SHERMAN WELLS SYLVESTER & STAMELMAN LLP

TAX AND TRUSTS & ESTATES UPDATE

February 2015

2015 Gift Tax Reminder

Gift tax returns can be an important part of your yearly tax return filing responsibilities. Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return) is filed on a calendar-year basis and is due April 15th of the year following the year in which the gifts were made (unless an effective extension applies). As you determine whether or not you are required to file a gift tax return for 2014, consider the following frequently asked questions:

How much can I give without having to file a gift tax return?

An individual donor is entitled to an annual exclusion from federal gift tax on total gifts made in 2014 of up to $14,000 per donee. There is no limit on the number of annual exclusion gifts that can be made to different donees in any year. For example, if you have three children, you can give each of them $14,000 in 2014 and not have to file a gift tax return.

What kinds of gifts would not qualify for the annual exclusion?

Total gifts to any donee in excess of $14,000 will require a 2014 gift tax return to be filed. And bear in mind that only gifts of "present interests" qualify for the annual exclusion. Outright gifts are gifts of present interests, but gifts to trusts that do not include what are known as "Crummey" withdrawal powers for beneficiaries often are not. And even gifts to trusts that include Crummey powers should be reviewed to ensure that a return is not required - often in order to allocate federal Generation Skipping Tax ("GST") exemption to those trust gifts. The GST tax is a federal tax imposed on transfers of wealth to individuals that the IRS considers to be two more or more generations below that of the donor (for example, a gift from a donor to his grandchild) and needs to be taken into account when considering whether a gift tax return should be filed and how to report generation-skipping gifts.

My spouse and I both have annual exclusions - so we can transfer $28,000 to a donee and not have to file gift tax returns?

If each of you and your spouse makes a separate gift of $14,000 from his or her own separate assets, that is correct. But the IRS also allows "gift-splitting". That can occur when one spouse makes a gift of (for example) $28,000 to an individual. If the donor's spouse consents, he or she can

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Office Locations:

Florham Park
210 Park Avenue
2nd Floor
Florham Park, NJ 07932
973.302.9700

New York
805 Third Avenue
10th Floor
New York, NY 10022
212.763.6464

"split" that gift, so that each is deemed to be making a gift of only $14,000. In that way, the split gift does not exceed the annual exclusion amount for either spouse. However, gift splitting will require a gift tax return to be filed to record the split and the spousal consent. And gift-splitting will then apply to all gifts made by either spouse in that year.

Will I have to pay gift tax?

You will be required to pay gift tax only if your aggregate taxable gifts in prior years plus your 2014 gifts exceed the amount of the gift/estate tax exemption available to you in 2014. That exemption was $5,340,000 in 2014. If, for example, you have made $3,000,000 of taxable gifts after January 1, 1977 (and no taxable gifts before that date), you used up $3,000,000 of your exemption, but you would still be able to make taxable gifts (i.e., gifts that do not qualify for the annual exclusion or any applicable deduction) in 2014 of $2,340,000 and still not have to pay gift tax.

What deductions are available?

Regardless of amount, outright gifts to your spouse or to qualifying charities qualify for deductions from the gift tax. In fact, if you made outright gifts in 2014 only to your spouse or to qualifying charities, you will not have to file a gift tax return. The only exception would be if you transferred less than 100% of an asset to a charitable organization (e.g., half of a residence property).

Are there any other reasons to file a gift tax return?

Suppose you made a $14,000 gift in 2014 to a trust that included a "Crummey" withdrawal provision. Assuming notice was provided to the beneficiary of that trust, that gift would qualify for the annual exclusion, so a gift tax return would not need to be filed. But suppose that trust is intended to last for multiple generations but does not qualify for automatic allocation of your GST exemption. In that case, you may want to file a timely gift tax return to allocate your GST exemption to that gift. Or, if that trust is not intended to last for multiple generations but fits the IRS definition of a "GST Trust" so that your GST exemption is automatically allocated by statute, you will likely want to file a gift tax return to "opt out" of automatic allocation - for that gift and for future gifts to that trust - to ensure that your GST exemption is not wasted.

For example, a common trust that holds life insurance on your life and provides a trust for your spouse after your death and a further trust for children after your spouse's death but is expected to completely distribute the trust assets to your children during their respective lifetimes fits the IRS definition of a "GST Trust". As a result, any contribution to that trust will have GST exemption automatically allocated to it unless a gift tax return is filed to opt out of that allocation.

Moreover, even if automatic allocation of GST exemption is desired and useful, filing a gift tax return can help keep track of what amount of exemption was automatically allocated and when.

Also, if you made a gift of assets that are difficult to value or for which you took a valuation discount, you may want to file a gift tax return to begin the running of the statute of limitations period. If no return is filed, the IRS has an unlimited amount of time to challenge the value of that gift. If a return is filed and the gift (and its valuation) is adequately disclosed, the IRS has only three years (in most cases) to challenge the value of that gift. Even a sale transaction (e.g., a sale of assets to an intentionally defective grantor trust) might be appropriate to report on a gift tax return, so that - after the statute of limitations has run - the IRS cannot revalue the assets sold and assert that part of the transaction was a gift.

Key Estate Tax Provisions Absent in 2015-16 New York State Executive Budget

Although several state estate tax concepts were clarified in the 2015-2016 New York State Executive Budget issued on January 21, 2015, two major provisions continue to go unaddressed. Among other things, there was no attempt to fix the confiscatory estate tax cliff for estates slightly above the state exemption amount; nor does the Budget allow for state estate tax portability of the New York unused exclusion amount of deceased spouses.

The Executive Budget simply clarifies the following:

(1) the applicability of the tax rate table to incorporate decedents dying after March 31, 2015; (2) the gift add back provision to exclude decedents dying after January 1, 2019; and (3) expressly disallows a deduction related to intangible personal property for non-resident estates.

Sherman Wells adds a new attorney to their Tax and Trusts & Estates Group

Jonathan Schwartz, a 2012 cum laude graduate of Fordham Law School, joined our Tax and Trusts & Estates group at the start of this year. After law school, Jonathan clerked with the Honorable Vito L. Bianco of the New Jersey Tax Court. Jonathan joins us from McGladrey LLP, an accounting firm, where he specialized in state and local tax planning and compliance. Jonathan is admitted to practice law in New York and New Jersey and is looking forward to assisting our clients with all of their tax, trust and estate planning needs.

We wish to thank the overwhelming number of our clients for their decision to move with us to Sherman Wells Sylvester & Stamelman LLP.
We have transitioned thousands of files to our new firm and look forward to working with each of you in the future. For those of you who have not yet sent us an authorization form, but who wish to move your files to us, you can obtain an authorization form by calling us at 973-302-9700.

Attorney Contact Information

Sandra Brown Sherman
Partner
973.302.9716
ssherman@shermanwells.com

Andrew J. Stamelman
Partner
973.302.9714
astamelman@shermanwells.com

Charles R. Berman
Partner
973.302.9692
cberman@shermanwells.com

James A. Mohoney
Counsel
973.302.9702
jmohoney@shermanwells.com

Heidi I. Hansen
Counsel
973.302.9706
hhansen@shermanwells.com

Tracy McSweeney Child
Counsel
212.763.6465
tchild@shermanwells.com

Jonathan Schwartz
Associate
973.302.9673
jschwartz@shermanwells.com

Fiduciary Accountant & Paralegal Contact Information

Monika Hilliard
Fiduciary Accountant
973.302.9701
mhilliard@shermanwells.com

Judith Kaplan Malamed
Fiduciary Accountant
973.302.9703
jmalamed@shermanwells.com

Marci Racaniello
Fiduciary Accountant
973.302.9699
mracaniello@shermanwells.com

Betty Kleiman
Paralegal
973.302.9705
bkleiman@shermanwells.com

Beatrice Kwok
Paralegal
973.302.9704
bkwok@shermanwells.com

Farhayal Zubair
Paralegal
973.302.9678
fzubair@shermanwells.com