
# GIFT-SPLITTING CAN BE TRICKY WITH SPOUSAL LIFETIME ACCESS TRUSTS (SLATS)

Spousal Lifetime Access Trusts (SLATs) have become a popular vehicle for married couples who desire to shift wealth outside their taxable estates but still retain access to the transferred assets by virtue of the grantor naming his or her spouse as a beneficiary of the trust. However, there are some tricky gift-splitting rules that apply to gifts to SLATs. This memorandum highlights that the utilization of lifetime exemptions could be different for gift tax and GST tax purposes depending on the facts.

## Gift Tax Implications

When a gift is made in part to a trust that benefits both a spouse and descendants, the election to gift-split may create unintended results. In this case, the consent to gift-split is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and deemed severable from the interest transferred to the spouse. Treas. Reg. § 25.2513-1(b)(4), PLR 200345038 and PLR 200452003.

- Example 1: Wife funds a trust with $1,000,000. The trust allows Husband to withdraw up to the greater of $5,000 or 5% of the trust each year. Further, the trustee may pay to the Husband and/or descendants any income or principal as the trustee determines necessary for their health, maintenance, education and support. Upon Husband's death, the assets remain in trust for the couple's children. Assuming Husband's ascertainable and severable interest equates to $300,000, any consent to gift-split applies to the portion ($700,000) of the total gift that is not attributable to Husband's ascertainable and severable interest. Therefore, Wife's gift tax return would reflect a gift of $650,000 ($300,000 plus $350,000), and Husband's return would reflect a gift of $350,000.

- Example 2: Wife funds a trust with $1,000,000. The trust is a discretionary trust that does not include ascertainable standards with regards to potential income and principal distributions. Therefore, the gift to the spouse is not severable from the gifts to the other beneficiaries, and the gift may not, to any extent, be considered as made one-half by the donor and one-half by the spouse within the meaning of § 2513. Wife's gift tax return would reflect a gift of $1,000,000 and Husband would not be deemed to make a gift.

## Generation-Skipping Tax Implications

For GST purposes, a gift-splitting election is respected and causes the consenting spouse to be treated as the "transferor" with respect to one-half of the gift.

Under I.R.C. § 2652(a)(2), if under I.R.C. § 2513 one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of the GST.

The regulations; however, refine this rule further. Treas. Reg. § 26.2652-1(a)(4) states that in the case of a transfer with respect to which the donor's spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the consenting spouse is treated as the transferor of one-half of the entire value of the

property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513.

- Example 3: Assuming the same facts as Example 1 above, Wife was treated as making a $650,000 gift and Husband was treated as making a $350,000 gift, however, for GST purposes, they would each be treated as the transferor equal to one-half of the gift, or $500,000.

- Example 4: Assuming the same facts as Example 2 above, Wife was treated as making a $1,000,000 gift and Husband was treated as not making a gift. The GST consequences of this example are not clear depending on the presence of other gifts made during the same year, if any. Some commentators take the position that only the Wife is permitted to allocate GST exemption to this gift. Others take a different position if additional gifts throughout the same year nevertheless qualify for a gift-splitting election under § 2513. Based upon this argument, a 50/50 gift-split for GST purposes would likely apply to all gifts to the extent taxpayers made a valid gift-splitting election under § 2513.

*PLR 200345038*

As additional support for the results of the above hypothetical examples, see PLR 200345038. In PLR 200345038, the donor created three trusts, each for his Wife and one of his three children. The trustee could distribute income and principal to or for the benefit of the Wife or the respective child but only for his or her health, maintenance, support and education. The Service ruled that, because the standard for invasion was ascertainable, the Wife's right to receive income or principal was susceptible of determination. Therefore, the gift to the Wife was severable from the gifts to the other beneficiaries. Accordingly, the gifts were eligible for gift-splitting to the extent not attributable to the Wife's ascertainable and severable interest. The IRS also explained that, notwithstanding the gift tax treatment, as a result of the gift-splitting election, each spouse was treated as the transferor of one-half of the property for GST tax purposes referencing Treas. Reg. § 26.2652-1(a)(4).

As this memorandum demonstrates, care must be taken to properly report split gifts on a gift tax return. Additionally, it may not always be apparent how to calculate the extent of a spouse's ascertainable and severable interest. It may be necessary to add a supplementary page to the gift tax return to explain any split that should not be treated as made one-half by each spouse. If the result is different for GST purposes, that should also be explained in an attachment to the return. Given that a married couple cannot choose which gifts will be split and which will not be split within the same year, clients should carefully consider the gift and GST tax implications for each gift prior to making both gifts to SLATs and large gifts to other family members or trusts in the same tax year. Clients should consult with their tax advisor when reporting gifts to SLATs on their gift tax returns.

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