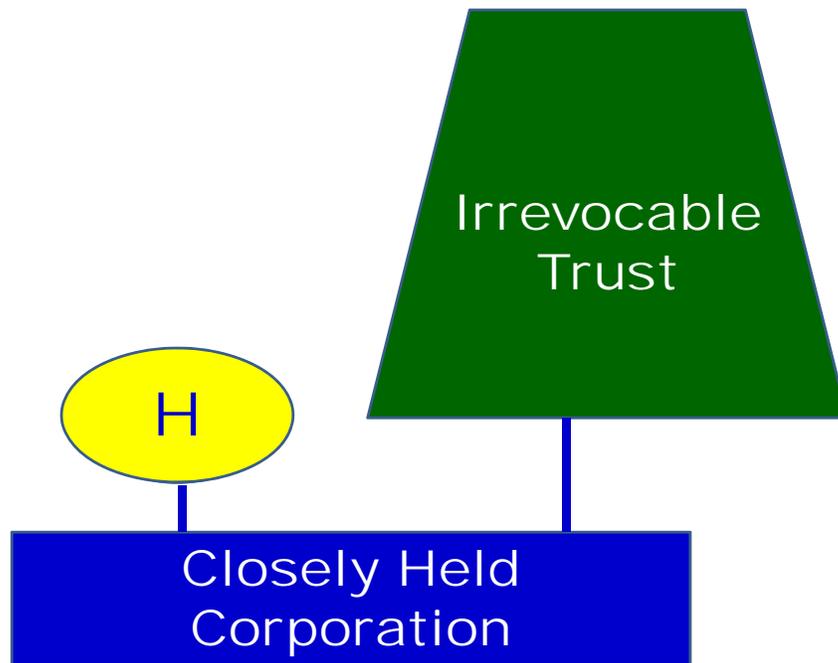
46

- W “will receive all of the net income of the trust annually.”
- The trustee can distribute principal to W but cannot sell company shares to distribute.

47

- Wife can withdraw an unspecified percentage of principal, but not the stock.
- Upon W’s death, principal reverts to H, or H’s estate if he predeceases her.

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IRS Agreed

- 1) No triggering of capital gain by H or W on the transfer to trust (sec. 1041).
- 2) **No gift tax on W's income interest.** W's relinquishment of spousal property rights or support is deemed full and adequate consideration (sec. 2516).

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- 3) No gift tax on H's reversionary interest (i.e., H's retained interest is not valued at zero under sec. 2702).
- 4) If H predeceases W, the trust property value in H's estate is reduced by the value of W's outstanding income interest.

51

Grantor Trust?

- Not discussed in PLR.
- Trust is a partial grantor trust if H's reversionary interest exceeds 5% of the trust value at inception--section 673.
(if so, H is taxed on stock sale gain)

52

- W is presumably taxed on trust income per sections 652 (income required to be distributed currently, 662 (income required to be distributed currently, whether distribute or not) or possibly section 678.

53

Notice 2017-15

(1/17/2017)

12-11

(last few days of Obama Admin.)

Applicable Exclusion
Amount & GST Exemption
For Pre-Windsor Transfers
Can Be Recalculated

54

The notice provides “special administrative procedures” allowing certain taxpayers and executors “to recalculate a taxpayer's remaining applicable exclusion amount [AEA] ... while the taxpayer was married to a person of the same sex.”

55

The AEA previously denied due to the Defense of Marriage Act (DOMA) (unconstitutional per Windsor) can be recovered for future use, even if the statute of limitations on refunds has expired.

56

Estate of Powell

148 TC No. 18

(5/18/2017)

12-12

(Reviewed Decision)

Transfer To Limited Partnership Was Includable In Estate

57

- **Aug. 15, 2008** Nancy Powell died.
- **Aug. 6, 2008**, Son created FLP.
- **Aug. 8, 2008**, Son transferred about **\$10 mil. cash and securities** to a limited PSP interest in the FLP. Son was GP.

58

- **Aug. 8, 2008**, Son (with a faulty POA) transferred the FLP interest to a CLAT (remainder to two sons).

59

IRS Argument

IRS argued that 2036(a)(2) applied because of decedent's ability, acting with her sons, to dissolve the FLP and thereby designate those who would possess the transferred property or the income from the property.

60

Majority Holding

- Section 2036(a)(2) applied to the transfer of cash and securities to the FLP.
- The gift to the CLAT was “void or revocable” under California law, due to the faulty POA.

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- Even if the gift to the CLAT were valid, because that transfer occurred less than three years before decedent's death, it would be pulled into the gross estate per section 2035(a).

62

The Court holds that section 2036(a)(2) and 2043(a) brings into the gross estate the **DOD value of the cash and securities** (\$10 million) **minus the value of the limited partnership interest** that the decedent got in exchange **at the date of the exchange.**

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Otherwise, the \$10 million would be double counted: first via section 2036(a)(2) and again via her partnership interest under section 2033.

64

Here, the parties stipulated that the DOD value of the assets matched the value of the partnership interest on the date of the exchange—so there is nothing further to litigate (and the section 2043(a) discussion is dictum)

65

The majority opinion notes that this is the **first time the court** has applied **section 2043(a)**.

66

Concurring Opinion

- 7 of the 17 Tax Court judges reached the same conclusion but disagreed with “double inclusion” problem and the need to address section 2043--a “solution in search of a problem”.
- They did agree with applicability of section 2036(a)(2).

67

Once that \$10 million is included in her gross estate under section 2036(a)(2), it seems perfectly reasonable to regard the partnership interest as having no distinct value because it was an alter ego for the \$10 million of cash and securities.

68

“There is no double-counting problem if we read section 2036(a)(2), as it always has been read, to disregard a ‘transfer with a string’ and include in the decedent's estate **what she held before the purported transfer-the \$10 million in cash and securities.**”

69

Estate of Sommers
149 TC No. 8
(Aug. 22, 2017)

12-13

No Estate Tax Deduction
Allowed For Gift Tax Paid
by Donees On Net Gift

70

"Our acknowledgment [in *Estate of Morgens*] that a net gift made within three years of the donor's death effects a removal of funds from the transfer tax base that must be redressed by the gross-up cannot be read as acquiescence in the permanent exemption from transfer tax that would result if the gross-up were offset by a deduction of the same amount under section 2053(a)(3)."

71

*Legal Advice Issued by
Field Attorneys
20172801F* (12-16)
(Released 7/14/2017)

Gift Tax Assessment
Period Remained Open
Due To Failure To
Properly File Form 709s

72

Issue

Whether the period of limitations (S of L) on assessing gift tax remains open for gifts (undescribed) for which a Form 709 was filed, but where the Form 709 did not describe the transferred property, nor did it provide a description of the method used to determine the value of the transferred property?

73

Yes, the
S of L
does not start until
complete and
accurate Forms 709
are filed.

74

PLR 201723005
(Released June 9, 2017)

Gift of Nonvoting LLC
Interest To Private
Foundation Was Not
Self-Dealing

75

Facts

- Founder of Foundation **owns a promissory note from a disqualified person** (a trust in which founder's descendants are beneficiaries).
- If the **promissory note** were contributed to the foundation, an act of self-dealing would occur.

76

- In order to **avoid the self-dealing prohibition**, founder contributed the note to a **New LLC** in exchange for voting and nonvoting interests in the New LLC.
- **The nonvoting LLC interests will be contributed to Foundation.**

77

Requested Ruling

That Founder's proposed gift to Foundation of the nonvoting interests in New LLC, **the only asset of which is a promissory note from a disqualified person**, will not violate the **prohibition against self-dealing** under section 4941.

78

IRS Ruling

The proposed
transfer
is not
self-dealing.

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*PLR 201745001
(11/09/2017)*

Supp

*IRS Oks Agreement
Language To Protect
Trustees Without
Triggering the Self-
Dealing Excise Tax*

80

IRS approves an arrangement which obligates a private foundation to, if necessary to pay unanticipated debts, **return previously distributed trust funds to the trustees** of a testamentary trust.

81

IRS Ruling:
no act of self-dealing under section 4941

82

12-19

CCA 201723018
(Released 6/9/2017)

IRS Failed to Object to
Probate Court's Payment
of Creditor Before IRS So
Executor Escapes
Liability

83

We [Chief Counsel] recommend
as a 'best practice' that the
Service either refrain from any
participation in a probate
proceedings involving a
taxpayer (thus preserving its
right to potentially sue the
executor for distributing
assets in violation of section
6323 and/or the insolvency
statute),

84

or **participate fully** in the proceedings, objecting to proposed distributions and appealing adverse determinations as appropriate.

85

12-21

*“Interim Guidance for
Responsibility to Process
all Requests for Discharge
of the Estate Tax Lien”*

(Apr. 5, 2017)

IRS Small Business/Self
Employed Division Memo

86

“Upon the death of the decedent, an estate tax lien (IRC § 6324(a)) immediately arises and attaches to all of the property included in the decedent’s gross estate, whether or not such property is part of the probate estate.

....**Unlike other tax liens, no assessment, no notice and no demand for payment are necessary to create the estate tax lien” (the “silent lien”).**

87

12-21

Estate of Simmons
(DC IN 07/31/2017)

IRS's Tax Lien Has
Priority Over Estate
Funeral and
Administrative Expenses

88

“Pursuant to IRM
5.5.2.4(3), the
Government ‘may in its
discretion not assert
priority over reasonable
administrative expenses
of the estate.’”

89

12-22

PLR 201731005
(Released Aug. 4, 2017)

Failure To Attach Notice
Of Allocation Was Not
Fatal To GSTT Exemption
Allocation Election

90

PLR 201743013
(Oct. 30, 2017) **Supp**

No Added Estate Tax
Triggered Upon Transfer
From Decedent's
Grandson To His Daughter
- Sec. 2032A

91

- The real property was valued as a farm for estate tax purposes (sec. 2032A).
- It was bequeathed to decedent's grandson who subsequently sold the property to decedent's daughter.

92

PLR Conclusion

- Both Grandson and Daughter are qualified heirs.
- The transfer of **Grandson's interest to Daughter does not** trigger the additional estate tax in 2032A.