Notice 2017-15

PURPOSE

This notice provides guidance on the application of the decision in United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013), and the holdings of Revenue Ruling 2013-17, 2013-38 I.R.B. 201, to the rules regarding the applicable exclusion amount under §§ 2010(c) and 2505 of the Internal Revenue Code (Code), and the generation-skipping transfer (GST) exemption under § 2631, as they relate to certain gifts, bequests, and generation-skipping transfers by (or to) same-sex spouses. In particular, this notice provides special administrative procedures allowing certain taxpayers and the executors of certain taxpayers' estates to recalculate a taxpayer's remaining applicable exclusion amount and remaining GST exemption to the extent an allocation of that exclusion or exemption was made to certain transfers made while the taxpayer was married to a person of the same sex.

With respect to the applicable exclusion amount applied to a transfer between spouses that did not qualify for the marital deduction for federal estate or gift tax purposes at the time of the transfer, based solely on the application of the Defense of

Marriage Act (DOMA), Public Law 104-199 (110 Stat. 2419), taxpayers will be permitted to establish that transfer's qualification for the marital deduction and to recover the applicable exclusion amount previously applied on a return by reason of such a transfer, even if the limitations period applicable to that return for the assessment of tax or for claiming a credit or refund of tax under §§ 6501 or 6511, respectively, has expired. If, however, qualification for the marital deduction or a reverse qualified terminable interest property (QTIP) election would require a QTIP, qualified domestic trust (QDOT), or reverse QTIP election, such taxpayers will have to request relief pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make such an election.

With respect to a taxpayer's GST exemption that was allocated to transfers made, prior to the recognition of same-sex marriages for federal tax purposes, to or for the benefit of one or more persons in a same-sex marriage and/or any other person(s) whose generation assignment is determined under § 2651 with reference to a same-sex spouse, certain exemption allocations to transfers to persons now recognized to be non-skip persons as defined in § 2613(b) will be deemed void. Accordingly, taxpayers who made such a transfer will be permitted to recalculate the amount of their remaining GST exemption.

BACKGROUND

Prior to the decision of the Supreme Court in Windsor, the Internal Revenue Service (IRS) interpreted section 3 of DOMA as prohibiting it from recognizing same-sex marriages for federal tax purposes. Specifically, section 3 of DOMA provided that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7.

As a result, taxpayers in a same-sex marriage were not treated as married for purposes of gift, estate, and GST taxes and were not entitled to claim a marital deduction for gifts or bequests to each other. Those taxpayers were required to use their applicable exclusion amount under § 2505 or § 2010(c) to defray any gift or estate tax imposed on the transfer or were required to pay gift or estate taxes, to the extent the taxpayer's exclusion previously had been exhausted. Further, taxpayers in a same-sex marriage were not allowed to determine generation assignments for GST tax purposes based on a familial relationship with the spouse rather than on age.

In Windsor, the Supreme Court held that section 3 of DOMA is unconstitutional because it violates the principles of equal protection. Subsequently, the IRS issued Revenue Ruling 2013-17, which provides that, for federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term "marriage" includes such a marriage between individuals of the same sex. Revenue Ruling 2013-17 also provides a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages. In addition, the terms

"spouse," "husband and wife," "husband," and "wife" do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term "marriage" does not include such formal relationships.

Revenue Ruling 2013-17 provides that its holdings will be applied prospectively as of September 16, 2013, the date of its publication in the Internal Revenue Bulletin. Taxpayers in a same-sex marriage recognized under state law may rely upon the revenue ruling to file original, amended, or adjusted returns, or claims for credits or refunds for any overpayment of tax resulting from the holdings in the revenue ruling, provided that the applicable limitations period for filing such a claim under § 6511 has not expired.

On September 2, 2016, the Department of the Treasury (Treasury Department) and the IRS published in the Federal Register (81 FR 60609-01) final regulations (T.D. 9785) amending the regulations under § 7701 to provide that, for federal tax purposes, the terms "spouse," "husband," and "wife" mean an individual lawfully married to another individual, and the term "husband and wife" means two individuals lawfully married to each other. See also § 301.7701-18. In addition, the final regulations provide that a marriage of two individuals will be recognized for federal tax purposes if that marriage would be recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the domicile of the parties to the marriage or, for a foreign marriage, if the relationship would be recognized as

marriage by at least one state, possession, or territory of the United States, regardless of the domicile of the parties. Finally, the final regulations clarify that the term "marriage" does not include registered domestic partnerships, civil unions, or other similar relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband," and "wife" do not include individuals who have entered into such a relationship.

SPECIAL ADMINISTRATIVE PROCEDURES

1. Marital Deduction and Applicable Exclusion Amount

Section 2001(a) imposes an estate tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States. Section 2010(a) provides that a credit of the applicable credit amount is allowed to the estate of every decedent against the tax imposed by § 2001. Section 2010(c)(1) defines the applicable credit amount as the amount of the tentative tax that would be determined under § 2001(c) if the amount with respect to which such tentative tax is to be computed were equal to the applicable exclusion amount. Section 2010(c)(2) defines the applicable exclusion amount as the sum of the basic exclusion amount of $5,000,000 (as increased for inflation) and the deceased spousal unused exclusion amount. Section 2056(a) provides that, except as limited for certain terminable interests, the value of the decedent's taxable estate is determined by deducting from the value of the gross estate the value of all interests in property passing from the decedent to the surviving spouse (estate tax marital deduction), assuming all requirements for that deduction are satisfied.

Section 2501 imposes a gift tax for each calendar year on the transfer of property by gift during such calendar year by any individual. Section 2502 provides that the tax imposed by § 2501 for each calendar year is an amount equal to the excess of (1) a tentative tax, computed under § 2001(c), on the aggregate sum of the taxable gifts for such calendar year and for each of the preceding calendar periods, over (2) a tentative tax, computed under such section, on the aggregate sum of the taxable gifts for each of the preceding calendar periods. Under section 2505(a), in the case of a citizen or resident of the United States, a credit is allowed against the tax imposed by § 2501 for each calendar year in an amount equal to (1) the applicable credit amount in effect under § 2010(c) that would apply if the donor died at the end of the calendar year, reduced by (2) the sum of the amounts allowable as a credit to the individual under § 2505 for all preceding calendar periods. Section 2523(a) provides that, when a donor transfers an interest in property by gift to a donee who is then the donor's spouse, the amount of the donor's taxable gifts for that calendar year is reduced by the total value of such gifts to the donor's spouse (gift tax marital deduction), assuming that the other requirements for that deduction are satisfied.

For example, when a married individual (A) makes a gift or bequest to A's spouse (B), A is entitled to claim a gift or estate tax marital deduction for the gift or bequest under § 2523 or § 2056 if the requirements of those sections are satisfied. Because of this marital deduction, A does not have to use any of A's applicable exclusion amount to exclude that spousal transfer from tax, thus preserving A's applicable exclusion amount for other gifts and bequests. Prior to the decision in

Windsor, if A and B were of the same sex, A was not allowed to claim the marital deduction for a transfer to B, and A's applicable exclusion amount (if any) would have been applied automatically to reduce the amount of the gift or estate tax due.

Applicable law provides that, as long as the limitations period for filing claims of credits or refunds under § 6511 has not expired, a taxpayer may file an amended Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return) or a supplemental Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return) to claim the marital deduction for a gift or bequest to the taxpayer's same-sex spouse and to restore the applicable exclusion amount allocated to that transfer. If the limitations period has expired, this notice allows the taxpayer to recalculate the taxpayer's remaining applicable exclusion amount as a result of recognizing the taxpayer's marriage to the taxpayer's spouse. However, once the limitations period on assessment of tax has expired, neither the value of the transferred interest nor any position concerning a legal issue (other than the existence of the marriage) related to the transfer can be changed pursuant to this notice. See §§ 2001(f), 2504(c), 6501(c)(9) and the regulations thereunder. Similarly, no credit or refund of the tax paid on that marital gift can be given once the limitations period on claims for credit or refund has expired.

In the interest of providing certainty and to ease the administrative burden on both the taxpayer and IRS, a taxpayer must recalculate the taxpayer's remaining applicable exclusion amount, in accordance with IRS forms and instructions, on a Form 709 (preferably, the first Form 709 required to be filed by the taxpayer after the issuance

of this notice), on an amended Form 709 (if the limitations period under § 6511 has not expired), or on the Form 706 for the taxpayer's estate if not reported on a Form 709. Unless a taxpayer has predeceased this notice, it is not necessary to file an amended or supplemental return solely to report the increase in available applicable exclusion amount as a result of this administrative guidance. The taxpayer should include a statement at the top of the Form 706 or Form 709 that the return is "FILED PURSUANT TO NOTICE 2017-15." Moreover, the taxpayer must attach a statement supporting the claim for the marital deduction and detailing the recalculation of the taxpayer's remaining applicable exclusion amount as directed in forms and instructions issued by the IRS. If a QTIP or QDOT election is required in order to obtain the marital deduction, a separate request for relief pursuant to § 301.9100-3 must be submitted. The IRS will provide on www.irs.gov a worksheet and instructions to the Form 706 and Form 709 to properly compute and report the recalculated applicable exclusion amount.

The provisions of this section 1 apply both to the recalculation of the remaining applicable exclusion amount of a taxpayer (whether living or deceased), as well as to the recalculation of any deceased spousal exclusion amount allowed to be included in the applicable exclusion amount of that taxpayer's surviving spouse.

While this notice allows taxpayers to recalculate their remaining applicable exclusion amount as a result of the allowance of a marital deduction, it does not extend the applicable time limits on electing to split gifts made by a spouse under § 2513. In addition, any claims for credit or refund of gift or estate tax filed after the expiration of the limitations period under § 6511 will be denied. Any unrefunded gift tax paid on a gift

to a same-sex spouse, for which the limitations period under § 6511 has expired, will continue to be recognized as gift tax paid or payable for purposes of the computation of the estate tax under § 2001.

2. GST Exemption and Generation Assignments

Section 2601 imposes a tax on all generation-skipping transfers. Section 2611(a) provides that a "generation-skipping transfer" is a taxable distribution, a taxable termination, or a direct skip, all of which are transfers to or for the benefit of one or more skip persons. Section 2613(a) provides that a skip person is (1) a person assigned to a generation that is two or more generations below the generation assignment of the transferor, or (2) a trust (A) if all interests in such trust are held by skip persons, or (B) if (i) there is no person holding an interest in such trust, and (ii) at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a non-skip person.

A person's generation is determined under § 2651 based on the transferee's familial relationship to the transferor or the transferor's spouse, or if there is no such relationship, then based on the difference in age between the transferor and transferee. For purposes of the GST generation assignment rules, family members of the transferor include the transferor's spouse and each lineal descendant of a grandparent of the transferor or the transferor's spouse. The generation assignment of each family member other than a spouse is determined by comparing the number of generations between the transferee and a grandparent of the transferee (or of the transferee's spouse or former spouse) with the number of generations between that grandparent

and the transferor (or the transferor's spouse or former spouse). Spouses are assigned to the same generation: an individual who has been married at any time to the transferor is assigned to the transferor's generation, and an individual who has been married at any time to a lineal descendant of a grandparent of the transferor (or of the transferor's spouse or former spouse) is assigned to the generation of that lineal descendant. Finally, a relationship by legal adoption or by the half-blood is treated as a relationship by blood.

Section 2651(d) provides that an individual who is not assigned to a generation by reason of the family relationships described in the preceding paragraph shall be assigned to a generation on the basis of the date of such individual's birth. An individual born not more than 12½ years after the date of birth of the transferor is assigned to the transferor's generation. An individual born more than 12½ years but not more than 37½ years after the transferor is assigned to the first generation younger than the transferor. A new generation begins every 25 years thereafter.

Under § 2631, every individual is allowed a GST exemption amount which may be allocated by such individual to any property with respect to which such individual is the transferor.

Section 26.2632-1(b)(4)(i) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of GST exemption to a trust is void to the extent that the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust. An allocation also is void if the allocation is made with respect to a trust that, at the time of the allocation, has no GST potential with respect to the

transferor whose exemption was allocated. For this purpose, a trust has GST potential even if the possibility of a GST is so remote as to be negligible. Under this rule, an allocation made to a trust with one or more skip persons as beneficiaries is not void.

Prior to the decision in Windsor, if a married individual (A) made a gift to A's same-sex spouse (B) or to a lineal descendant of B, B and B's descendants would be assigned to a generation for GST tax purposes based upon their ages, because they had no familial relationship to A that was recognized for federal tax purposes. If those generation assignments resulted in B or any of B's descendants being skip persons, A's gift could be subject to GST tax except to the extent A allocated A's GST exemption to the gift (or to the recipient trust). One result of the Windsor decision, however, is that the generation assignments of B and B's lineal descendants instead are established based on their familial relationship with A by reason of A and B's marriage. Accordingly, B is in the same generation as A, so neither B nor any of B's children are skip persons, A's gifts (or transfers on death) to them are not subject to GST tax, and any of A's GST exemption allocated to such transfers (or made to a trust solely for those individuals) is void.

In light of the Windsor decision, the Treasury Department and the IRS conclude that any allocation of GST exemption to a transfer also is void if the transfer is a direct skip not in trust to B or to a lineal descendant of B (or such descendant's spouse) who is not a skip person with regard to transfers from A.

These rules apply to allocations of a taxpayer's GST exemption made on a return filed, or by operation of law as of a date, before the issuance of this notice, whether or

not the limitations period on claims for credits or refunds under § 6511 has expired. This notice also permits a taxpayer to reduce his or her GST exemption allocated to transfers that were made to or for the benefit of transferees whose generation assignment is changed as a result of the Windsor decision. This notice is limited to the recalculation of the taxpayer's GST exemption that was allocated to a transfer to (or to a trust for the sole benefit of) one or more transferees whose generation assignment for purposes of that exemption allocation should have been determined on the basis of a familial relationship as the result of the Windsor decision, and who therefore are non-skip persons.

In the interest of providing certainty and to ease the administrative burden on both the taxpayer and IRS, a taxpayer should recalculate (also taking into account the GST implications of any interim transfers), in accordance with IRS forms and instructions, and report such taxpayer's available GST exemption based upon that recalculation, on a Form 709 (preferably, the first Form 709 required to be filed by the taxpayer after the issuance of this notice), on an amended Form 709 (if the limitations period under § 6511 has not expired), or on the Form 706 for the taxpayer's estate if not reported on a Form 709. Unless a taxpayer has predeceased this notice, it is not necessary to file an amended or supplemental return solely to report the increase in available GST exemption as a result of this notice. Chapter 13 of the Code, and the regulations thereunder, shall apply to the allocation of a taxpayer's newly recalculated GST exemption. A request for relief under § 301.9100-3 is not required. Rather, the taxpayer should include a statement at the top of the Form 706 or Form 709 that the

return is “FILED PURSUANT TO NOTICE 2017-15.” Moreover, the taxpayer should attach a statement that the taxpayer’s allocation of GST exemption in a prior year is void pursuant to this notice and a copy of the computation of the resulting exemption allocation(s) and the amount of exemption remaining available to that taxpayer. The IRS will provide on www.irs.gov a worksheet and instructions to the Form 706 and Form 709 to be used to properly recalculate the remaining exemption amount.

Notwithstanding the recalculation of GST exemption under this notice, a claim for a credit or refund resulting from this notice will be denied if the claim is not filed within the applicable period of limitations under § 6511.

DRAFTING INFORMATION

The principal authors of this notice are Juli Ro Kim and Mayer Samuels of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Ms. Kim or Mr. Samuels at (202) 317-6859 (not a toll-free call).