

Quick-Take: Normally I avoid ‘like the plague’ writing about the federal generation skipping transfer tax (GST) because: (i) I don’t fully understand the GST rules and its confusing elections and exemptions; and (ii) I usually break out in hives as I struggle to read and understand the GST rules and the nuances of those rules. Consequently, I will try to only briefly describe a new GST Final Regulation that was released on May 3, 2024 (and yes, I am already itching!)

Final Regulation: In the past there was no way for a donor to revoke or ‘fix’ an erroneously made GST exemption allocation election. Consequently, a donor who made a GST exemption election ‘mistake’ was left ‘holding the bag’ with no potential remedy in sight. In this situation, the result was often missed tax-savings opportunities that arise from an inefficient use of the donor’s then available GST exemption. The new Final Regulation authorizes some relief available to a donor who seeks a Private Letter Ruling (PLR) when the donor makes (or more accurately made) an erroneous ‘opt-in’ or ‘opt-out’ GST exemption allocation election on a federal gift tax return. This new flexibility to seek a PLR was not part of the originally proposed GST exemption election Regulations. The Preamble to these Final Regulations acknowledges that there was no statutory authority for Treasury’s earlier position that ‘opt-in’ and ‘opt-out’ GST exemption elections are irrevocable once they are made. I guess this is a ‘it’s better late than never’ response from the IRS (but I digress.)

Implications for Donors: The new Final Regulations now provide a path to revoke past GST exemption elections, albeit in some situations. However, as with any interaction with the Department of Treasury, there is a process, long and expensive, that the donor must follow.

PLR Cost: Starting May 6, 2024, GST exemption relief will now be granted under Treasury Regulations. [IRC 2642(g)(1); Regulation

26.2642-7.] To obtain this relief under the Final Regulations will still require a formal request from the donor who seeks a very expensive IRS Private Letter Ruling. The anticipated expense is in the form of IRS user fees, not to mention legal and accounting fees that the donor must incur to prepare the PLR request and meet with the IRS Chief Counsel. Interestingly, the Final Regulations do acknowledge a donor's concern about the complexity of GST rules and the costs incurred to obtain relief through a Private Letter Ruling. Notwithstanding this acknowledgement, Treasury still concludes that a PLR is the most efficient way to address the requested GST election relief.

No Guarantee: Added to the inherent PLR cost is the reality that there is no guarantee that the relief will be granted by the IRS, which probably leads to the reality that not too many donors will take advantage of this new 'process.' The donor must bear the burden to prove that he/she has acted reasonably and in good faith, that he/she is not merely acting with the benefit of 'hindsight,' and that the relief requested by the donor would not prejudice the interests of the U.S. government if the relief was granted. That is a stiff burden for the donor to have to meet.

Future Relief? Treasury also noted in its Preamble that it is open to issuing further revenue procedures, or other guidance, to simplify relief under IRC 2642(g)(1), although no timeline was identified in which to expect such 'simplified procedures.' I would not hold my breath that this additional simplification by Treasury will occur any time soon to help donors.

Conclusion: This new Regulation should prompt donors and their advisors to evaluate past GST exemption elections, with an eye towards potentially rectifying errors following the new process under Regulation 26.2642-7. Accordingly, donors and their advisors should conduct reviews of prior GST exemption allocations and elections on prior federal gift tax returns to ensure that they align with the donor's desired GST exemption status of specific Trusts the donor created and funded. Revoking a prior inadvertent GST exemption election could prove to be beneficial as a donor attempts to optimize his/her

GST exemption strategies, with the high cost of a PLR in mind..