

TAX SECTION

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May 17, 2016

Via E-Mail to Elaine.H.Christophe@irs.gov

Elaine H. Christophe
Internal Revenue Service, Room 6517
1111 Constitution Avenue NW.
Washington, DC 20224

RE: Comments on Form 706-GS(D-1)

Dear Ms. Christophe:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Department of Treasury and the Internal Revenue Service in 81 Fed. Reg. 14937, concerning Form 706-GS(D-1).

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT

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SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We appreciate being extended the opportunity to participate in this process.

Respectfully submitted,

A handwritten signature in black ink, reading "Alyson Outenreath". The signature is fluid and cursive, with a long horizontal flourish at the end.

Alyson Outenreath, Chair
State Bar of Texas, Tax Section

COMMENTS ON FORM 706-GS(D-1)

These comments on Form 706-GS(D-1) (the “Comments”) are submitted on behalf of the Tax Section of the State Bar of Texas. Celeste Lawton, R. Glenn Davis, and Laurel Stephenson were the principal drafters of these Comments. The Committee on Government Submissions (COGS) of the Tax Section of the State Bar of Texas has approved these Comments. Robert Probasco, Co-Chair of COGS, reviewed these Comments. Eric Reis also reviewed the Comments and made substantive suggestions on behalf of COGS.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: May 17, 2016

The Department of Treasury and the Internal Revenue Service (the “IRS”) have solicited comments concerning Form 706-GS(D-1). The intention of these Comments is to specifically address issues associated with the due date for filing Form 706-GS(D-1) and the filing requirement for trusts having an inclusion ratio of zero, in order to enhance the quality, utility, and clarity of the information to be collected and to minimize the burden of the collection of information on respondents.

1. Timing of Filing Form 706-GS(D-1)

We respectfully suggest that the IRS consider changing the due date for filing Form 706-GS(D-1) so that it does not coincide with the due date for filing Form 706-GS(D).

Generally, the trustee must file Form 706-GS(D-1) to report a taxable distribution by April 15th of the year following the year in which the taxable distribution was made. Similarly, by such date, a person who receives a taxable distribution from a trust (the “taxpayer”) must file Form 706-GS(D). The trustee, thus, is not required to send the taxpayer a copy of Form 706-GS(D-1) prior to the due date for filing Form 706-GS(D). In order for the taxpayer to complete Form 706-GS(D), the taxpayer relies on information that he or she obtains from Form 706-GS(D-1). In some instances, a taxpayer may not realize that a trust distribution constitutes a taxable distribution that gives rise to the necessity of filing Form 706-GS(D) until the taxpayer receives the trustee’s Form 706-GS(D-1).

Because the initial due date for both forms is the same, the taxpayer may not receive a copy of Form 706-GS(D-1) until after Form 706-GS(D) is due. As a result, if the taxpayer is relying solely on the information in Form 706-GS(D-1), it would be impossible for the taxpayer to timely file Form 706-GS(D). Furthermore, even if an extension of time to file is requested, without the information provided on Form 706-GS(D-1) it may be impossible for the taxpayer to timely pay any generation-skipping transfer (GST) tax that is due.

The taxpayer’s difficulty in timely filing Form 706-GS(D) and paying any GST tax due would be exacerbated if a separate valuation were necessary. The Instructions for Form 706-GS(D) contemplate that there may be instances when the trustee has not completed column e of Form 706-GS(D-1) (regarding the value of property distributed from the trust) or that the taxpayer may disagree with the amounts that the trustee entered in column e of Form 706-GS(D-1). The burden of determining the appropriate value of the property received by the taxpayer in a taxable distribution ultimately lies with the taxpayer, given that he or she is the one who must pay the GST tax associated with the taxable distribution. In some instances, such as when the trustee fails to report the correct value of the distributed property, the taxpayer may need information from the trustee regarding the property or may need to engage a qualified appraiser in order to properly value the property. As shown in the Instructions, the definition of fair market value mirrors the definition for Federal estate tax purposes. In the Federal estate tax context, the fiduciary has nine months (or fifteen months, if the due date for Form 706 is extended) to fully value the property, unlike the taxpayer filing Form 706-GS(D), who has a fraction of that time if he or she begins the valuation process upon receipt of Form 706-GS(D-1) from the trustee.

Form 706-GS(D-1) is similar to a Form 1099 in that the form provides notice and information to a taxpayer to aid the taxpayer in properly paying tax. Form 1099, like other information returns, must be provided to taxpayers (“payees”) by February 15th of the year following the year in which a payment is made. If the due date for Form 706-GS(D-1) were changed to a date such as March 15th of the year following the year in which a taxable distribution is made, the taxpayer’s ability to timely file Form 706-GS(D) and pay any GST tax resulting from a taxable distribution may be improved.

Changing the due date of Form 706-GS(D-1) as suggested¹ would enhance the quality, utility, and clarity of the information to be collected both in that form and in Form 706-GS(D). We recognize that such a change could be more burdensome for the trustee, but it would better enable the taxpayer to timely and accurately file Form 706-GS(D) and pay any GST tax that may be due.

2. Addition of Cautionary Note to Instructions of Form 706-GS(D-1)

We respectfully suggest that the IRS consider adding a cautionary note to the Instructions to Form 706-GS(D-1) regarding the timeliness of the trustee’s filing Form 706-GS(D-1) and providing the taxpayer with information necessary for the taxpayer to timely file Form 706-GS(D).

As mentioned previously, the taxpayer may not receive a copy of Form 706-GS(D-1) before the initial due date of the taxpayer’s Form 706-GS(D) or may not otherwise have the information needed to file Form 706-GS(D) by its initial due date. We suggest that the IRS consider including in the Instructions to Form 706-GS(D-1) a cautionary note to inform or remind the trustee, if a distribution was made that results in GST tax being due, to file Form 706-GS(D-1) and provide a copy of such Form to the taxpayer in a timeframe sufficient to allow such taxpayer to challenge the valuation of any distributed asset and/or timely file Form 706-GS(D) and pay any GST tax due. We further suggest that such cautionary note inform or remind the trustee that failure to provide the Form 706-GS(D-1) to the taxpayer within a sufficient timeframe may risk a breach of fiduciary duty claim.

3. Eliminating Form 706-GS(D-1) Filing Requirement for Zero Inclusion Ratio Trusts

We respectfully suggest that the IRS consider eliminating the Form 706-GS(D-1) filing requirement for trusts with an inclusion ratio of zero.

Pursuant to the Instructions, the purpose of the Form 706-GS(D-1) is to “report certain distributions from a trust that are subject to the GST tax and to provide the skip person distributee with information needed to figure the tax due on the distribution.” The Instructions suggest that a trustee of a trust having an inclusion ratio of zero would not have to file Form 706-GS(D-1), because such a trust is commonly understood as not subject to the GST tax. Nevertheless, the

¹ The due date for filing both Forms 706-GS(D) and 706-GS(D-1) is set forth in Treasury Regulation Section 26.2662-1. Our suggested change would require a revision of that regulation, which may be beyond the scope of the feedback requested.

Instructions make clear that the trustee must file Form 706-GS(D-1) for each skip person “even if the inclusion ratio applicable to the distribution is zero.”

Form 706-GS(D-1) requires the trustee to include a detailed description of each distributed asset of the trust as well as the value of each such asset. This can be time consuming and expensive, particularly with respect to distributions of hard-to-value assets which would require appraisals to be obtained. When the trust has an inclusion ratio of zero, no GST tax is due regardless of the value of any distributed asset. Thus, it is seemingly a waste of time and resources to require the trustee of a trust having an inclusion ratio of zero to file the Form 706-GS(D-1), and it does not accomplish the Form’s purpose. In fact, the beneficiary receiving a Form 706-GS(D-1) reporting an inclusion ratio of zero is not required to file Form 706-GS(D). Thus, eliminating the requirement that the trustee of a trust having an inclusion ratio of zero file a Form 706-GS(D-1) would be consistent with the relief previously granted to the beneficiaries with respect to the filing of a Form 706-GS(D).

In the alternative, if the trustee of a trust having an inclusion ratio of zero must file a Form 706-GS(D-1), we suggest that the trustee be required to file such return only in the first year in which a distribution is made from such trust. For any subsequent year in which a distribution is made from such trust, we suggest that the IRS consider eliminating the filing requirement if the inclusion ratio of the trust is still zero at the time such distribution was made.