

Gift Tax Return Update

Take-Away: There are recent changes regarding the filing of a Form 709 gift tax return of which we need to be aware.

Background: There are a few changes and IRS and court developments when a Form 709 is filed to report gifts for federal gift and GST tax purposes. Some of those changes are summarized below.

Form 709-NA: This is an entirely new form that is used to report transfers by non-residents who are not citizens of the United States who are subject to federal gift and generation skipping transfer (GST) taxes. An individual considered to be a non-resident, not a citizen of the U.S. for these purposes, is a person who is a non-resident if that person is neither domiciled nor a citizen of the U.S. at the time the gift is made. A person who acquired U.S. citizenship solely reason of being a citizen of a U.S. territory or by reason of birth or residence within a U.S. territory is *not* treated as a U.S. citizen. A donor who is a U.S. citizen or resident for part of the year when the reportable gift was made must continue to use the Form 709.

E-Filing: On July 14, 2025, Treasury announced that it is possible to e-file gift tax returns, effective immediately. Treasury authorized this type of filing through the modernized e-file or MEF system. The MEF system provides paper-free, proof of filing quickly. E-filing requires that the filer become an authorized e-file provider. This requires the need to first complete the IRS e-file application to become an ‘authorized e-filer.’

Gift-Splitting by Spouses: A split-gift by spouses enables the reported gift to be considered as being made one-half by each spouse. Both spouses can apply the annual gift tax exclusion to one half of the reported gift. In the past, the donor-spouse reported the gift on his/her Form 709 gift tax return but makes the election to split the gifts on part three of Form 709. There is now a new procedure to report split gifts. The consenting-spouse no longer signs the donor spouse’s Form 709. Now, the consenting-spouse must file what is called a Notice of Consent, which includes a statement that he/she elects to treat all gifts made to third parties as having been made one half by each spouse. In the event that both spouses are required to file Form 709’s, each spouse must execute this Notice of Consent,

and their gift tax returns must be filed in the *same* envelope. This gift-splitting election must be made on the first gift tax return for the year that is filed by either spouse.

Digital Assets: In 2023 Treasury issued a Notice that it will treat digital assets such as virtual currencies, cryptocurrencies, and stable coins as *property* for gift tax purposes. Form 709 specifically addresses the gift of digital assets. The value of the transferred digital asset that is reported on the Form 709 is that which is recorded on a cryptographically secured distributed ledger ‘or any similar technology.’

Adequate Disclosure: The Taxpayer Relief Act of 1997 generally provides that there will be a three-year statute of limitations on gifts that were ‘adequately disclosed.’ Until the last decade, there was very little guidance from either the IRS or the federal courts on what constitutes ‘adequate disclosure’ to trigger the running of the three-year statute of limitations.

How Strong is the 3-Year Limitations Period? Prior to the 1997 Act the IRS was not barred by the statute of limitations unless either gift tax was actually paid and the IRS statute of limitations applied only to questions of value (not law.) Accordingly, legal issues could be revisited by the IRS, which was problematic since gift and estate taxes are cumulative, causing a lot of uncertainty.

Three Questions: Over the years needed guidance has centered on three topics. (i) What issues cannot be adjusted after the expiration of the statute of limitations?; (ii) Whether a gift was adequately disclosed is a question of fact; and (iii) what information needs to be provided to be adequately disclosed?

1. **What Can be Adjusted?** Some issues cannot be adjusted after the expiration of the three-year statute of limitations. As noted earlier, prior to the ‘adequate disclosure’ rule if a gift was under the applicable exemption amount, valuation issues were still fair game on audit, and legal issues like the validity of elections, or whether the gift was ‘complete’, were always open to IRS question. Now, once the statute of limitations has run, neither the value of the gift nor legal positions can be changed, regardless of whether a gift tax was actually paid by the donor.

Regulations have been adopted to reflect this limitation. That said, there were nonetheless some Private Letter Rulings (2015-1017) that dealt with split-gift elections that were made that were determined to be invalid by the IRS. As a result, the IRS has concluded that if the statute of limitations had not run, an adjustment could be made. However, if the 3-year statute of limitations did in fact 'run', then it would be treated that the election was made, even if it was invalid when it was made.

2. **What is Adequate Disclosure?** A couple of Tax Court decisions have addressed whether adequate disclosure was made by the donor on a Form 709. The donors made the argument that he/she had adequately disclosed transfers, and therefore the IRS could not adjust what was reported on the return. The IRS responded that the statute of limitations never started to run because the transfers and questions were not adequately disclosed on the return. In these two cases the Tax Court denied the donor's motion for summary judgment because whether there was adequate disclosure was a question of fact, meaning that both sides to the contest would need to present evidence and arguments on the point that determine if there had been adequate disclosure. [*Estate of Brown, Tax Court Memo, 2013-41 and Estate of Hazel Hicks, Tax Court Memo 2014-100.*]

3. **How is Adequate Disclosure Made?** What must the donor do to adequately disclose on his/her Form 709? The Regulations state that "a transfer will be adequately disclosed on the return only if it is reported in a manner to apprise the IRS the nature of the gift and the basis for the values so reported." There are two 'safe harbors' in the Regulations that comply with the 'adequate disclosure' standard: one is the 'appraisal method', where an appraisal that meets certain requirements in the Regulations is submitted along with the Form 709. The other is the 'description method', where the donor provides certain information that is set out in the Regulations. In 2015 the IRS issued a Field Attorney Advice in which it said that the 'appraisal method' and the 'description method' are "the sole means of adequately disclosing, rather than the safe harbors of the Regulations." Later, a Tax Court decision rejected this IRS conclusion finding that they are safe harbors and not the sole means to meet the adequate disclosure requirement. [*Schlapfer v Commissioner, Tax Court Memo 2023-65.*] The same *Schlapfer* decision also held that the standard of compliance on the

donor's gift tax return is *substantial compliance*, not *strict compliance*, meaning that a mistake by the donor will not preclude adequate disclosure from applying.

Conclusion: While the Form 709 gift tax return appears pretty straightforward, it is a lot more complex than one would surmise from its breadth. We often throw around the '3-year-statute-of-limitations' like it is a simple clock that starts to run from the date the return is filed, and the donor is magically 'home free' after three years, which is not the case. Often overlooked is what 'adequate disclosure' on the return actually requires, along with the consequences if that standard is not met.

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