August 13, 2019

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Guidance Under Sections 2631(c) and 2010(c)(3) as Modified by Pub. L. No. 115-97 with Respect to Allocation of Increased GST Exemption to Prior Transfers

Dear Commissioner Rettig:

Enclosed please find comments regarding the need for published guidance with respect to taxpayers’ ability to allocate the increased GST exemption amount in effect through December 31, 2025, as set by sections 2631(c) and 2010(c)(3)(C) of the Internal Revenue Code, to transfers made prior to January 1, 2018. These comments are submitted on behalf of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Eric Solomon
Chair, Section of Taxation

Enclosure

cc: Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Catherine Hughes, Attorney-Adviser, Office of Tax Policy, Department of the Treasury
Hon. Michael Desmond, Chief Counsel, Internal Revenue Service
William M. Paul, Deputy Chief Counsel (Technical), Internal Revenue Service
Holly Porter, Associate Chief Counsel (Passthroughs & Special Industries), Internal Revenue Service
Deborah S. Ryan, Attorney, Office of Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service
Comments on Guidance Under Sections 2631(c) and 2010(c)(3)(C) as Amended by Pub. L. No. 115-97 with Respect to Allocation of GST Exemption to Prior Transfers

These comments ("Comments") 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, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Jeffrey D. Chadwick, George D. Karibjanian, Kevin T. Keen, and Hannah W. Mensch of the Estate and Gift Taxes Committee. These comments were reviewed by Joseph Barry Schimmel of the Section’s Committee on Government Submissions.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: August 13, 2019
These Comments address the need for published guidance regarding sections 2631(c) and 2010(c)(3)(C), as modified by Public Law Number 115-97 (the “Act”).

As a result of the Act, the basic exclusion amount available to taxpayers under section 2010(c) for estate and gift tax purposes was effectively doubled (the “Increased Basic Exclusion Amount”). Because the generation-skipping transfer (“GST”) exemption amount under section 2631(c) is set by cross-reference to the basic exclusion amount under section 2010(c), the Act also effectively doubled the GST exemption amount.

Among other provisions, section 2632 sets forth rules regarding the deemed (or automatic) allocation of GST exemption to certain lifetime transfers.

Section 2632(b)(1) provides that if a taxpayer makes a direct skip during his lifetime, any unused portion of the taxpayer’s GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. Further, section 2632(c)(1) provides that if a taxpayer makes an indirect skip during the taxpayer’s lifetime, any unused portion of the taxpayer’s GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. These are referred to as the “automatic allocation” provisions.

If a taxpayer desires to allocate GST exemption to a lifetime transfer, including a transfer to an irrevocable trust, to which the automatic allocation rules do not apply, or if a taxpayer opted out of automatic allocation pursuant to section 2632(b)(3) or 2632(c)(5), section 2632(a)(1) permits the taxpayer to allocate GST exemption “at any time on or before the date prescribed for filing the estate tax return for such individual’s estate (determined with regard to extensions), regardless of whether such a return is required to be filed.”

A taxpayer generally makes an affirmative allocation of GST exemption to a lifetime transfer by filing form 709, United States Gift (and Generation-Skipping Transfer) Tax Return (“Form 709”). Section 2632-1(b)(4)(ii)(A)(1) of the Treasury Regulations provides that “an allocation of GST exemption is effective as of the date of any transfer as to which the Form 709 on which it is made is a timely filed return (a timely allocation).” If a taxpayer fails to make a timely allocation of GST exemption, however, the taxpayer is still permitted to make a “late” allocation of GST exemption, although the value of the property to which the late allocation is made will be measured as of the date of the allocation, and not as of the date of the transfer. Specifically, section 2632-1(b)(4)(ii)(A)(1) of the Treasury Regulations provides that an allocation of GST exemption “to a trust made on a Form 709 filed after the due date for reporting a transfer to the trust (a late allocation) is effective on the date the Form 709 is filed,” which is generally the date it is postmarked to the Internal Revenue Service.

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1 References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.


3 For tax year 2019, the inflation-adjusted basic exclusion amount is $11.4 million per person.
Analyzing the allocation rules, the statutory provisions of section 2632 do not restrict the late allocation of GST exemption to the maximum amount of exemption available at the time that the transfer was made. For example, when the GST exemption amount was increased in 2009 from $2,000,000 to $3,500,000, under the “late allocation” provisions of section 2632 it was possible to allocate the newly granted $1,500,000 of GST exemption to a transfer made before the additional exemption was granted.

Under the Act, the GST exemption amount was doubled from its original 2011 amount of $5,000,000, adjusted for inflation (the increased amount is referred to as the “Increased GST Exemption Amount”). However, section 2010(c)(3)(C) provides that the Increased Basic Exclusion Amount only applies to “estates of decedents dying or gifts made after December 31, 2017.” This provision has caused some concern among practitioners when advising taxpayers who desire to allocate their Increased GST Exemption Amount to an irrevocable trust that was funded on or before December 31, 2017 (a “Pre-2018 Trust”), as the allocation of Increased GST Exemption Amount to a Pre-2018 Trust is neither (i) an estate of a decedent dying after December 31, 2017, nor (ii) a gift made after December 31, 2017. Interpreting section 2010(c)(3)(C) to prevent such taxpayers from allocating their Increased GST Exemption Amount to Pre-2018 Trusts, however, would be contrary to the basic principles behind late allocations of GST exemption.

Despite the wording of section 2010(c)(3), it appears that the legislative intent behind the Act was to permit taxpayers to allocate their Increased GST Exemption Amount to Pre-2018 Trusts, which would be consistent with taxpayers’ ability to make a late allocation of GST exemption in accordance with section 2632(a)(1) and the Regulations thereunder. On December 19, 2018, the staff of the Joint Committee on Taxation prepared a “General Explanation of Public Law 115-97” (the “Blue Book”). Footnote 372 on page 89 of the Blue Book includes an example in which a taxpayer allocates GST exemption in 2018 to an irrevocable trust created in 2016. Consequently, it appears that a taxpayer can make a late allocation of his or her Increased GST Exemption Amount to a Pre-2018 Trust, at least in the view of the Joint Committee on Taxation staff.

Section 2001(g)(2) to the Code directs the Secretary of the Treasury (“Treasury”) to prescribe such regulations as may be necessary or appropriate to carry out section 2001 with respect to any difference between the basic exclusion amount applicable at the time of a decedent’s death and the basic exclusion amount applicable with respect to any gifts made by the decedent. We recognize that Treasury has already issued proposed regulations clarifying certain aspects of how the Increased Basic Exclusion Amount operates in computing the credit available to reduce the estate tax due upon the death of a taxpayer, particularly if the Increased Basic Exclusion Amount reverts back to pre-2018 levels. We feel it is appropriate to also address whether the Increased GST Exemption Amount may be allocated to Pre-2018 Trusts.

In light of the foregoing Comments, we respectfully request that Treasury issue guidance as soon as reasonably practicable confirming that the increased GST exemption amount provided for under section 2631(c) by the Act may be allocated to an irrevocable trust funded on or before December 31, 2017.

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