



Section of Taxation

10th Floor
740 15th Street, N.W.
Washington, DC 20005-1022
202-662-8670
FAX: 202-662-8682
E-mail: tax@abanet.org

August 20, 2007

Mr. Kevin Brown
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments in Response to Notice and Request for Comments on Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return

Dear Acting Commissioner Brown:

Enclosed are comments in response to notice and request for comments on Form 709, United States Gift (and generation-skipping transfer) tax return. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stanley L. Blend
Chair, Section of Taxation

Enclosure

cc: Donald L. Korb, Chief Counsel, Internal Revenue Service
Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury
Michael J. Desmond, Tax Legislative Counsel, Department of the Treasury

CHAIR

Stanley L. Blend
San Antonio, TX

CHAIR-ELECT

William J. Wilkins
Washington, DC

VICE CHAIRS

Administration

Rudolph R. Ramelli
New Orleans, LA

Committee Operations

Elaine K. Church
Washington, DC

Communications

Ellen P. Aprill
Los Angeles, CA

Government Relations

Armando Gomez
Washington, DC

Professional Services

Samuel L. Braunstein
Fairfield, CT

Publications

Louis Mezzullo
Rancho Santa Fe, CA

SECRETARY

Alice G. Abreu
Philadelphia, PA

ASSISTANT SECRETARY

Walter Burford
Atlanta, GA

COUNCIL

Section Delegates to the

House of Delegates

Paul J. Sax
San Francisco, CA

Richard M. Lipton
Chicago, IL

Immediate Past Chair

Susan P. Serota
New York, NY

MEMBERS

Christine L. Agnew
Houston, TX

John P. Barrie
New York, NY

Peter P. Blessing
New York, NY

Peter J. Connors
New York, NY

Richard S. Gallagher
Milwaukee, WI

Sharon Stern Gerstman
Buffalo, NY

C. Wells Hall
Charlotte, NC

Helen M. Hubbard
Washington, DC

Kathryn Keneally
New York, NY

Emily A. Parker
Dallas, TX

Priscilla E. Ryan
Chicago, IL

Stephen E. Shay
Boston, MA

Barbara Spudis de Marigny
San Antonio, TX

LIAISON FROM ABA

BOARD OF GOVERNORS

Raymond J. Werner
Chicago, IL

LIAISON FROM ABA

YOUNG LAWYERS DIVISION

Matthew McLaughlin
Gulfport, MS

LIAISON FROM LAW

STUDENT DIVISION

Venay Kumar Puri
Pittsburgh, PA

DIRECTOR

Christine A. Brunswick
Washington, DC

**ABA SECTION OF TAXATION
COMMENTS IN RESPONSE TO NOTICE AND REQUEST FOR
COMMENTS ON FORM 709, UNITED STATES GIFT (AND
GENERATION-SKIPPING TRANSFER) TAX RETURN**

These comments ("Comments") concerning Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, are submitted on behalf of the American Bar Association Section of Taxation (the "Section") and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, the Comments should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Carmen Irizarry-Díaz, Chair of the Subcommittee on Reporting Requirements and Gift Tax of the Section's Estate and Gift Taxes Committee. Substantive contributions were made by Edward Kessel, Lloyd Leva Plaine, and David Pratt, members of the Estate and Gift Taxes Committee. The Comments were reviewed by T. Randolph Harris, of the Section's Committee on Government Submissions, and by John P. Barrie, Council Director Nominee for the Estate and Gift Taxes Committee.

Although members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal estate and gift tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact:

Carmen Irizarry-Díaz

Phone: 202-452-7968

Fax: 202-452-7989

Email: carmen.irizarry-diaz@bipc.com

Date: August 20, 2007

EXECUTIVE SUMMARY

By Notice and request for comments published in the Federal Register on June 4, 2007 (the "Notice"), the Internal Revenue Service ("Service") invited comments concerning Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return ("Form 709").¹

The Notice invited comments on: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the agency's estimate of the burden of the collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (5) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Our comments are intended to enhance the quality, utility and clarity of the information to be collected. We also hope that our suggested changes will make Form 709 and the Instructions for Form 709 (the "Instructions") simpler. We submit the following Comments:

1. We request that the Instructions provide guidance on the appropriate reporting if the close of an estate tax inclusion period is a taxable termination or a taxable distribution.
2. We recommend that Part 1, Line 10 be revised to read as follows: "Enter the total number of individual donees for whom the gift tax annual exclusion (or part thereof) has been claimed on Schedule A. Count each individual only once."²
3. We recommend that Schedule A, Question B be modified so that a taxpayer is deemed to make the election under section 529(c)(2)(B) for all gifts during the year to a 529 Plan unless either (i) the taxpayer affirmatively elects otherwise or (ii) the amount of the gift to the 529 Plan, when combined with other gifts during the year to that beneficiary, does not exceed the taxpayer's annual exclusion available for gifts to that beneficiary.³
4. We recommend that the description for Schedule A, Part 1 be revised to read as follows: "**Part 1 - Gifts Currently Subject Only to Gift Tax.** Gifts that are currently subject to gift tax less political organization, medical, and educational exclusions. See instructions."
5. We recommend that the description for Schedule A, Part 2 be revised to read as follows: "**Part 2 - Direct Skips.** Gifts that are direct skips and are currently subject to both gift tax and generation-skipping transfer tax. You must list the gifts in chronological order."
6. We recommend that the Instructions be revised to state that, in situations where the donor's adjusted basis of a gift is not reasonably available for any reason, including cost

¹ 72 Fed. Reg. 30919 (2007).

² All references to a "Question", "Page", "Schedule" "Part" or "Line Number" are to the Question, Page, Schedule, Part or Line Number on the Form 709.

³ All "section" references are to sections of the Internal Revenue Code of 1986, as amended (the "Code").

considerations, the taxpayer is allowed to enter "N/A" (for not available) in Column D of Parts 1, 2 or 3 of Schedule A or to leave such Column D blank without having the return being deemed incomplete.

7. We recommend that the description of Schedule A, Part 3, Column C be modified to add the phrase "Attach statement."
8. We recommend that the phrase "value of" be inserted between "Total" and "annual" on Schedule A, Part 4, Line 2.
9. We recommend that a reference to section 2642(c)(2) be added in the "Note" at the bottom of Page 10 of the Instructions for Schedule C, Part 1, Column C.
10. We recommend that Schedule C, Part 2, Line 5 request an attachment reconciling the allocation of GST exemption.
11. We recommend that the Instructions for Schedule C, Part 2 clarify the meaning of "appreciation" referenced in the following sentence on page 10 of the Instructions: "In general, each annual increase can only be allocated to transfers made (or appreciation occurring) during or after the year of the transfer." We recommend that the parenthetical "(or appreciation occurring)" be deleted absent clarification of its intended purpose.

COMMENTS

I. Instructions for Reporting Transfers At the Close of an Estate Tax Inclusion Period

The Instructions, at Page 3, under the subheading "Transfers Subject to an Estate Tax Inclusion Period," direct that the gift portion of a direct skip subject to an estate tax inclusion period ("ETIP") be reported on Schedule A, Part 1 at the time of the actual transfer and that the GST portion be reported on Schedule A, Part 2, but only at the close of the ETIP. Further, the Instructions state: "Use Form 709 only to report those transfers where the ETIP closed due to something other than the donor's death." Because Schedule A, Part 2 is used to report direct skips, the Instructions seem only to address the close of an ETIP that is a direct skip. The close of an ETIP often results in a taxable termination or a taxable distribution.

The Instructions should provide guidance on what to do if the close of an ETIP is a taxable termination or a taxable distribution. This guidance also will likely be useful to (i) trustees who are required to report taxable distributions to skip person distributees on Form 706-GS(D-1), Notification of Distribution From a Generation-Skipping Trust, (ii) skip person distributees using Form 706-GS(D), Generation-Skipping Transfers Tax Return for Distributions, to calculate and report the tax due on trust distributions subject to the generation-skipping transfer tax, and (iii) to trustees of a trust that has a taxable termination using Form 706-GS(T), Generation-Skipping Transfers Tax Return for Terminations, to calculate and report the tax due on the taxable termination.

II. Part 1, Line 10 – Number of Donees Listed on Schedule A

Line 10 of Part 1 (General Information) requests that the taxpayer enter the number of donees listed on Schedule A (Computation of Taxable Gifts) and directs that each person be counted only once. Presumably, the purpose of the question is to ascertain the number of gift tax annual exclusions that the taxpayer may be entitled to claim on Form 709.

We recommend revising the question so that it reads "Enter the total number of individual donees for whom the gift tax annual exclusion (or part thereof) has been claimed on Schedule A. Count each individual only once." We also recommend that an instruction be added for Line 10 of Part 1- General Information to this effect. Alternatively, a reference to Line 10 of Part 1- General Information may be added to the discussion under the subheading "Annual Exclusion" on Page 2 of the Instructions.

III. Schedule A, Question B – 529 Plan Gifts and Proration Over Five Year Period

Question B of Schedule A allows the taxpayer to check a box if he or she elects under section 529(c)(2)(B) to treat any transfers made during the year to a qualified tuition program ("529 Plan") as made ratably over a 5-year period beginning in the year of the gift. Based on the similar changes to the prior boxes on the Form 706 for a qualified terminal interest property ("QTIP") election, we recommend that the Form 709 be revised so that a taxpayer is deemed to make the election under section 529(c)(2)(B) for all gifts during the year to a 529 Plan unless either (i) the taxpayer affirmatively elects otherwise or (ii) the amount of the gift to the 529 Plan, when combined with other gifts during the year to that beneficiary, does not exceed the taxpayer's annual exclusion available for gifts to that beneficiary.

IV. Schedule A, Part 1 – Description of Gifts Subject Only to Gift Tax

Gifts that are currently subject only to gift tax are reported on Part 1 (Gifts Subject Only to Gift Tax) of Schedule A (Computation of Taxable Gifts). We suggest the insertion of "currently" in the description, so that it reads **"Part 1 - Gifts Currently Subject Only to Gift Tax**. Gifts that currently are subject to gift tax less political organization, medical, and educational exclusions. See instructions."

V. Schedule A, Part 2 – Description of Direct Skips

Direct skips are reported on Part 2 (Direct Skips) of Schedule A (Computation of Taxable Gifts). We suggest the insertion of "currently" in the description, so that it reads **"Part 2 - Direct Skips**. Gifts that are direct skips and currently are subject to both gift tax and generation-skipping transfer tax. You must list the gifts in chronological order." This suggested revision is consistent with the direction in the Instructions that only those gifts that currently are subject to both gift tax and generation-skipping transfer tax should be listed in Part 2. In that regard, the Instructions are clear that the gift portion of a direct skip subject to an ETIP should be reported on Schedule A, Part 1 at the time of the actual transfer.

VI. Instructions for Schedule A, Parts 1, 2 and 3, Column D – Requirement that Donor's Adjusted Basis of Gift be Provided

Column D of Part 1 (Gifts Subject Only to Gift Tax), Part 2 (Direct Skips) and Part 3 (Indirect Skips) of Schedule A (Computation of Taxable Gifts) require that the donor's adjusted basis in gifted property be reported. The Instructions explain that this is the basis that one would use for income tax purposes if the gift were sold or exchanged (generally, cost plus improvements, less applicable depreciation, amortization, and depletion).

Basis information is often unavailable or may prove difficult and expensive to obtain. The donor's adjusted basis of a gift has no relevance to the determination of the gift (and generation-skipping transfer) tax. It also is unlikely that information entered in Column D will be accepted by the Service as determinative of the donor's adjusted basis in the gifted property. The donee may be unaware of the information entered in Column D by the donor with respect to the gifted property.

We suggest that the Instructions be revised to state that, in situations where the donor's adjusted basis of a gift is not reasonably available for any reason, including cost considerations, the taxpayer is allowed to enter "N/A" (for not available) or to leave Column D blank without having the return being deemed incomplete.

VII. Schedule A, Part 3, Column C – Elections Under Section 2632(c) for Indirect Skips

The Instructions, on Page 9, explain that:

Section 2632(c) provides for the automatic allocation of the donor's unused GST exemption to indirect skips. This section also sets forth three different elections you may make regarding the allocation of exemption.

Election 1. You may elect not to have the automatic allocation rules apply to the current transfer made to a particular trust.

Election 2. You may elect not to have the automatic rules apply to both the current transfer and any and all future transfers made to a particular trust.

Election 3. You may elect to treat any trust as a GST trust for purposes of the automatic allocation rules.

Column C (2632(c) election) of Part 3 (Indirect Skips) of Schedule A (Computation of Taxable Gifts) must be checked in order to make one of the three elections listed above (also referred to in the Instructions as Election (1), Election (2) and Election (3)). The checkmark gives no indication of the type of election that the taxpayer is making. In addition, the Instructions require that a statement that describes the election made and that clearly identifies the trusts or transfers (or both) to which the election applies be attached to Form 709. We suggest that the description of Column C be modified to add "Attach statement."

VIII. Schedule A, Part 4, Line 2 – Total Annual Exclusions

Line 2 of Part 4 of Schedule A requires the taxpayer to state the "Total annual exclusions for gifts listed on line 1". Because the number for this entry is a value of gifts covered by the annual exclusion, we recommend that the phrase "value of" be inserted between "Total" and "annual" on Line 2 of Part 4 of Schedule A.

IX. Schedule C, Part 1, Column C – Nontaxable Portion of Transfer Reported

Direct skips that were reported in Part 2 (Direct Skips) of Schedule A (Computation of Taxable Gifts) are listed in Part 1 (Generation-Skipping Transfers) of Schedule C (Computation of Generation-Skipping Transfer Tax). In Column C (Nontaxable portion of transfer) of Part 1, the taxpayer reports the nontaxable portion of the transfer for generation-skipping transfer tax purposes.

The nontaxable portion of a transfer for gift tax purposes and for generation-skipping transfer tax purposes may differ. A reference to section 2642(c)(2) in the "Note" at the bottom of Page 10 of the Instructions for Column C of Part 1 of Schedule C would be a helpful addition.

X. Schedule C, Part 2, Line 5 – Reconciliation of GST Exemption

Schedule C, Part 2, Line 5 does not provide any detail with respect to the GST exemption allocation. Moreover, for many reasons, Line 5 can differ substantially from the amount reported on Schedule A, Part 3 (e.g., as a result of the section 2632(c) election or as a result of exclusion differences in the reported gifts). Certain tax preparation programs are difficult to deal with in this area. A reconciliation of the automatic allocation of GST exemption is essential to ensure that the appropriate amount of GST exemption is shown on Schedule C, Part 2, Line 5 as well as to review GST exemption allocations in the future.

We recommend that Schedule C, Part 2, Line 5 request an attachment reconciling the allocation of GST exemption.

XI. Instructions for Schedule C, Part 2 – GST Exemption Reconciliation

Historically, there was some confusion with regard to the provision for indexing of the GST exemption amount added by the Taxpayer Relief Act of 1997.⁴ The indexing provision, contained in section 2631(c), was amended by the Internal Revenue Service Restructuring and Reform Act of 1998 (the "1998 Act").⁵ The General Explanation of Tax Legislation Enacted in 1998⁶ (the "General Explanation") explicitly states that the indexing of the GST exemption amount is effective with respect to all generation-skipping transfers (*i.e.*, direct skips, taxable terminations and taxable distributions) made after 1998. Further, the General Explanation states, with respect to existing trusts, that transferors can make late allocations of the additional GST exemption amount attributable to the indexed amounts, and gives an example consistent with that statement.⁷ The Economic Growth and Tax Relief Reconciliation Act of 2001 (the "2001 Act") amended section 2631(c) to make the GST exemption amount the same as the applicable exclusion amount under section 2010(c), effective for generation-skipping transfers after December 31, 2003.⁸ There is no explanation of the amendment of section 2631(c) by the 2001 Act similar to the General Explanation, but presumably the same principles apply to increases in the GST exemption amount after 2003.

The Instructions, at Page 10, state that: "In general, each annual increase can only be allocated to transfers made (or appreciation occurring) during or after the year of the transfer." It is unclear to what "appreciation" refers in the statement. We recommend that the parenthetical "(or appreciation occurring)" be deleted absent clarification of its intended purpose.

The Instructions, at Pages 10-11, give the following example:

A donor made \$1,750,000 in GSTs through 2005, and allocated all \$1,500,000 of the exemption to those transfers. In 2006, the donor makes a \$207,000 taxable generation-skipping transfer. The donor can allocate \$207,000 of exemption to the 2006 transfer but cannot allocate the \$293,000 of unused 2006 exemption to pre-2006 transfers.

However, if in 2005, the donor made a \$1,750,000 transfer to a trust that was not a direct skip, but from which generation-skipping

⁴ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 501(d) (1997), adding section 2631(c), applicable to decedents dying, and gifts made, after December 31, 1997.

⁵ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 6007(a) (1998).

⁶ Joint Committee on Taxation, 105th Cong., General Explanation of Tax Legislation Enacted in 1998 (JCS-6-98), at 169-170.

⁷ *Id.*

⁸ The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 521(c)(2) (2001).

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. See Regulations section 26.2642-4 for details on the redetermination of the applicable fraction when additional exemption is allocated to the trust.

It appears that what the Instructions are trying to state, by reference to the example at Pages 10-11 of the Instructions, is that if a donor made \$1,750,000 in generation-skipping transfers (*e.g.*, direct skips) through 2005, and his entire \$1,500,000 GST exemption amount was allocated to those transfers, he cannot retroactively allocate the additional \$500,000 2006 GST exemption amount to the pre-2006 direct skips in 2006. Again by reference to the example at Pages 10-11 of the Instructions, had any of the pre-2006 transfers been to one or more trusts that were subject only to gift tax at the time of the pre-2006 transfer but could later be subject to generation-skipping transfer tax, the donor is not precluded from making late allocations of the additional 2006 GST exemption amount attributable to the increase (or indexing amounts, for years prior to 2004) to one or more of such trusts in 2006.