

ADVANCED PLANNING BULLETIN

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Same Sex Marriage: The Door Opens a Little Wider – IRS Allows Recalculation of Tax Treatment on Prior Gifts or Bequests

Summary

IRS will now allow certain taxpayers to recalculate their remaining estate exemption amount and GST exemption amount to the extent that the allocation of that exemption was made on transfers when the individual's same sex marriage was not recognized.

Related Information

[Same-Sex Marriage and the Law: A Little Clarity A Whole Lotta Confusion \(09/13\);](#)
[Planning for Same-Sex Marriage After Obergefell v. Hodges \(09/15\)](#)

Notice 2017-15 allows taxpayers retroactive relief in recalculating the transfer tax treatment of prior gifts made by those individuals in same-sex marriages prior to 2013.

Background

Prior to the United States Supreme Court decision in United States v. Windsor,¹ the Internal Revenue Service interpreted section 3 of the Defense of Marriage Act (DOMA) as prohibiting it from recognizing same-sex marriages for federal tax purposes. Accordingly, if a married individual made a significant gift to his or her same-sex spouse, no unlimited marital gifting was allowed and the individual would be forced to use some of his or her gift tax exemption, or if the gift tax exemption was exhausted, gift tax would have to be paid on the transfer. Similarly, if the married individual died leaving his or her estate to his or her same-sex spouse, no unlimited marital deduction was recognized in the transfer, resulting in the possible assessment of estate tax to the extent the deceased's estate tax exemption had been exhausted.

The U.S. Supreme Court held in Windsor² that section 3 of DOMA was unconstitutional, violating equal protection under the law. As a consequence of the Windsor decision, the IRS issued Revenue Ruling 2013-17, recognizing same-sex marriage for federal tax purposes, and *prospectively*³ allowing claims, credits or refunds for any overpayment of gift or estate tax, provided that the applicable limitations period for filing such a claim had not expired. Once the limitations period on assessment of tax expired, however, neither the value of the transferred interest nor any position concerning any legal issue related to the transfer could be changed.

¹ 133 S. Ct. 2675 (2013)

² The facts surrounding the Windsor decision actually involved the imposition of estate tax. Edie Windsor and Thea Spyer, New York residents, were married in Canada in 2007. When Spyer died in 2009, she left all of her assets to Windsor. The IRS refused to recognize the marriage (even though their marriage was recognized under New York state law), and denied Windsor the use of the unlimited marital deduction, resulting in an estate tax owed of \$363,053. Windsor filed suit in district court seeking a declaration that DOMA was unconstitutional.

³ As of September 16, 2013.

IRS Notice 2017-15

On January 18, 2017, the IRS issued Notice 2017-15, which expanded the parameters of Revenue Ruling 2013-17. Now, certain married same-sex taxpayers are allowed to recalculate their remaining applicable gift and estate tax exemption amount, as well as any remaining GST exemption amount, in recognition of their marriage, even if the limitations period applicable to that tax return has expired.

For example, let's say Barry made a gift of \$1 million to his spouse, Larry, in 2009. Because federal law at the time didn't recognize this transfer as a marital transfer, Barry would have been required to file IRS Form 709 (gift tax return) and allocate \$1 million of his gift tax exemption amount to that transfer. Had federal law recognized their marriage, Barry would not have had to use any of his gift tax exemption amount, as federal tax law allows unlimited gifting between spouses.⁴ Notice 2017-15 will now allow Barry to recalculate his remaining applicable gift tax exemption amount, adding back in the \$1 million exemption, even though the limitations period for that gift tax return has expired.

While Notice 2017-15 allows a taxpayer to recalculate his or her remaining applicable exemption amount as a result of the allowance of a marital deduction, it does not enable the taxpayer to get a credit or refund if any gift or estate tax was paid. The Notice clearly states if the limitations period for filing a claim has expired, any such claim for reimbursement will be denied.

Let's take the same couple as in the previous example. If Barry had died in 2009, and had left his estate of \$4 million to Larry, the IRS would not have recognized their marriage for federal estate tax purposes, and would have required Barry's estate to allocate the estate tax exemption to this bequest. Since the bequest to Larry was in excess of the 2009 estate tax exemption amount of \$3.5 million, Barry's estate would have owed estate tax in the amount of \$225,000 (45% of \$500,000). Any tax paid by Barry's estate is not reimbursable under Notice 2017-15.

Notice 2017-15 provides similar relief from the generation skipping transfer tax. In determining whether the recipient of a gift is a "skip person" (someone who is two or more generations below the generation of the transferor), the law first looks at the recipient's family relationship to the transferor or the transferor's spouse. However, if the couple isn't married, then the determination is based exclusively on the age difference between the transferor and the recipient of the gift. Prior to 2013, if Barry made a gift of \$75,000 to Larry's child, Destiny, the family relationship would not have been recognized for federal GST purposes. If Destiny is more than 37 ½ years younger than Barry, Destiny would be a skip person under GST taxation laws and GST exemption would have had to have been allocated to the \$75,000 gift.

Under Notice 2017-15, any previous allocation of GST exemption to a transfer is void if a gift recipient, such as Destiny, would not be a skip person due to a family relationship (*i.e.* the marital relationship between Barry and Larry.) The taxpayer is now permitted to reduce his or her GST exemption allocated to transfers that were made to or for the benefit of recipients whose generation assignment changed as a result of the Windsor decision. But, as mentioned above, no credit or refund on GST taxes paid will be issued if the limitations period has already expired.

⁴ IRC § 2523(a).

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