

**IRS NOTICE 2017-15: APPLICATION OF *WINDSOR* TO
MARITAL DEDUCTION AND GST FOR SAME-SEX SPOUSES**

On January 17, 2017, the Internal Revenue Service (“IRS”) issued Notice 2017-15 (“Notice”). The Notice provides guidance on the application of the US Supreme Court’s 2013 decision in *United States v. Windsor* and the holdings in Revenue Ruling 2013-7 to the rules regarding the applicable exclusion amount under Sections 2010(c) and 2505 of the Internal Revenue Code of 1986, as amended (“Code”), and the generation-skipping transfer (“GST”) exemption under Code Section 2631, as they relate to certain gifts, bequests and generation-skipping transfers by (or to) same-sex spouses. Specifically, the Notice provides special administrative procedures permitting certain taxpayers and the executors of certain taxpayer’s estates to recalculate a taxpayer’s remaining applicable exclusion amount and remaining GST exemption to the extent an allocation of that exclusion or exemption was made to certain transfers made while the taxpayer was married to a person of the same sex.

In the Notice, the IRS implicitly recognizes the retroactive application of the unconstitutionality of the Defense of Marriage Act (“DOMA”) by tackling two separate transfer tax issues: the pre-*Windsor* use of the applicable exclusion amount for prior gifts and the generational-assignment of pre-*Windsor* transfers to a same-sex spouse or to the spouse’s family members for purposes of the GST tax.

Marital Deduction and Applicable Exclusion Amount

The first part of the Notice grants partial relief to a same-sex married spouse who used applicable exclusion amount on a gift to his spouse. As to the applicable exclusion amount applied to a transfer between spouses that did not qualify for the federal estate or gift tax marital deduction at the time of the transfer, based solely on the application of DOMA, taxpayers will be permitted to establish that transfer's qualification for the marital deduction and to recover the applicable exclusion amount previously applied on a return by reason of such a transfer, even if the limitations period applicable to that return for the assessment of tax or for claiming a credit or refund of tax under Code Sections 6501 or 6511, respectively, has expired (i.e., the year of the transfer is closed for tax purposes). In other words, if the limitations period has expired, the Notice permit the taxpayer to recalculate the taxpayer's remaining applicable exclusion amount as a result of recognizing the taxpayer's marriage to the taxpayer's spouse.

However, once the limitations period on assessment of tax has expired, neither the value of the transferred interest nor any position concerning a legal issue (other than the existence of the marriage) related to the transfer can be changed pursuant to the Notice. Likewise, no credit or refund of the tax paid on that marital gift can be given once the limitations period on claims for credit or refund has expired.

In addition, if qualification for the marital deduction or a reverse qualified terminable interest property ("QTIP") election would require a QTIP, qualified domestic trust, or reverse QTIP election, such taxpayers will have to request relief pursuant to Regulation Section 301.9100-3 to make such an election (i.e., application for late relief).

GST Exemption

The second part of the Notice deals with the GST exemption and generational assignments. As to a taxpayer's GST exemption that was allocated to transfers made, prior to the recognition of same-sex marriages for federal tax purposes, to or for the benefit of one or more persons in a same-sex marriage and/or any other person(s) whose generation assignment is determined under Code Section 2651 with reference to a same-sex spouse, certain exemption allocations to transfers to persons now recognized to be "non-skip persons" as defined in Code Section 2613(b) will be deemed void.

Accordingly, taxpayers who made such a transfer will be permitted to recalculate the amount of their remaining GST exemption.

Procedures for Implementing the Relief

The Notice provides the same procedures for implementing the relief regarding the covered marital and GST tax transfers.

First, the adjustment for the applicable exclusion amount and GST tax exemption will occur on the first federal gift tax return (i.e., Form 709) to be filed by the taxpayer after the issuance of the Notice. If the taxpayer dies prior to filing a Form 709, the adjustment should be made on the taxpayer's federal estate tax return (i.e., Form 706). If the year in question is an open year, then an amended Form 709 for that year should be filed.

Second, with whatever return is filed, a statement at the top of page 1 should be added, which reads "FILED PURSUANT TO NOTICE 2017-15."

Third, the taxpayer must attach a statement supporting the claim for the marital deduction/GST tax exemption adjustment and detailing the recalculation of the taxpayer's remaining applicable exclusion amount/GST tax exemption.