Fiduciary Representation in Pre-Litigation Gift Tax Controversies Before the Internal Revenue Service

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I. Introduction

Estate and gift tax auditors return for tax authorities more dollars per capita than any other subdivision of tax, and as such, audits in estate and gift tax tend to be emphasized. Anecdotally, gift tax return audits have historically been rare. That may soon change if, as is currently being proposed in connection with ongoing tax reform efforts, the estate tax is repealed or the applicable exemption amount is increased. If the estate tax is eliminated or the applicable exclusion amount is increased, then the Internal Revenue Service ("Service") may emphasize the audits of gift tax returns with greater frequency than it has historically done.

For these reasons, in addition to the fact that it is our duty to file tax returns that are true, correct, and complete as to every material fact, estate planners and return preparers preparing estate and gift tax returns must be mindful of the audit at all stages of the estate planning process - from estate planning to gift return preparation. Make no mistake, in high-stakes, high-dollar estate and gift tax controversies, personal representative, trustee, or beneficiary-clients can face considerable liability for tax debts owed but not paid. And, at the same time that estate planning is concerned with how to settle a person's estate post-death, issues from the decedent's life may require fiduciaries to file gift tax returns on behalf of a decedent. This outline advises readers on strategies to minimize audit risk and proven methods by which your clients can be protected from unnecessary fiduciary and transferee liability.

II. Gift Tax Return Filing Requirements, Statutes of Limitations, and Requests for Prompt Assessment

A. Filing Requirements

1. When Required: Generally, I.R.C. § 6019 requires a U.S. federal gift tax return to be filed by any individual who, subject to certain exceptions, makes a transfer by gift which (i) does not qualify for the marital deduction, (ii) does not qualify for the charitable deduction, (iii) is greater than the I.R.C. § 2503(b) annual exclusion amount of $10,000 as adjusted for inflation, or (iv) is not a qualifying medical or educational expense. A gift tax return is made on a Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*.

2. When Due:

a. In General: As a general rule, gift tax return must be filed on or before April 15th of the close of the taxable year. I.R.C. § 6075(b).

b. Extensions Allowed: I.R.C. § 6081(a) authorizes the Service to extend the filing of a gift tax return by up to six months. Any extension of time granted to a taxpayer for filing his or her Federal income tax return is deemed to be also an extension of time to file a gift tax return under I.R.C. § 6019.

B. The Period of Limitations on Assessment

1. In General: I.R.C. § 6501 requires the Service to assess a gift tax liability by the later of (1) three years after the due date of the gift tax return, or (2) three years after the gift tax return was actually filed.

2. May Be Extended by Agreement: I.R.C. § 6501(c)(4) provides that the general three-year period of limitations on assessment may be extended if the Service and the taxpayer agree to do so in writing.

3. Situation in Which Gift Tax May Be Assessed at Any Time:

a. General Rule: I.R.C. § 6501(c)(9) provides that if a gift is not shown on a gift tax return in a manner adequate to apprise the Service of the nature of the gift, then the gift tax may be assessed at any time with respect to that gift. Most typically, this additional assessment occurs in connection with the filing of the estate tax return.

b. Adequate Disclosure Especially Important in Gift Tax Cases: Because the failure to adequately disclose a gift on

a gift tax return means that the relates gift tax can be assessed at any time, it is especially important for practitioners to adequately disclose the gift on the return.

c. When Is a Gift Not Adequately Disclosed: I.R.M., pt. 4.25.1.11.2 (Oct. 30, 2017) instructs that a gift may be inadequately disclosed if it is:

(1) Omitted completely from the return; or

(2) Shown on the return, but the manner in which it is shown is not adequate to apprise the Service as to the nature of the gift.

d. Protective Returns: In situations in which the taxpayer contends that a gift was not made (*i.e.*, in a bona fide sale for adequate consideration such as a promissory note), it is usually advisable to file a gift tax return reporting a zero tax liability with respect to the "sale". The protective return should disclose all facts and supporting documentation surrounding the "sale". The purpose of filing this protective return is to have the statute of limitations with respect to that "sale" expire from a gift tax perspective.

4. Calculating the Statute of Limitations: The following chart may be helpful to calculate the assessment statute expiration date:

Returns Without Filing Extensions	Statute Runs From:
Return mailed and received on or before due date	Due date of return
Return mailed and received after due date	Date return received
Return mailed on or before due date but received after due date	Due date of return
Returns With Filing Extensions:	Statute Runs From:
Return mailed and received on or before extension date	Date return received
Return mailed and received after extension date	Date return received
Return mailed on or before extension date but received after extension date	Postmark date of return

C. Prompt Assessment Requests:

1. In General: Under I.R.C. § 6501(d), the personal representative of an estate may make a request for prompt assessment that will shorten the period of limitations on assessment to 18 months from the date of the written request therefor. Thus, in virtually every case in which a personal representative is filing a gift tax return on behalf of a decedent, it is good practice to make a request for prompt assessment. We discuss the method by which to make a prompt assessment request in Section VI.B.

III. Prepare the Gift Tax Return With the Audit in Sight

A. Planning: Plan With the End In Sight

1. Anticipate Your Audience: All estate planners should anticipate their audience from the planning stage forward. "Begin with the end in sight" is good advice to follow. This means you should plan and prepare gift tax returns to minimize your audit risks.

2. Practice Tip 1: Always Use Reputable Appraisal Firms: Use reputable and independent appraisal firms whenever valuing property for purposes of estate planning, whether it be in connection with lifetime gifts or preparing an estate tax return.

3. Practice Tip 2: Ensure Adequate Documentation for the Audit: Ensure that all necessary documentation is completed during the planning process and stored in a safe place so, if necessary, it can be produced in connection with the gift tax or estate tax audit.

4. Practice Tip 3: Assume That All Relevant Evidence Will Be Reviewed By An Agent and a Judge: Plan with an expectation that all relevant evidence will be reviewed by an estate and gift tax examiner and/or Judge.

5. Practice Tip 4: Rely on Reference Books for Appraisal: Be sure to double check appraisals against standard references materials (*e.g.*, David Laro & Shannon P. Pratt, Business Valuation and Taxes: Procedure, Law, and Perspective (WG&L 2005)) and case law dealing with similar issues (*e.g.*, fractional interest discounts, discounts for lack of marketability and lack of control). You may not be an appraiser but you are an intelligent person.

B. Gift Tax Return Preparation: Prepare With the End in Sight

1. Overview: Like the planning process, gift tax returns should be prepared with the audit in sight.

2. Be Sure to Perfect the Return: A gift tax return, signed under penalties of perjury, certifies that the return is "true, correct, and complete." This means, in addition to making reasoned judgment calls as to how to present a return for examination, that the gift tax return includes all required information and attachments. A common reason for audit is the gift tax return does not include all required information and attachments. Preparers often overlook (or ignore) the following items that should be included with the return:

a. If valuation discounts are claimed, a statement should be attached to the gift tax return that gives the basis for the claimed discounts and shows the amount of the discount(s) claimed;

b. To support the value of gifts, for stock of close corporations or inactive stock, "balance sheets, particularly the one nearest the date

of the gift, and statements of net earnings or operating results and dividends paid for the 5 preceding years;"

c. For each life insurance policy transferred, attach a Form 712, *Life Insurance Statement*, for all life insurance policies listed on return (*i.e.*, on the life of the decedent);

d. If the gift was made by means of a trust, attach a certified or verified copy of the trust instrument to the return on which you report your first transfer to the trust. To report subsequent transfers to the trust, you may attach either a brief description of the terms of the trust or a copy of the trust instrument;

e. Attach copies of appraisals used to determine the value of real estate or other property, or, alternatively, a full explanation of how the value was determined; and

f. Attach necessary statements for all elections being made with respect to the gift (*e.g.*, allocations of the generation skipping transfer tax exemption).

3. Secure Powers of Attorney Early:

a. Protection Against Unauthorized Disclosure: I.R.C. § 7213 makes it unlawful for any Federal employee to willfully disclose any return or return information to an unauthorized person. Therefore, the Service has taken significant steps to prevent unauthorized disclosure of returns and return information.

b. Request a Form 2848 in Any Event: Practitioners representing the donor or the fiduciary of an estate should have the donor or personal representative (after letters of administration have been issued in the case of an estate) sign a Form 2848, *Power of Attorney and Declaration of Representative*, so the practitioner is authorized to discuss the return with the Service, request transcripts, and request copies of prior years' gift tax returns, among other things.

4. Know What the Service Knows When the Return is Prepared: Before preparing the Form 709, arm yourself with the information the Service knows. Specifically, request or perform the following:

a. Account Transcripts: Request Service account transcripts, including (i) wage and income, (ii) account, (3) gift, and (4) related entity transcripts. Transcripts can be requested by telephone at (800) 908-9946 or online at http://www.irs.gov/Individuals/Get-Transcript;

b. Prior Years' Gift Tax Returns: Order prior years' gift tax returns from the Service by filing Form 4506, *Request for Copy of Tax*

Return. Note the $50 fee for each return requested, which is nonrefundable if no return is found;

c. Last Three Years of Income Tax Returns: For gift tax returns prepared by a fiduciary on behalf of a decedent, request the last three years of the decedent's federal and state income tax returns to understand sources of income and assets held (the estate tax return preparer will need to provide the last full year's return for some states (*e.g.*, New Jersey));

d. Last Three Years of Bank Statements: For gift tax returns prepared by a fiduciary on behalf of a decedent, request the last three years of the decedent's bank statements to understand sources of income, potential liabilities, and claims against the estate;

e. FOIA Requests: For gift tax returns prepared by a fiduciary on behalf of a decedent, practitioners should submit to the Service Disclosure Office a Freedom of Information Request Act, 5 U.S.C. § 552, et seq. ("FOIA") with respect to the six years prior to the decedent's date of death. If any return (gift or estate) is selected for audit, practitioners should make regular FOIA requests to the Service and request third parties to whom summonses have been issued to provide a copy of all records produced to the Service. This will allow the practitioner to monitor the case and ensures that he or she has all information in the Government's possession;

f. Credit Checks: For gift tax returns prepared by a fiduciary on behalf of a decedent, perform a credit check on the decedent to learn of liabilities and expenses of the estate, which may impact the value of the gift or estate;

g. Westlaw's Adverse Judgment Search: For gift tax returns prepared by a fiduciary on behalf of a decedent, use Westlaw to conduct an adverse judgment search to learn of liabilities and expenses of the decedent which may impact the value of the gift or estate;

h. Accurint: For gift tax returns prepared by a fiduciary on behalf of a decedent, use LexisNexis to conduct an Accurint search, which provides detailed information available on businesses and individuals, as well as their assets (including real estate), relatives, and associates;

i. TLO: For gift tax returns prepared by a fiduciary on behalf of a decedent, use Transunion TLOxp ("TLO"), to search personal information, bankruptcies, foreclosures, liens, judgments, assets, and professional licenses, in addition to other items; and

j. Google Searches: For gift tax returns prepared by a fiduciary on behalf of a decedent, use Google to understand the decedent and

obtain any information about the decedent disseminated on the Internet.

C. Examinations of Gift Tax Returns - An Overview

1. Characters in the Cast: The typical case of character in an estate tax audit include the following:

   a. *Donor*: The donor is the person who made the gift and who is filing a gift tax return or for whom a gift tax return is being filed.

   b. *Personal Representative, Executor, or Administrator*: The personal representative, executor, or administrator is a court-appointed fiduciary of the estate charged with, among other fiduciary responsibilities, filing an estate tax return and representing the estate during the audit and any ensuing litigation. The personal representative, executor, or administrator may also filed gift tax returns on behalf of a decedent.

   c. *Estate and Gift Tax Examiner*: The estate and gift tax examiner is a Service employee who is charged with auditing the gift and, as appropriate, estate tax return, for compliance with the Federal estate and gift tax laws;

   d. *Appeals:* The Service's Office of Appeals ("Appeals") is an independent organization within the Service whose mission is to help taxpayers and the Service resolve tax disagreements without litigation;

   e. *CI:* The Service's Criminal Investigation Division ("CI") is the law enforcement division of the Service;

   f. *TAS:* The Taxpayer Advocate Service, which is an independent organization within the Service whose mission is to ensure that all taxpayers are treated fairly and that the taxpayers' rights are understood and respected; and

   g. *Chief Counsel* and *Division Counsel:* The Service's Chief Counsel (based in Washington, D.C.) and its Division Counsel (based locally) are the Commissioner's attorneys who litigate cases and advise with respect to, among other things, estate and gift tax audits.

2. The 80/20 Rule: Examination activity should be commensurate with the time charged to the case. I.R.M., pt. 4.25.1.5.3 (Jan. 9, 2014). Estate and gift tax examiners adhere to the mantra that 80% of the tax determined to be due will come from 20% of the

issues identified for audit. Thus, estate tax return audits tend to be highly focused.

3. Key Revenue Raiser: Transfer taxes generated only a small percentage of the total Federal tax collected. However, estate and gift tax auditors return for the tax authorities more tax dollars per capita than any other subdivision of tax. Therefore, the Service emphasizes audits in this area.

4. Auditors are Specially Trained: Examining agents in estate and gift tax audits are specially trained in estate and gift tax.

IV. The Gift Tax Audit

A. Overview

1. Understand How the Service Will Examine the Return and Take Appropriate Countermeasures: The Service is methodical in its approach to examining estate and gift tax returns. This means we can generally know what to expect, and in turn, can take counteractive steps to ensure that you know everything the Service knows (and more). We first begin with an overview of the process and then offer practical tips for handling the audit.

2. Step 1: The Examiner Will Obtain and Review IDRS Transcripts and Prints: The Service's Integrated Data Retrieval System ("IDRS") is designed to provide examiners with the most current information on tax accounts. The examiner will request a copy of the IDRS transcript, which includes information on the Master File, to ensure that items are internally coded correctly. I.R.M., pt. 4.25.5.1 (Jan. 6, 2014).

    a. Countermeasure: As noted above, you should have already requested copies of the relevant account transcripts. Once you know the gift tax return has been selected for examination, request these transcripts again.

3. Step 2: The Examiner Will Verify the Date on Which the Statute of Limitations Expires: Soon after a case is assigned, an examiner is required to verify the statute of limitations by comparing the original tax return received date and postmark date with the statute date reflected on the Master File. I.RM., pt. 4.25.5.1.1.1 (Jan. 6, 2014). The statute of limitations is calculated in accordance with I.R.C. § 6501.

    a. Countermeasure: As noted above, you have the tools to calculate the statute of limitations, and should do so. While auditors should fiercely protect the statute of limitations, this does not mean they do not miscalculate the assessment date. Be aware of when the statute of limitations expires, but do not volunteer your calculation.

4. Step 3: The Examiner Will Verify Assessments and Payments: Soon after a case is assigned, the examiner will also verify any assessments and payments made to the account by comparing the original tax return with a transcript of the tax account. I.R.M., pt. 4.25.5.1.1.2 (Aug. 6, 2015).

    a. Countermeasure: Service account transcripts previously requested will allow you to similarly determine the accuracy of related assessments and payments.

5. Step 4: Identify and Request Related Returns Necessary for Examination: The examiner should make a preliminary determination as to whether other returns are required to be examined (*e.g.*, other years' gift tax returns, a related entity's returns, individual income tax returns, estate or trust income tax returns). See generally I.R.M., pt. 4.25.5.1.2 (Aug. 6, 2015).

    a. Countermeasure: As part of your preparation of the gift tax return, you should have already requested copies of the prior years' gift tax returns and relevant income tax returns.

6. Step 5: Complete a Case Activity Record for All Action Taken With Respect to a Case: The Form 9984, *Examining Officer's Activity Record*, is used to document the hours charged to a case and to briefly record the examiner's action.

    a. Countermeasure: Request the Case Activity Record (*i.e.*, the Form 9984) as part of your FOIA request to understand all actions the examiner is taking with respect to the estate tax return.

7. Step 6: Review Necessary Lead Sheets and Issue Spot: The Estate and Gift Examination function has developed comprehensive lead sheets that are intended to allow auditors to identify issues that may result in a deficiency. As summarized in I.R.M., pt. 4.25.5.3 (Aug. 5, 2016), among the lead sheets commonly reviewed (and completed) are the following:

    a. Statute Verification Lead Sheet (to verify the correct statute of limitations date);

    b. Activity Record (to document the hours charged to a case and to briefly record the examiner's action);

    c. Administrative Lead Sheet (to provide a set of administrative guidelines for the auditor to follow, such as providing the taxpayer a copy of Publication 1, *Your Rights as a Taxpayer*, soliciting payment, etc.);

    d. Other Tax Returns Lead Sheet (determine whether the audit should be expanded to include those returns);

    e. Asset Probe and Consistency Lead Sheet (to correlate estate assets and other transfers with income tax returns, gift tax returns, and estate or trust accountings);

f. Penalty Approval Form (to determine whether an assessment of penalties is warranted in all cases with an increase in tax);[3]

g. Reasonable Cause Lead Sheet (to document a taxpayer or preparer's reasonable cause defense to the assessment of penalties);

h. Fraud Lead Sheet (to assist the examiner in determining whether the assessment of fraud penalties is warranted);

i. Plan to Close Lead Sheet (to develop a schedule and plan to close the audit); and

j. Issue Specific Lead Sheets (to help identify individual items on an estate tax return):

k. Countermeasure: In connection with the preparation of the estate tax return, you should have a good idea of where, if at all, the estate tax return is weak. If you did not prepare the estate tax return, critically analyze it to determine all issues that the auditor might look into. DO NOT, HOWEVER, VOLUNTEER ISSUES.

8. Step 5: The Examiner Will Make Contact With the Taxpayer: After the examiner has critically reviewed the estate tax return, the auditor will make contact with the taxpayer or the taxpayer's representative. The examiner will generally contact the taxpayer or the taxpayer's representative by mail correspondence in the form of an information document request ("IDR"), though some do begin with an introductory telephone call (that practice has been reduced in recent years on account of identity theft).

   a. Countermeasure: As discussed more fully below, once the audit commences, request Service account transcripts, and perform another FOIA request. Also as discussed below, perform an inquiry of third-party contacts the Service has made.

9. Step 6: The Examiner Will Review Information Provided and May Determine Adjustments to the Return: After the exchange and review of information, as well as discussions as to the

[3] To the extent the penalty approval form does not comport with the requirements of I.R.C. § 6751(b)(1), which generally requires that the initial determination that the penalty applies be approved in writing by the person making such determination, the taxpayer may argue that the penalty may not be assessed. This issue is pending before the United States Tax Court. See, e.g., Graev v. Commissioner, docket No. 30638-08.

propriety of those adjustments, the examiner may determine adjustments to an estate tax return or gift tax return. The examiner summarizes his or her determination in a gift tax audit on Form 3233, *Report of Gift Tax Examination*. I.R.M., pt. 4.25.6.2 (Aug. 7, 2015). The examiner summarizes his or her determination in an estate tax audit on Form 1273, *Report of Estate Tax Examination Changes*. Id. Additionally, the following forms will likely be included with the Form 3233 or Form 1273:

a. If the gift tax adjustment occurs in connection with an estate tax audit, then Form 6180, *Adjustment to Taxable Estate*, is used to summarize the net changes on each schedule of the Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, including the adjustment to taxable gifts;

b. Form 886-A, *Explanation of Items*, is used in estate or gift tax reports to explain each adjustment shown on the columns entitled, "Tax Previously Assessed/Shown on Return" or "As Corrected Tax"; and

c. Interest estimates through a specified date.

d. Copies of Appraisals and Reports: When an engineer, economist, or other expert report is prepared and the findings accepted by the examiner, a copy designated as the "Taxpayer's Copy" should be attached as an exhibit to the Form 1273 or Form 3233. I.R.M., pt. 4.25.6.2 (Aug. 7, 2015). If the examiner previously submitted the report to the taxpayer, an additional copy of the appraisal does not need to be attached to the report. Id.

10. Step 7: Determine Whether the Representative Agrees or Disagrees With the Proposed Adjustments: Discussions about the propriety of the adjustments will reach a breaking point. At that point, examiners are counseled to solicit payment from the taxpayer and end the audit. The circumstances that follow, in turn, depend upon whether the taxpayer agrees or disagrees with the proposed adjustments.

a. Fully Agreed Cases: If there is a change in the tax assessment and the case is agreed, the examiner will:

(1) Prepare either (i) a draft Form 1273 and Form 886-A in the case of a gift tax examination, or (ii) a draft Form 1273, Form 6180 and Form 886-A in the case of an estate tax examination. In either

event, the reports will explain all changes made during the course of the examination;

(2) Prepare and secure Form 890, *Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment*, which is used to document that the taxpayer agrees to the proposed adjustments and is waiving the statutory restrictions upon assessment and collection of the deficiency in tax. I.R.M., pt. 4.25.6.2(2)(h) (Aug. 7, 2015). The execution of this form permits the Service to assess the deficiency, schedule the over-assessment, or adjust the applicable credit amount immediately. Id. It also stops the running of interest from the 31st day after the date of receipt until notice and demand for payment is made. Form 890 does not constitute a final closing agreement. Id.;

(3) Solicit payment for all agreed deficiencies with an interest computation through a specified date on which the deficiency is agreed to be paid;

(4) Close the case with all due expedience. See I.R.M., pt. 4.25.10.2.4 (Oct. 30, 2017).

b. Partially Agreed Cases: If the taxpayer does not agree to all of the proposed adjustments, but agrees to some of the proposed adjustments, the case is partially agreed. In partially agreed cases, the examiner will:

(1) Prepare two reports; the first of which is intended to show which adjustments are agreed and which adjustments are not agreed;

(2) The first report, Form 3233 (for gift tax cases) or Form 1273 (for estate tax cases), will address the agreed adjustments. In general, the figures returned by the taxpayer will be reflected in the "Shown on Return" column. The agreed changes will be reflected in the "As Corrected" column. A Form 6180, Forms 886-A and Form 890 should also be included; and

(3) The second report, Form 3233 (for gift tax cases) or Form 1273 (for estate tax cases), will address the unagreed adjustments. The unagreed changes will be reflected in the "As Corrected" column. A

Form 6180, Forms 886-A and Form 890 should also be included. The unagreed portion of the case will then be processed as discussed immediately below. See I.R.M., pt. 4.25.10.2.5 (Oct. 30, 2017).

c. Unagreed Cases: In estate, gift, and generation skipping transfer tax examinations, if the taxpayer does not agree to the proposed adjustments, the case is unagreed. In such cases, the examiner will:

(1) Solicit a statement of the taxpayer's position on each unagreed issue and consider the taxpayer's position with appropriate documentation before concluding the examination;

(2) Determine whether case is eligible and should use Fast Track Settlement procedures;

(3) Confirm the date on which the statute of limitations expires. If there are more than 210 days remaining on the statute of limitations on the date the taxpayer communicates disagreement with the proposed adjustments, a 30-day letter (or ticket to Appeals) may be issued. See I.R.M., pt. 4.25.10.2.6 (Aug. 5, 2016). The taxpayer should request that a 30-day letter, rather than a 90-day letter (or notice of deficiency) be issued. If there are less than 210 days remaining on the statute of limitations on the date the taxpayer communicates disagreement with the proposed adjustments, then a 90-day letter (or notice of deficiency) letter is issued. See id.

(4) The determinations of an unagreed case are set forth in Form 3233 (for gift tax cases) or Form 1273 (for estate tax cases). The unagreed changes will be reflected in the "As Corrected" column. A Form 6180, Forms 886-A and Form 890 should also be included.

d. Countermeasure: Be vigilant in protecting your client's right to exercise Appeals' rights in response to the 30-day letter or Tax Court deficiency rights in response to a 90-day letter. Note: If a taxpayer desires administrative review of an adjustment in excess of $25,000, then the taxpayer must submit a written formal protest to Appeals. See I.R.M., pt. 4.25.10.2.7.3 (Aug. 5, 2016). It is

advisable to include in the protest (1) the factual basis for the disagreement, (2) the legal basis for the disagreement, (3) a section reserving the right to amend or supplement the protest, and (4) importantly, a request that all necessary steps be taken to avoid *ex parte* communications including that the taxpayer be invited to participate in any preconference procedure pursuant to I.R.M., pt. 4.25.13.1.1 (Jan. 6, 2014). These points are discussed more fully below.

11. Step 8: Close the File: After the Form 890 has been obtained or the 30-day letter issued, the examiner will proceed to close his or her file. The examiner is responsible for preparing the appropriate closure letter, but that letter is issued by the Service's Centralized Case Processing (CCP). In accordance with I.R.M., pt. 4.25.10.3.10 (Oct. 30, 2017), the Service may issue the following letters in connection with the closing of the examination:

Letter	Use and Preparation
Letter 590 (Straight No Change)	Letter 590 is used on examinations that resulted in no change to the reported tax liability. This letter notifies the taxpayer and/or representative that the examination report has been reviewed and accepted by the Chief, Estate and Gift Tax. Therefore, the examination proceeding is officially closed. The examiner will prepare the Letter 590, No-Change Final Letter, to be retained undated in the case file. Cincinnati Centralized Case Processing (CCP) will date, obtain the necessary signature, and mail the Letter 590 to the taxpayer and representative, if applicable.
Letter 1156 (Change/No Change estate)	Letter 1156 is used when an examination results in no change in the tax liability, but changes to items impacting other tax periods. This final no-change letter notifies the taxpayer and/or representative that the report has been reviewed and accepted by the Chief, Estate and Gift Tax. Therefore, the examination proceeding is officially closed. The examiner will prepare the Letter 1156, Change/No Change Final Letter, to be retained undated in the case file. Cincinnati Centralized Case Processing (CCP) will date, obtain the necessary signature, and mail the Letter 1156 to the taxpayer and/or representative, if applicable.

Letter 570 (Claim allowed in full)	Letter 570 (DO), Claim Allowed in Full, is used on examinations for claims allowed in full. This letter notifies the taxpayer and/or representative of the final findings of the claim examination. Therefore, the examination proceeding is officially closed. The examiner will prepare the Letter 570 (DO). The examiner will mark the box on Form 3198, *Fully Allowed - L570*, for closing instructions to Cincinnati Centralized Case Processing (CCP). CCP will date, obtain the necessary signature, and mail the Letter 570 (DO) to the taxpayer and representative, if applicable.
Letter 2738 (Claim informal abatement)	This letter is sent to taxpayers informing them that after a reconsideration of their audit, all taxes and penalties will no longer be assessed.
Letter 950-G (Change/No-Change Gifts)	Letter, 950-G, Preliminary Determination Letter showing proposed changes to the value of gifts that does not generate a gift tax for certain periods. This letter will also explain the taxpayer's appeal rights under I.R.C. § 7477. Field examiners within the Estate and Gift Tax Program will use this letter.
Letter 950-F (Change/No-Change)	This letter is sent on unagreed examination cases for Change/No Change cases where the taxpayer wants to go to Appeals. The examiner should include Form 13683, *Statement of Disputed Issues*, with the mailing of the Letter 950-F. The examiner will prepare the Letter 950-F, Appeals Request for Change/No Change Cases. This case will be processed in the same manner as normal unagreed case and the case will be routed for Appeals consideration if a timely response is received and the statute of limitations permits.

V. Practice Tips for the Gift Tax Audit

A. Practice Tip 1: Manage Client Expectations

1. Clearly Explain the Potential Range of Outcomes in the Audit: Practitioners should be straightforward and honest with the client regarding the audit and its potential range of outcomes.

2. Clearly Define the Scope of Representation: Practitioners should use the engagement letter to clearly define the scope of representation.

3. Protect Yourself: Practitioners should protect themselves by taking the following steps:

a. Plan for the possibility that the client may attempt to blame the tax professional to escape penalties, especially in fraud cases;

b. Recognize when it may be prudent to bring in outside counsel or refer the case to another; and

c. Maintain complete files, workpapers, and correspondence.

B. Practice Tip 2: Protect the Personal Representative From Personal Liability

1. In General: As discussed below, in the case of gift tax return audits that are handled by a personal representative because the donor has died, a personal representative may face potential exposure for certain of the estate's tax liability. In addition to indemnity contracts, which are discussed below and may be appropriate for certain personal representatives, a personal representative should file the following three forms, each of which is discussed more fully below, to protect the personal representative from exposure to tax liability:

a. Form 56, *Notice Concerning Fiduciary Liability*;

b. Form 4810, *Request for Prompt Assessment Under Internal Revenue Code Section 6501(d)*; and

c. Form 5495, *Request for Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905*.

2. Form 56, Notice Concerning Fiduciary Relationship:

a. When to File: File Form 56 two times: first, when the personal representative is appointed to let the Service know who the personal representative is and where to send all tax notices; and second, when the personal

representative completes his or her job and dies, resigns, or is discharged.

b. Relevant Regulatory Requirement to File Up-Front: Treas. Reg. § 301.6903-1(a) provides as follows:

(1) Every person acting for another person in a fiduciary capacity shall give notice thereof to the district director in writing. As soon as such notice is filed with the district director such fiduciary must, except as otherwise specifically provided, assume the powers, rights, duties, and privileges of the taxpayer with respect to the taxes imposed by the Code. If the person is acting as a fiduciary for a transferee or other person subject to the liability specified in I.R.C. § 6901, such fiduciary is required to assume the powers, rights, duties, and privileges of the transferee or other person under that section. The amount of the tax or liability is ordinarily not collectible from the personal estate of the fiduciary but is collectible from the estate of the taxpayer or from the estate of the transferee or other person subject to the liability specified in I.R.C. § 6901.

c. Forward Mail: Have the decedent's mail forwarded to the personal representative or attorney to ensure that all proper financial and tax mailings are obtained.

d. Ensure Liquidity for the Estate: Promptly estimate the amount of cash required to discharge all liabilities and take early steps to ensure sufficient liquidity to prevent the assessment of penalties and interest.

e. Be Sure to File Following Discharge: If the personal representative dies, resigns, or is discharged from his or her fiduciary duty, file a second Form 56. In Estate of Hull v. Commissioner, T.C. Memo. 1990579, where a wife filed Form 56 with the Service, administered the estate, but did not file a second Form 56 providing notice that the fiduciary relationship had terminated, the Tax Court held that a notice of deficiency was validly issued.

3. Form 4810, Request for Prompt Assessment Under Internal Revenue Code Section 6501(d):

a. Determine Tax Exposure Through Form 4810: Determine whether the Decedent owed any back taxes by filing with

the Service a Form 4810, through which a request is made for prompt assessment of income and gift taxes.

b. Relevant Statutory Provision: Normally, the period for limitations on assessment is limited to three years. I.R.C. § 6501(a). The period of limitations on assessment may be extended by written agreement. I.R.C. § 6501(c)(4). Under I.R.C. § 6501(d), the personal representative of an estate may make a request for prompt assessment that will shorten the period of limitations on assessment to 18 months from the date of the written request therefor. For an estate, the prompt assessment procedures apply to any tax (other than estate tax) for which a return is required and for which the decedent or the estate may be liable. As an aside, this provision also applies to a liquidating corporation.

c. Limit Distributions: A cautious personal representative will wait for the Service to respond to their assessment request prior to making any distributions to the beneficiaries of the estate. The benefit of filing the Form 4810 is that a personal representative can distribute assets to the estate's beneficiaries more quickly while limiting the representative's risk.

d. Cases and Administrative Guidance Involving Attempts to Reduce a Personal Representative's Exposure to Personal Liability:

(1) The Request for Prompt Assessment Does Not Extend the Three-Year Period of Limitations on Assessment in the Second Circuit: In Estate of Callaway v. Commissioner, 231 F.3d 106 (2d Cir. 2000), the Court of Appeals for the Second Circuit held that the 18-month period for making a prompt assessment does not extend the period of limitations on assessment beyond the normal three-year period. Under the facts of the case, taxpayers, husband (H) and wife (W), timely filed their income tax return for 1988 on April 15, 1988. In 1990, H died. On Dec. 23, 1991, W, acting as personal representative of H's estate, filed a prompt assessment request with respect to taxpayers' 1988 return. The Court held that the time for making an assessment expired on April 15, 1992, three years after the filing of the 1988 return, not on June 23, 1993, 18 months after the

filing of the prompt assessment request. This was because, the Court held, the 18-month period for assessment (here ending on June 23, 1993) does not extend the period for making the assessment beyond the date three years after the filing of the return (here, April 15, 1992).

(2) The Request for Prompt Assessment Does Not Limit a Statute Extension: In Greenfield v. Commissioner, T.C. Memo. 2008-16, the Tax Court held that a request for prompt assessment does not limit an agreement to extent the statute of limitations entered into by the taxpayer.

(3) Transferee Liability is Not Affected by a Request for Prompt Assessment: In Gen. Couns. Mem. 32904 (Aug. 27, 1964), the Service addressed whether transferee liability statutes are affected by a request for prompt assessment. The Service held that I.R.C. §§ 6501(d) and 6901(e), when read together, reveal that for purposes of computing the period of limitations on assessment against a transferee, the period of assessment against a deceased person, or dissolved corporation as a transferor, regardless of the fact that a request for prompt assessment has been made, is the period that would be in effect had death or termination not occurred (*i.e.*, the normal 3-year period from the date the return was filed rather than the 18-month period prescribed in I.R.C. § 6501(d)).

4. Form 5495, Request for Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905:

a. General Rule for Liability:

(1) Regulatory Liability: Treas. Reg. § 20.2002-1 provides that a personal representative is generally personally liable for the tax debts of a decedent or estate. That section provides as follows:

(a) Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person

and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

(2) Liability Imposed: In Estate of Sivyer v. Commissioner, 64 T.C. 581 (1975), the Court held a personal representative fully liable for a deficiency to the extent of the remaining estate assets in the personal representative's control or in the control of the transferees.

b. Overview of Mechanisms to Discharge a Personal Representative From Liability: There are various provisions by which a personal representative can limit his or her personal liability. Generally, the personal representative invokes the benefits of these statutory provisions by filing with the Service Form 5495. As suggested by the name of the Form, *Request for Discharge From Personal Liability Under Internal Revenue Code Section 2204 or 6905*, the types of requests that can be made (and the statutory predicates) are as follows:

(1) Discharge From Personal Liability for Estate Tax: I.R.C. § 2204 provides that a fiduciary other than a personal representative (*e.g.*, a trustee of a revocable trust) may apply for discharge of personal liability for estate tax.

(2) Discharge From Personal Liability for Income and Gift Taxes: I.R.C. § 6905(a) provides, that after a decedent's individual (but not fiduciary) income or gift tax return has been filed, a personal representative may make written application to the Service office where the estate tax return is filed for release of the PR's personal liability for such income or gift tax.

c. Effect of Filing Form 5495: If, in response to the filing of a Form 5495, the personal representative pays the additional tax or if no notice is received from the Service within nine months from the date of filing Form 5495, then the personal representative is discharged from personal liability.

d. When to File: Practitioners or personal representatives should file Form 5495 separately but at the same time as the Form 4810.

e. Relevant Statutory and Regulatory Provisions:

(1) General Rule for Relief From Liability: I.R.C. § 2204(a) provides as follows:

(a) If the executor makes written application to the Secretary for determination of the amount of the tax and discharge from personal liability thereof, the Secretary (as soon as possible, and in any event within 9 months after the making of such application, or, if the application is made before the return is filed, then within 9 months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in I.R.C. § 6501) shall notify the executor of the amount of the tax. The executor, on payment of the amount of which he is notified (other than any amount the time for payment of which is extended under I.R.C. §§ 6161, 6163, or 6166), and on furnishing any bond which may be required for any amount for which the time for payment is extended, shall be discharged from personal liability for any deficiency in tax thereafter found to be due and shall be entitled to a receipt or writing showing such discharge.

(2) Good Faith Reliance on Gift Tax Returns: I.R.C. § 2204(d) provides as follows:

(a) If the executor in good faith relies on gift tax returns furnished under section 6103 (e)(3) for determining the decedent's adjusted taxable gifts, the executor shall be discharged from personal liability with respect to any deficiency of the tax imposed by this chapter which is attributable to adjusted taxable gifts which–

i) are made more than 3 years before the date of the decedent's death, and

ii) are not shown on such returns.

f. Time for Service to Respond: If Form 5495 is properly filed, the Service has nine months to notify the personal representative of any deficiency for decedent's applicable income or gift tax returns.

5. Indemnity Agreements and Refunding Bonds and Releases: Additionally, the personal representative can enter into contractual agreements with distributees in which the distributees agree to (1) indemnify the personal representative from any personal liability arising from the distribution, and/or (2) refund such amounts distributed as are necessary to satisfy the estate's debts, including tax debts, and release the personal representative from personal liability for such distribution.

a. Indemnity Agreements: The personal representative can enter into contractual agreements with distributees in which the distributees agree to indemnify the personal representative from any personal liability arising from the distribution.

b. Refunding Bond and Releases: The personal representative (or any other fiduciary, such as a trustee) can condition a distribution upon the distributee signing a refunding bond and release, which is a contractual arrangement through which the distributee agrees to refund such amounts distributed as are necessary to satisfy the estate's debts, including tax debts, and release the personal representative from personal liability for such distribution

C. Practice Tip 3: Know What the Government Knows (and More)

1. Know What the Government Knows When the Audit Commences: Once the audit commences, request Service account transcripts and perform another FOIA request.

2. Additionally, Request a Third-Party Contact Sheet From the Service: As an added step, once the audit commences, periodically request from the Service a third-party contact sheet. Pursuant to IRC §7602(c)(2), the Service is required to provide a taxpayer with a list of third-party contacts periodically and also when requested by the taxpayer. See I.R.M., pt. 4.81.5.7.7.3 (Nov. 1, 2009).

3. Learn as the Government Learns: Periodically during the course of the audit, and at least every six months, request Service account transcripts, perform another FOIA request, and request a third-party contact sheet pursuant to I.R.C. § 7602(c).

4. Do Not Underestimate Your Adversary: Assume the agent has read the file, is familiar with the potential issues, and understands those issues.

D. Practice Tip 4: Make a Conscious Choice as to How to Approach the Audit

1. Consciously Decide How to Approach the Audit: Early-on, practitioners should decide how to approach the investigation and continually check that approach during the course of the audit. Will you:

   a. Passively cooperate and produce requested documents;

   b. Aggressively represent your client, asserting all privileges and requiring the estate and gift tax examiner to issue summonses?

2. Suggested Approach: Ideally, practitioners should strike a proper balance between the two approaches. In some cases, practitioners will be more passively cooperative and in others, practitioners will be extremely protective.

E. Practice Tip 5: Know What to Expect in the IDR

1. The Service's Statutory Right to Examine Items: Congress has given the Service broad powers to compel production of information it requires to determine the liability of any taxpayer. In this regard, I.R.C. § 7602 permits the Service to perform any of the following: (1) examine any books, papers, records, or data which *may be relevant or material*; (2) summon a taxpayer or any other person, requiring the person to appear, to produce books and records, and to give testimony under oath; and (3) take testimony under oath.

2. Introduction to the IDR: The examiner's initial request for information and documentation is made in an information document request ("IDR"). The examiner's IDR should be clear and concise and cover all issues that are apparent in the return. I.R.M., pt. 4.25.1.5.4.3 (Jan. 9, 2014). This is not to say that the audit will be confined to what is in the initial IDR, but it is a good starting point.

3. Respect Deadlines and Request Extensions Ahead of Time: Requests for information will normally include a response date,

such as a specific date or reference to a specific time frame (*e.g.*, "by November 20, 2014" or "within three weeks from the date on this letter"). All practitioners should respect these deadlines to the greatest extent possible.

4. Request Extensions in Writing and State the Reasons Therefor: Any requested extension to an IDR should be in writing. This is important because, if the case proceeds to trial and the taxpayer wishes to have the burden of proof shifted to the Government (usually a favorable outcome for the taxpayer), the taxpayer must demonstrate that he or she cooperated with the Service's reasonable requests for witnesses, information, documents, meetings, and interviews.

5. Supplemental IDRs: Do not be surprised if the Service issues multiple IDRs. These supplemental IDRs will give the practitioner insight into the items the auditor is focusing on in his or her examination.

F. Practice Tip 6: Identify the Issues to be Examined

1. In General: Fully research and document every potential issue. Look at the gift tax return (or an estate tax return) like an auditor would look at it.

2. Commonly Encountered Issues on Estate and Gift Tax Returns: The issues that the Service focuses on evolves over time. However, certain issues tend to be frequently examined by the Service. Among the issues most common to be examined in connection with a gift tax return audit are:

a. Adjusted taxable gifts (common in estate tax return audits)

(1) Have all lifetime gifts been reported on Form 709 and line 4 of Form 706?

(2) Have you reported any gift tax the decedent paid with respect to lifetime gifts on line 7 of Form 706?

(3) If annual exclusions were claimed, did the donee receive a present interest in the transferred property?

b. Real Estate

(1) If the property was not sold, is the fair market value determined on the basis of a reliable appraiser with a copy of the appraisal attached to the return?

(2) If the property was sold in an arm's length transaction, is the sales price reflected?

c. Stocks and Bonds

(1) Did you properly account for accrued interests and dividends?

d. Closely Held Businesses

(1) Does the governing entity instrument contain requirements for determining the sales price of the closely held business interest? If so, did you adhere to those standards?

(2) Does the closely held business have an established practice for determining the fair market value of the closely held business interest if not disclosed in the agreements? If so, were you consistent in following that approach on the estate tax return?

(3) Is the value determines on the basis of a reliable appraisal? Review the entity's tax returns and financial statements to determine the fair market value of the shares.

(4) Have you reviewed for appropriate discounts (*e.g.*, lack of marketability, lack of control, built in gains, key person, etc.)? Is the discount reasonable in the light of the facts and existing case law?

(5) Was there a bargain sale of the company?

(6) Were there family limited partnerships, and if so, did the formation and funding of the partnership result in an indirect gift?

e. Mortgages, Notes, and Cash

(1) Were there self-canceling installment notes, forgiveness of indebtedness, installment sales, promissory notes that are not at arm's length, and below market or gift loans?

G. Practice Tip 7: Prepare, Prepare, and Prepare: It is important to prepare early and often. Ensure adequate documentation for all items.

H. Practice Tip 8: Establishing an Audit Defense and Preliminary Issues to Consider When Representing a Taxpayer Before the Service

1. Handling the Initial Audit Interview: You will have to answer the following questions:

a. Where should the initial audit interview take place?

(1) The Options: At the taxpayer's home or business, at your business, or at the Service's office?

(2) Pros and Cons of Meeting at the Taxpayer's Home or Business: It is useful to have books and records available, and the location of those documents may drive the location of the audit interview.

(3) Pros and Cons of Meeting at the Service's Office: The Service's Office may be less convenient if there are many books and records that must be transported or which cannot be left with the Service. However, holding the interview at the Service's Office will generally insulate the client from the examining agent.

b. Should the taxpayer attend?

(1) The Options: Yes or no.

(2) When to Consider Brining the Taxpayer to the Interview: Consider whether the taxpayer is credible in his or her explanations or has a compelling story that may prevent penalties from being imposed. If yes, then it may make sense to bring the client to a subsequent meeting, but rarely (if ever) the first meeting.

(3) When to Consider Leaving the Taxpayer at Home: Consider whether the taxpayer is agitated over the audit, whether the taxpayer has unsympathetic qualities, or whether the taxpayer would do more harm then good.

(4) When in Doubt: When in doubt, leave the client home. Once harm has been committed, it will be very difficult to overcome.

(5) Criminal Concerns: If there is any concern that the case turn criminal, leave the taxpayer home. It is a good idea to also hire an attorney to represent the taxpayer, either in-person before the Service or behind the scenes. The counsel that an experienced criminal tax attorney can provide during the audit stage will be invaluable if the case turns criminal.

(6) Pros and Cons of Meeting at the Service's Office: The Service's Office may be less convenient if there are many books and records that must be transported or which cannot be left with the Service. However, holding the interview at the Service's Office will insulate the client from the examining agent.

c. Let the Agent Identify the Issues: Never volunteer issues. Let the examining agent identify the scope of the audit.

2. Handling Requests for Information or Documents - The Good and the Bad:

a. The Good: Turning information over to the Service can build trust and good faith.

b. The Bad: However, there may be times where the taxpayer or taxpayer's representative deems the documents to be irrelevant or privileged. In that case, the Service may obtain the documents by summons or subpoena.

c. Caution: Do not turn over irrelevant or privileged documents solely on the belief that they are harmless. Irrelevant documents may lead to new inquiries, and privileged documents may constitute a waiver of privilege.

d. Streamline the Audit: By responding directly to the questions posed and providing responsive documents, you will help to keep the audit narrow and streamlined.

e. The Service's Subpoena Power: The Service may issue summonses or subpoenas for the purpose of "ascertaining the correctness of any return, making a return where none has been made, or determining the liability of any person for any internal revenue tax". Pursuant to its subpoena power, the Service may:

(1) Examine any books, papers, records, or other data that may be relevant or material to such inquiry, and

(2) Summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other

person the Service may deem proper to produce such books, papers, records, or other data.

f. Limitations on the Service's Subpoena Powers: The following may limit the Service's subpoena powers:

(1) Attorney-client privilege (beware of potential waiver of attorney-client privilege);

(2) Work product privilege;

(3) Tax practitioner's privilege;

(4) Physician-patient privilege (although there is no circuit court precedent allowing for a physician-patient privilege, the Supreme Court has noted that psychotherapist-patient disclosures are privileged);

(5) Relevance.

g. Handling Third-Party Contacts and Summonses:

(1) Right to Contact: The examining agent may contact third parties for information. By law, the agent is required to notify the taxpayer of such contact within three days following the contact. It is important to follow-up with the third-party to determine what questions were asked and what information was given. If possible, request to be present at any meeting to preserve privilege.

(2) Right to Summons: The examining agent may issue summonses for documents or to unwilling third-parties. Advise the third-party as to any issues or privilege concerns the taxpayer may have.

h. Settlement Attempts:

(1) Consider Dollar or Issue Settlements: The examining agent may be willing to settle based upon a dollar-figure amount or may be willing to settle on an issue-by-issue basis.

(2) Consider Which Points to Concede: Identify the strong vs. the weak issues; the important vs. the non-important issues; and decide which are worth conceding in order to achieve a settlement.

(3) Failed Settlement Attempts: If settlement does not work, request a copy of the Form 3233, *Report of*

Gift Tax Examination, or Form 1273, *Report of Estate Tax Examination Changes*, as the case may be.

I. Practice Tip 9: Handling the Audit Itself

1. Establish Credibility Early:

a. Establish Credibility: Credibility begins prior to the audit by attaching all relevant information to the return. Maintain a comprehensive file and be prepared to justify the positions taken.

b. Be Reasonable: Although the advocate has a duty to zealously represent his or her client's interests, being reasonable with procedure can build and maintain credibility.

c. Adhere to Deadlines: Set deadlines for producing information or documents and stick to them.

d. Do Not Taint the Audit: Once the examining agent believes the donor or estate is hiding something or not being completely truthful, this belief may color the rest of the audit and can be very difficult to overcome.

2. Ascertaining the Issues:

a. Assume Familiarity With the Issues and Planning Techniques: Expect that the examining agent is familiar with estate planning techniques and is familiar with the gift and/or tax return.

b. Inquire as to Issues Identified at the Initial Conference: At the initial conference, ask the examining agent if any issues have been identified. This will help the practitioner know how to prepare an appropriate defense.

c. Use Computer Programs to Understand How the Issues Affect the Numbers: Use computer programs such as Inter-EST to understand how the issues identified will affect the deficiency. For those unfamiliar, Inter-EST is a computer program the Service sometimes uses to calculate the tax due as a result of any audit adjustments. The program is a useful tool in the practitioner's arsenal because it allows the practitioner to run several different scenarios to determine their "bottom-line" effect and can guide the defense strategy.

3. Addressing the Examining Agent's Requests to Speak With the Personal Representative:

a. Interviews With Fiduciaries: In situations where the donor-decedent has died, the agent can compel the testimony of the personal representative via subpoena. Thus, it is usually better to control the time and location of that interview by arranging for it. The interview will also tend to be less formal if agreed upon rather than compelled. Remember that the examining agent is usually an attorney, and usually has a firm grasp on the issues in the case, and will know what questions to ask. Conversely, the personal representative likely has had little or no experience being formally interviewed. Thus, preparation is key to ensure that the representative knows what to expect and how to properly answer questions.

b. Presence of Counsel: The representative's attorney should also be present to ensure that privileged information is not revealed and to correct any misstatements

VI. Concluding the Audit

A. Overview

1. Overview: When the examining agent has reached a decision, he or she will discuss his or her findings with the taxpayer. As noted above, depending upon whether the case is agreed in full, agreed in part, or unagreed, the auditor will then take further steps that usually confer upon the taxpayer legal rights.

2. Fully Agreed Cases: If there is a change in the tax assessment and the case is agreed, the examiner will:

   a. The examiner will prepare a draft Form 1273 and Form 886-A in the case of a gift tax examination;

   b. Prepare and secure Form 890, Waiver of Restrictions on Assessment and Collection of Deficiency and Acceptance of Overassessment, which is used to document that the taxpayer agrees to the proposed adjustments and is waiving the statutory restrictions upon assessment and collection of the deficiency in tax. I.R.M., pt. 4.25.6.2(2)(h) (Aug. 7, 2015). The execution of this form permits the Service to assess the deficiency, schedule the over-assessment, or adjust the applicable credit amount immediately. Id. It also stops the running of interest from the 31st day after the date of receipt until notice and demand for payment is made. Form 890 does not constitute a final closing agreement. Id.;

   c. Solicit payment for all agreed deficiencies with an interest computation through a specified date on which the deficiency is agreed to be paid;

   d. Close the case with all due expedience. See I.R.M., pt. 4.25.10.2.4 (Oct. 30, 2017).

3. Partially Agreed Cases: If the taxpayer does not agree to all of the proposed adjustments, but agrees to some of the proposed adjustments, the case is partially agreed. In partially agreed cases, the examiner will:

   a. Prepare two reports; the first of which is intended to show which adjustments are agreed and which adjustments are not agreed;

   b. The first report, Form 3233 (for gift tax cases), will address the agreed adjustments. In general, the figures returned by the taxpayer will be reflected in the "Shown on Return" column. The agreed changes will be reflected

in the "As Corrected" column. A Form 6180, Forms 886-A and Form 890 should also be included; and

c. The second report, Form 3233 (for gift tax cases), will address the unagreed adjustments. The unagreed changes will be reflected in the "As Corrected" column. A Form 6180, Forms 886-A and Form 890 should also be included. The unagreed portion of the case will then be processed as discussed immediately below. See I.R.M., pt. 4.25.10.2.5 (Oct. 30, 2017).

4. Unagreed Cases: In estate, gift, and generation skipping transfer tax examinations, if the taxpayer does not agree to the proposed adjustments, the case is unagreed. In such cases, the examiner will:

a. Solicit a statement of the taxpayer's position on each unagreed issue and consider the taxpayer's position with appropriate documentation before concluding the examination;

b. Determine whether case is eligible and should use Fast Track Settlement procedures;

c. Confirm the date on which the statute of limitations expires. If there are more than 210 days remaining on the statute of limitations on the date the taxpayer communicates disagreement with the proposed adjustments, a 30-day letter (or ticket to Appeals) may be issued. See I.R.M., pt. 4.25.10.2.6 (Aug. 5, 2016). The taxpayer should request that a 30-day letter, rather than a 90-day letter (or notice of deficiency) be issued. If there are less than 210 days remaining on the statute of limitations on the date the taxpayer communicates disagreement with the proposed adjustments, then a 90-day letter (or notice of deficiency) letter is issued. See id.

d. The determinations of an unagreed case are set forth in Form 1273 (for estate tax cases) or Form 3233 (for gift tax cases). The unagreed changes will be reflected in the "As Corrected" column. A Form 6180, Forms 886-A and Form 890 should also be included.

B. The 30-Day Letter and Appeals

1. Appeals Preconference Procedures:

a. Overview: Preconference meetings may be held between Appeals Officers and examiners on unagreed cases containing unusual or complex issues. I.R.M., pt.

4.25.13.1.2 (Aug. 6, 2015). The preconference is held at the request of the examiner. Id. The I.R.M. states that the purpose of a preconference is to discuss the issues, protest, and the auditor's written rebuttal to the protest in cases containing complex or unusual issues. Id.

b. When it Occurs: Preconference meetings will take place prior to the Appeals/Taxpayer conferences. I.R.M., pt. 4.25.13.1.2 (Aug. 6, 2015).

c. *Ex Parte* Communications: Historically, *ex parte* communication between Appeals officers and examiners was strictly prohibited. See, *e.g.*, Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 1001(a), 112 Stat. 685; Rev. Proc. 2000-43, 2000-2 C.B. 404, modified, amplified, and superseded by Rev. Proc. 2012-18. However, in Rev. Proc. 2012-18 and I.R.M., pt. 8.1.10 (Oct. 1, 2012), the Service modified its approach to *ex parte* communications.

d. Strategy to Avoid *Ex Parte* Communication: It is hard to understand why a preconference does not violate the prohibition on *ex parte* communications set forth above. As such, it is advisable for the taxpayer in his or her protest to request that ex parte communications not occur as consistent with Rev. Proc. 2004-32.

2. Fast Track Settlement:

a. Overview: The Service's Small Business/Self-Employed Unit ("SBSE") and the Appeals Fast Track Settlement ("FTS") is a jointly administered program offered by the Service to expedite case resolution at the earliest opportunity. I.R.M., pt. 4.25.13.2 (Aug. 6, 2015). FTS is intended to enable taxpayers and the Service to work together in resolving disputed issues while the case remains in SBSE jurisdiction. Id. FTS is designed to streamline the settlement process of estate and gift tax cases because the taxpayer, the taxpayer's representative, the examiner, the estate and gift group manager, and an Appeals mediator actively participate in the outcome. Id. The FTS is estimated to be complete within 60 days.

b. When Available: FTS became available nationally beginning on July 1, 2013. I.R.M., pt. 4.25.13.2(3) (Aug. 6, 2015). FTS is generally available for all non-docketed SBSE cases with no regard to dollar amount. However, the following cases are specifically excluded from FTS:

(1) Docketed cases

(2) Cases with numerous issues, whether simple or complex, which will require longer than 60 days to resolve;

(3) Cases where SBSE or the taxpayer are unable to meet during the 60 day time frame;

(4) High profile, sensitive taxpayers or issues;

(5) Cases where the taxpayers have failed to respond to Service communications and no documentation has been previously submitted for consideration (a/k/a "no-show cases");

(6) Non-filer cases;

(7) Frivolous filers; and

(8) Whipsaw issues.

c. Steps to Commence: A request for FTS should be made by submitting an package to an Appeals Team Manager (ATM) that includes the following information:

(1) Signed Form 14017, Application for Fast Track Settlement;

(2) A summary of issues;

(3) The taxpayer's written position and response to the examiner; and

(4) In the case of a family limited partnership valuation issue, Form 6180A, Form 886-A, the taxpayer's appraisal, and the Service's appraisal. See I.R.M., pts. 4.25.13.2.2 (Jan. 6, 2014) and 8.26.2.6 (Oct. 1, 2012).

d. The FTS Conference: The examiner, the taxpayer, and the Appeals Officer participate in the FTS Conference. I.R.M., pt. 4.25.13.2.3 (Aug. 6, 2015). Appeals leads the session and conducts it as a mediator would.

e. Cases That Effectively Settled in FTS: If the parties resolve the issue(s) brought through the FTS process, and the examiner's group manager or territory manager agrees with the settlement, Appeals will prepare and execute the appropriate agreement form and a brief Appeals Case Memorandum. I.R.M., pt. 4.25.13.2.3 (Aug. 6, 2015). Once the disputed issues are resolved or the decision is

made that a resolution cannot be reached, the Appeals Official solicits signatures of the taxpayer and SBSE representative on a report (known as the "Fast Track Session Report"). Id. The Fast Track Session Report lists the issues in dispute as well as the resolution of the issues. Id. Both parties are given a copy of this report and are also notified the settlement is not final until the necessary closing documents or waivers are signed. Id.

f. Cases That Do Not Settle in FTS: If the parties are unable to resolve an issue, the taxpayer will retain all of the standard appeal rights and the examiner will close the case as "Unagreed" . When Appeals receives an unagreed case after an FTS session, Appeals assigns it to a different Appeals Officer (assuming of course that a 90-day letter is not issued first). I.R.M., pt. 4.25.13.2.3 (Aug. 6, 2015).

g. Withdrawal or Termination of FTS Allowed: A taxpayer's request to participate in the FTS process can be terminated or withdrawn at any time. I.R.M., pt. 4.25.13.2.4 (Jan. 6, 2014).

3. Best Practice Before Appeals: Prepare Appeals Conferences as if the Case Were Going to Trial: In preparing for an Appeals conference, prepare as though the estate were going to trial. In this regard, do the following:

a. Fully research applicable law and present it to the Appeals officer;

b. Bring all supporting documentation that the estate would seek to have considered as exhibits in court;

c. Obtain declarations from relevant third parties; and

d. If the case fails to settle at Appeals, the trial preparation is partially complete.

C. The Notice of Deficiency or 90-Day Letter and Tax Court Litigation

1. Overview: If a case is unagreed within 210 days of the date on which the statute of limitations expires, or if the case otherwise fails to settle with Appeals, the Service will issue a notice of deficiency (a/k/a the "90-day letter") determining deficiencies in estate or gift tax. While a complete discussion of the United States Tax Court ("Tax Court"), the United States Court of Federal Claims ("Court of Claims"), or United States District Court litigation is outside the scope of this outline, practitioners should be familiar with some basic concepts.

2. Estate Tax and Gift Tax Deficiency Cases Generally

   a. Background: I.R.C. § 6212 authorizes the Service to issue a notice of deficiency with respect to any of the following types of tax: (i) income tax (including individual, corporate, trust, and estate income taxes); (ii) estate and gift tax; or (iii) excise taxes on certain organizations and persons dealing with them.

   b. Tax Court's Basis for Jurisdiction: I.R.C. § 6213(a) grants jurisdiction to the Tax Court to redetermine a deficiency in any type of tax which is the subject of the issuance of a notice of deficiency. The Tax Court tends to be the preferred venue for litigating tax cases because, unlike the Court of Claims or the District Courts, the tax does not need to be prepaid in order to litigate in Tax Court.

3. Invoking the Tax Court's Jurisdiction: The Tax Court's jurisdiction to redetermine a deficiency depends upon a valid notice of deficiency and a timely filed petition. Both must be present before the Tax Court has jurisdiction over a case. I.R.C. § 6213(a); Tax Ct. R. Prac. & Proc. 20(a).

   a. Time to Petition the Tax Court: A taxpayer generally has 90 days to file a petition to redetermine a notice of deficiency unless the notice is addressed to a person outside of the United States, in which case the taxpayer has 150 days to file the petition.

4. Bring in an Experienced Tax Litigator Early: If you have not already brought a tax litigator on your team in connection with the audit or the Appeals process, it is usually a good idea to do so when the notice of deficiency is issued. Estate tax and gift tax litigation tends to be high-dollar, high-stakes litigation in which valuation is almost always at issue. Tax Court litigation is very specialized and its rules are very different than those in other federal or local courts.

VII. FOIA Requests

A. Background

1. Enactment of the Law: The Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is a federal freedom of information law that allows for the full or partial disclosure of previously unreleased documents within the control of the federal Government, including the Service.

2. Learn What the Government Knows: Practitioners should submit a FOIA request to the Service at various stages during the audit, Appeals, and post-audit or post-Appeals stages of a tax controversy.

3. Reason for Making the Request: Often, but not always, the FOIA will give the practitioner insight into the reasons that the Service determined a certain adjustment in the taxpayers' income, estate, or gift tax for a particular year. Additionally, FOIA might help certain taxpayers show that procedural due process requirements were not met (*e.g.*, I.R.C. § 6751's written supervisory approval of a penalty determination.[4] In this regard, a FOIA response can be of considerable value when taking an issue before Appeals or before a federal court.

B. Making FOIA Requests

1. Format of the FOIA Request: There is no required form for making a FOIA request. We advise that such request be made in writing to the Service's Disclosure Office.

2. How to Make: FOIA requests can be sent by fax or by mail as follows:

a. By Fax: FOIA requests can be faxed to (877) 891-6035.

b. By Mail: FOIA requests can be sent by mail to the following address:

(1) Internal Revenue Service,

IRS FOIA Request,

Stop 93A,

[4] As noted, I.R.C. § 6751(b)(1) generally requires that the initial determination that a penalty applies be approved in writing by the immediate supervisor of the person making the determination, the taxpayer may argue that the penalty may not be assessed. This issue is pending before the United States Tax Court. See, e.g., Graev v. Commissioner, docket No. 30638-08.

3. Cost: There is generally no charge for the first 100 pages and $0.20 per page thereafter. As a practical matter, the Service tends to issue its FOIA response for voluminous materials on a CD.

4. Limitations on the FOIA Request: There are, of course, limits to the FOIA request. Two of the more noteworthy limitations are as follows:

   a. The Service is only required to look for an existing record or document in response to a FOIA request. FOIA does not require the Service to collect information it does not have or to research or analyze data for a person making a FOIA request; and

   b. The Service is not obligated to create a new record to comply with a FOIA request. However, when records are maintained by a computer, the Service may be required to retrieve information in response to a FOIA request.

C. The FOIA Response

1. Time to Respond: Under FOIA, the Service must determine within 20 business days after the date a FOIA request is received whether and to what extent to comply with the FOIA request. 5 U.S.C. § 552. The Service can extend the 20-day period by an additional 10 days in unusual circumstances. See, *e.g.*, 5 U.S.C. § 552 (a)(6)(B)(i)-(iii). Such unusual circumstances include, but are not limited to, the need to collect information from field offices, the need to review large numbers of documents, and the need to consult with other agencies. 5 U.S.C. § 552 (a)(6)(B)(i).

2. Denials in Whole or In Part: The Service tends to respond to the FOIA request and will generally produce some but not all documents. If a FOIA request is denied in whole or in part, the Service must state the reasons for the denial. The request may be exempt from disclosure under FOIA because:

   a. It concerns classified documents pertaining to national defense and foreign policy;

   b. It is prohibited by internal personnel rules and policies;

   c. The information is exempt under other laws, the most common of which cited in the tax contest is the prohibition on disclosure of other taxpayer information under I.R.C. § 6103;

d. It concerns trade secrets and confidential commerce or financial information;

e. It concerns interagency or intragency memorandums or letters;

f. It is exempt for personal privacy reasons, such as personnel, medical, and similar files, the disclosure of which would amount to an invasion of privacy;

g. It concerns information compiled for law enforcement reasons;

h. It concerns information that is contained in or related to examination, operating, or conditions reports prepared by, on behalf of, or for the use of an agency responsible for the regulation of a financial institution;

i. It covers geological and geophysical information, data, and maps concerning wells. See Posting of FOIA Requests: A Look Into the IRS Examination File to Tax Controversy (Civil and Criminal Report) blog, http://taxlitigator.me/2012/01/11/ foia-requests-a-look-into-the-irs-examination-file/ (discussing the FOIA requirements and exemptions more fully).

D. FOIA Appeal Rights and Judicial Actions

1. Right to Appeal: Taxpayers can appeal a denial of a FOIA request, either in whole or in part, administratively to the Service. The appeal should include reasons why the Service response to the FOIA request was inadequate and must be postmarked within 35 days after the date of the denial letter or other adverse determinations.

2. Means of Appeal: An appeal is filed by sending a letter to Internal Revenue Service Office of Appeals, Attn: FOIA Appeals, 5045 E. Butler Avenue, M/Stop 55201, Fresno, California 93727-5136.

3. Contents of Appeal: The appeal should include copies of the FOIA request and the initial Service decision responding to the request. The envelope containing the appeal should be marked in the lower lefthand corner with the words "Freedom of Information Act Appeal."

4. Time for Appeal: The Service is required to make a decision on an appeal within 20 business days after the date of receipt of the appeal unless extended. Treas. Reg. § 601.702(c)(10)(iii).

5. Judicial FOIA Actions: If an administrative FOIA appeal before the Service is denied, a complaint against the Service seeking disclosure of the requested information may be filed to the appropriate federal District Court. 5 U.S.C. 552(a)(4)(B); Treas. Reg. § 601.702(c)(13). A copy of the complaint must be served upon the Commissioner of Internal Revenue, Attention: CC:PA, 1111 Constitution Avenue, N.W., Washington, D.C. 20224.

6. Right to Attorneys' Fees: Reasonable attorneys' fees and litigation costs may be awarded if the taxpayer substantially prevails in the FOIA litigation.

VI. Federal and State Liability of the Personal Representative and Transferees

A. Overview

1. Personal Liability for an Personal Representative: Where a personal representative files gift tax returns on behalf of a decedent, it is important to understand the liability such person may face. A personal representative can become personally liable for unpaid Federal estate tax of the estate or for unpaid Federal income tax of the decedent. See 31 U.S.C. § 3713(a), (b). A personal representative can also become personally liable for unpaid State estate and inheritance taxes. See, *e.g.*, N.J.S.A. 54:35-2.

2. The Relevant Statutes: 31 U.S.C. § 3713, entitled "Priority of Government Claims," provides that a personal representative can be held personally liable to the United States is a personal representative pays a "debt" of the estate before satisfying the Government's claims.

a.

(1) A claim of the United States Government shall be paid first when-

(a) a person indebted to the Government is insolvent and-

i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

ii) property of the debtor, if absent, is attached; or

iii) an act of bankruptcy is committed; or

(b) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

b. A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

3. Liability Can Extend to Certain Trustees: A trustee of a trust which was revocable until the decedent's death can, in certain circumstances, also be personally liable for the decedent's and the estate's taxes. See, *e.g.*, Fla. Stat. §§ 737.3054(1) and 733.607(2).

4. United States Need Not Perfect Its Claim: The United States is not subject to State law requirements of filing proofs of claim.

5. United States May Assert a Claim After Discharge: The United States may make its claim long after the estate has been probated and the personal representative discharged by the probate court.

B. The King's Debtors Dying, the King Shall First Be Paid

1. The King Shall Be Paid First: A personal representative of an estate without enough property to pay all claims of the estate must pay the Federal tax claims before all other claims. 31 U.S.C. § 3713.

2. Creation of Liability: I.R.C. § 3713(b) creates the underlying liability for the personal representative and I.R.C. § 6901(a)(1)(B) provides the Service to use their standard assessment and collection methods for the liability which, as discussed below, is the issuance of a notice of liability.

3. The Notice of Liability: When proceeding pursuant to I.R.C. § 6901(a)(1)(B) the Service issues a notice of liability.

4. The Periods to Assess and Collect a Liability Under I.R.C. § 6901: The period of limitations on assessment with respect to a liability under I.R.C. § 6901 expires on the date that is the later of one year after (1) the liability arises, or (2) the expiration of the period of collection of the tax in respect of which the liability arises (*i.e.*, generally ten years). Thus, as a general rule, the Service can assess liability on the fiduciary under I.R.C. § 6901 up to ten years after assessment of the tax in respect of which such liability arises.

5. Means of Enforcing the Liability: The United States asserts this claim by filing suit against the personal representative in the appropriate federal district court pursuant to I.R.C. § 7402(a).

C. Federal Personal Liability for the Personal Representative

1. Overview: If the personal representative pays other creditors prior to paying the United States, the fiduciary may be held personally liable to the extent of the payments that he or she turned over to non-governmental creditors. 31 U.S.C. § 3713(b);

United States v. Coppola, 85 F.3d 1015, 1020 (2d Cir. 1996); I.R.M., pt. 5.5.3.9 (Mar. 26, 2010).

2. Requirements for Liability: Pursuant to 31 U.S.C. § 3713(b), the following requirements must be met for there to be personal liability imposed upon the personal representative:

   a. The United States must have a claim;

   b. The personal representative must have knowledge of the United States' claim or be placed on inquiry notice of the claim;

   c. The personal representative must have paid a "debt", which term is generally defined to include the payment of a beneficiary's distributive share;

   d. The debt must have been paid at a time when the estate is insolvent or the debt must have created the insolvency; and

   e. The Service must have filed a timely assessment against the personal representative.

3. Potential Criminal Liability of the Personal Representative and Attorney

   a. In General: In rare circumstances, the United States has prosecuted the personal representative of an estate criminally.

   b. Tales from the Crypt:

      (1) Personal Representative Guilty of Making False Return: September 9, 2004 - Press Release: ROSEMARIE D. BRIA, "sentenced…. for subscribing a false estate tax return," "one-count Information charging her with filing a false estate tax return," "omitted estate assets from the estate tax return resulting in a tax loss to the Government."

      (2) Attorney Guilty of Obstruction of Justice: May 2, 2012 – Press Release: SUZANNE LAND, "a Cincinnati attorney, pleaded guilty today to obstructing and impeding the Internal Revenue Service (IRS) while representing the estates of two deceased clients."

      (3) Attorney Guilty of Making False Statements to the Service: December 28, 2012 – Press Release:

William A. Hirst, "attorney pleaded guilty yesterday to one count of making a false statement to the Internal Revenue Service," "Hirst told the IRS he found the three lost deeds in a file and recorded them, which was false since Hirst knew he signed the client's signature to the three deeds recorded on April 4, 2005".

D. Federal Personal Liability for the Transferees of Estates and Gifts

1. General Lien Attached to Property: The United States has a lien on all property of the taxpayer for assessed and unpaid taxes. See I.R.C. § 6321 and 6322. The lien does not arise until the tax is assessed. Id.

2. Estate Tax a Lien on the Gross Estate: The United States has a special tax lien on the gross estate of an estate equal to the estate tax due. I.R.C. § 6324. This lien attached at the time of the decedent's death (*i.e.*, the tax need not be assessed before the lien attaches). See Treas. Reg. § 301.6324-1(a)(1). Thus, the Service can also attach the property of the gross estate to a special lien.

3. Transferee Liability Imposed: I.R.C. § 6901(a)(1)(A) also imposed transferee liability on any heir, legatee, devisee of an estate or a donee of any gift . See also Treas. Reg. § 301.6901-1(a)(1).

VIII. Gifts and Bequests From Non-U.S. Donors and Decedents - Reporting Requirements

A. Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*

1. Who Must File

a. The Grantor or Beneficiary must file whenever there is a "reportable event:"

i. Formation of a foreign trust,

ii. Transfer of cash or other assets into a foreign trust (Grantor),

iii. The receipt of any distributions by U.S. beneficiaries,

iv. Aggregate gifts or bequest from a foreign person or foreign estate to a U.S. person in excess of $100,000 (no spousal exception) (beneficiary) (see IRS Notice 97-34, superseded in part),

v. Receipt of a gift by a U.S. person from a foreign partnership or corporation in excess of $14,375 in 2011, $15,102 in 2013 adjusts for inflation (beneficiary),

vi. Anyone who loans money to a foreign trust (grantor, loaner),

vii. The U.S. Grantor of a foreign trust (grantor), and

viii. See I.R.C. §§ 6048, 679(c) for changes implemented as a result of the HIRE Act changes.

2. Purported Gifts § 1.672(f)-4

a. The IRS may re-characterize gifts received directly or indirectly from foreign partnerships or corporations to U.S. person as income that must be included in gross income.

b. Exceptions:

i. If the U.S. citizen or resident alien individual treated and reported the gift as a distribution for U.S tax purposes and as a gift to the U.S. donee OR

ii A nonresident alien reported under the laws of their country of residence as a distribution to such individual and a subsequent gift or bequest to the United States donee, and the United States donee timely complied with the reporting requirements of section 6039F, if applicable.

3. When To File

a. The form is due when the income tax return of the U.S. entity (individual, partnership, corporation, etc.) is due, including any extensions of time to file. The form is not filed with the tax return.

4. Penalties

a. 35% of the gross value of the distributions received from a foreign trust or transferred to a foreign trust.

b. 5% per month for the amount of certain foreign gifts, up to 25%.

c. Penalties may be waives for reasonable cause.

i. The fact that disclosure is a crime in another country is not reasonable cause.

d. See I.R.C. §6677; IRS Notices 96-60; 97-34.

e. See I.R.C. §6662(j) for additional penalties.

f. Statute of limitations suspended, see I.R.C. §6501(c)(8).

5. Special Rules

a. Lerch v. Commissioner, T.C. Memo. 1987-295, where petitioners were assessed deficiencies and penalties in part for failing to report foreign sourced income on a Form 3520.

B. Form 3520-A, *Annual Information of Foreign Trusts With a U.S. Owner*

1. Who Must File

a. A foreign trust with a U.S. owner must file Form 3520-A in order for the U.S. owner to satisfy its annual information reporting requirements. See I.R.C. § 6048.

b. Exception: Canadian registered retirement savings plans (RRSP) and Canadian registered retirement income funds (RRIF) are not required to file Form 3520-A

c. Grantor if the foreign trust fails to file a timely Form 3520-A or does not provide the information required.

d. See I.R.C. § 679(c) for changes made by the HIRE Act regarding loans, etc.

e. See I.R.C. § 679(d) for presumption that the foreign trust has a US beneficiary

2. When To File

a. The Form is required to be filed three and a half months after the end of the tax year of the trust.

b. For a trust using a calendar year, the deadline is March 15th.

c. However, an extension of time can be requested – See Form 7004.

3. Penalties

   a. The U.S. owner is subject to a penalty equal to 5% of the gross value of the portion of the trust's assets treated as owned by the U.S. person at the close of that year (or $10,000 if higher).

   b. Additional penalties may be imposed if noncompliance continues after the IRS gives the taxpayer notice.

   c. Criminal penalties may be imposed.

   d. The penalties may be waived for reasonable cause.

4. IRS Notice 97-34

   a. A U.S. person who is the owner of a foreign trust is responsible for ensuring that the trustee files IRS Form 3520-A. The U.S. Person is subject to a penalty of 5 percent of the gross reportable amount in the event of noncompliance, as well as additional penalties for continued noncompliance.

   b. Be especially aware that the filing deadline is March 15, not April 15.

5. Special Rules

   a. Para Technologies Trust v. Commissioner, T.C. Memo. 1994-366, where a foreign trust was not reported by its Officers and Trustees, and ultimately found to be disregarded, and its principal liable for negligence.