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1989

Allocating the GST Exemption Under the Generation-Skipping Transfer Tax

Michael B. Lang

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ALLOCATING THE GST EXEMPTION UNDER THE GENERATION-SKIPPING TRANSFER TAX*

by Michael B. Lang**

I. Introduction

One of the most significant aspects of the Tax Reform Act of 1986 for estate planners was the retroactive repeal of the original 1976 generation-skipping transfer (GST) tax and the enactment of an entirely new generation-skipping transfer tax. The new generation-skipping transfer tax, unlike the 1976 version, generally applies to transfers that constitute "direct skips," such as outright gifts to grandchildren. Like the earlier tax, the new tax also applies to "taxable terminations," such as a termination of the life estate of the transferor's child resulting in the grandchild receiving possession of the transferred property in fee simple under the terms of the original transfer, and "taxable distributions," such as a discretionary

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** Professor of Law, University of Maine School of Law. A.B., Harvard College; J.D., University of Pennsylvania. A somewhat different version of this article will appear in M. Lang & C. Khoury, Federal Tax Elections (to be published by Warren, Gorham & Lamont, New York and Boston). The author wishes to thank Professor Colleen Khoury for comments on an earlier version of this article.


2. I.R.C. § 2611(a)(3) (Supp. 1986) (defining generation-skipping transfers as including inter alia "a direct skip"). See id. § 2612(c)(1) (definition of "direct skip"); § 2613 (definition of "skip person" and "non-skip person"); § 2651 (assignment of persons to generations, which is of most relevance in unusual contexts).

3. Direct skips to grandchildren receive special treatment in two situations. First of all, if at the time of the transfer the parent of the grandchild who is a direct lineal descendant of the transferor (or the transferor's spouse or former spouse) is dead, the grandchild is treated as a child of the transferor, with the result that the transfer does not constitute a taxable direct skip. See id. § 2612(c)(2). Secondly, a transitional rule in the 1986 Act excludes from the definition of a "direct skip" any pre-1989 transfer to a grandchild of the transferor "to the extent that the aggregate transfers from such transferor to such grandchild do not exceed $2,000,000." Pub. L. No. 99-514, § 1433(b)(3), 100 Stat. 2731, 2731 (1986). The overall effect of this provision is to delay the application of the 1986 tax to direct skips to grandchildren until 1990.

4. I.R.C. § 2611(a)(2) (Supp. 1986) (defining generation-skipping transfers as including inter alia "a taxable termination"). See id. § 2612(a) (definition of "taxable termination").

5. Id. § 2611(a)(1) (defining generation-skipping transfers as including inter alia "a taxable distribution"). See id. § 2612(b) (definition of "taxable distribution").
distribution to a grandchild from a trust created for the benefit of the transferor's children and grandchildren.\(^6\) It is notable, however, that the taxable event (referred to in the statute as the "generation-skipping transfer") is the transfer of the property by the transferor in the case of a direct skip, while the taxable event in the case of a taxable termination or a taxable distribution will usually occur long after the initial transfer of property by the transferor.

Although the scope of transfers potentially subject to tax under the 1986 generation-skipping transfer tax is broader than under the 1976 tax, the 1986 tax also includes a larger and more broadly applicable exemption. In lieu of the possible use under the earlier law of the transferor's remaining (at death) unused unified credit and a limited exemption for transfers to grandchildren, section 2631 provides each individual making generation-skipping transfers with a $1,000,000 GST exemption.\(^7\) The effect of the GST exemption on the computation of the generation-skipping transfer tax depends, however, on whether the exemption is allocated to a direct skip or to property with respect to which the individual is the transferor and which may be the subject of a taxable distribution or a taxable termination at a later date. Furthermore, section 2631 allows the individual or the executor of his estate to allocate the GST exemption to any property with respect to which the individual has made a generation-skipping transfer. Such allocations may be made expressly or by allowing the provisions of section 2632 to deem allocations with respect to certain transfers.

Planning use of the GST exemption requires an understanding of both the manner in which the GST exemption operates with respect to different types of taxable transfers and the allocation choices that the transferor may make. The next section of this article will deal with how the GST exemption operates with respect to different types of transfers. The third section of the article addresses the basic allocation choices and their planning consequences. The fourth section of the article addresses the sharing of the GST exemption with a spouse, a planning concern of particular interest because each spouse in a married couple has a full $1,000,000 of GST exemption. The final section of the article discusses the procedural thicket that allocating GST exemption seems to involve.

II. HOW THE GST EXEMPTION OPERATES

To the extent the GST exemption is allocated to a direct skip, such as a transfer to a grandniece, the exemption reduces the taxa-

\(^6\) Under the 1976 tax if such a discretionary distribution had been made out of the trust's accounting income, see id. § 643(b) (1982), the distribution would not have been treated as a taxable distribution. This aspect of the 1976 tax was specifically rejected in the new tax. See House Report No. 426, supra note 1, at 825.

\(^7\) See House Report No. 841, supra note 1, vol. II, at 775.
ble amount of the transfer pro tanto. Thus, if an individual gives her
grandniece $1,300,000 and allocates her entire $1,000,000 GST
exemption to the gift, only the remaining $300,000 is subject to the
generation-skipping transfer tax. 8

If, however, the individual allocates part or all of her GST excep-
tion to property with respect to which she is the transferor and from
which a taxable distribution or a taxable termination may occur at
some later date, the allocated GST exemption will generally exempt
a fractional part of the transferred property from the generation-
skipping transfer tax (rather than a specific dollar amount), regard-
less of the property's value when the taxable termination or taxable
distribution occurs. The effect of such an allocation of GST exempt-
ion will depend on the value of the transferred property at two dif-
ferent times: (1) for purposes of determining the includible and ex-
empt portions of the property, generally when the property is valued
for gift tax or estate tax purposes or when the allocation is made; 9
and (2) for purposes of determining the amount actually subject to
tax, when the taxable termination or taxable distribution occurs.

The "inclusion ratio" determines the fractional part of the prop-
erty that is taxable when a generation-skipping transfer occurs. The

8. The statute reaches this result in one of the Internal Revenue Code's truly
mind-boggling circumlocutions. Section 2641 defines the "applicable rate" of tax for
the transfer as the product of the maximum federal estate tax rate and the "inclusion
ratio" for the transfer. The "inclusion ratio" for a direct skip is the excess of one over
the "applicable fraction" for the skip, which is defined as the amount of GST exempt-
ion allocated to the skip divided by the value of the property involved in the skip, or
$1,000,000/$1,300,000 in the textual example. I.R.C. § 2642(a) (Supp. 1986). That is,
the inclusion ratio will generally be the fraction of the property that is not covered
by the GST exemption. Note that the value of the property in the above computation
will usually be its value for gift tax or estate tax purposes, as appropriate. See id. §
2642(b).

9. In certain circumstances property will be valued at the close of the "estate tax
inclusion period," and this time of valuation will not be the same as when the an-
ocation is made or the date of valuation for gift tax or estate tax purposes. See id. §
2642(f)(3) (as amended by the Technical and Miscellaneous Revenue Act of 1983).
For example, if the transferor transfers property in trust for the benefit of a single
beneficiary, retaining only the power to distribute or accumulate the income of the
trust during his life, the transfer will constitute an immediate gift for gift tax pur-
poses. See Treas. Reg. § 25.2511-2(d) (as amended in 1983). The value of the prop-
erty, however, would probably be included in the gross estate under section 2036. See
O'Connor's Estate v. Commissioner, 54 T.C. 969 (1970); Rott's Estate v. United
retained power during his life would not result in a taxable gift, but would call for
valuation as of the close of the estate tax inclusion period, a date likely to be differ-
ent from the date on which the allocation of GST exemption is made. Assuming the
transferor lived long enough, the statute seems to define the estate tax inclusion pe-
riod as including the three-year period after the relinquishment of the retained
power, although this is inconsistent with section 2642(f)(2)(A), which contains the
parenthetical limitation "other than by reason of section 2035." See I.R.C. §
“inclusion ratio” is determined under section 2642 by subtracting from 1 the “applicable fraction,” which is itself determined by dividing the amount of GST exemption allocated with respect to the property transferred by the value of the property (subject to certain statutory adjustments) for gift tax or estate tax purposes or, in the case of certain allocations to inter vivos transfers, at the time of the allocation of GST exemption.\(^\text{10}\) Since this system exempts a fractional part of the property rather than a specific dollar amount of the property, once property or a fractional part thereof is designated exempt (by being allocated GST exemption), all subsequent appreciation in the property or the fractional part of the property is also exempt from the generation-skipping transfer tax.\(^\text{11}\)

The House Ways and Means Committee Report illustrated the above principles with an example involving a transfer of $1,000,000 in trust for the grantor’s children and grandchildren.\(^\text{12}\) If the grantor allocates all $1,000,000 of the GST exemption to the trust, no part of the trust will ever be subject to the generation-skipping transfer tax, regardless of how much the trust property appreciates before being distributed to the grandchildren. The “inclusion ratio” in this case is zero, determined as follows. The inclusion ratio is the excess of 1 over “the applicable fraction determined for the trust.”\(^\text{13}\) The “applicable fraction,” the fractional part of the trust covered by the GST exemption, generally equals the amount of GST exemption allocated to the trust divided by the value of the property transferred to the trust at the time of the transfer.\(^\text{14}\) In this example, since the entire transfer is initially covered by the GST exemption, the applicable fraction is 1, and the inclusion ratio is correspondingly zero. If, on the other hand, only $500,000 of GST exemption is allocated to the trust, the applicable fraction is one-half. Then, the inclusion ratio is one-half (i.e., 1 minus 1/2); half of all distributions or deemed distributions to the grandchildren, if otherwise taxable, will be subject to tax, and half of the trust property will be taxable on termination of the children’s interest.

\(^\text{10}\) See I.R.C. § 2642(b)(1)(A), (2)(A), (3) (Supp. 1986), and § 2642(f) (as amended in 1988). For the possibility that section 2642(f) will require a different time of valuation, see supra note 9. For a special rule for determining the inclusion ratio for a charitable lead annuity trust, see I.R.C. § 2642(e) (as amended in 1988).

\(^\text{11}\) The “applicable rate” for the tax under section 2641 is the product of the maximum federal estate tax rate and the “inclusion ratio.” See I.R.C. § 2641 (Supp. 1986).

\(^\text{12}\) See House Report No. 426, supra note 1, at 826.


\(^\text{14}\) Id. § 2642(a)(2). The value of the property in some cases may have to be adjusted for this purpose to take into account certain estate and death taxes recovered from the trust and/or charitable contribution deductions. In some cases, the value of the property on a date other than the date of the transfer is used in computing the applicable fraction. See id. § 2642(b)(3), (4), and § 2642(f) (as amended in 1988).
The situation becomes more complicated if, after the creation of the trust, the settlor makes an additional transfer to the trust and allocates additional GST exemption to the trust. Under section 2642(d), the applicable fraction used to determine the inclusion ratio for the trust must then be redetermined, based on the value of the trust property at the time used for making allocations with regard to the second transfer. Thus, if in the second example above (a transfer in trust of $1,000,000 to which $500,000 of GST exemption was allocated), when the value of the assets originally placed in trust has increased from $1,000,000 to $2,000,000, the settlor transfers additional property worth $2,000,000 to the trust and allocates the remaining $500,000 of GST exemption to the trust, the applicable fraction must be recalculated. The numerator will then be the sum of (1) the additional amount of GST exemption allocated to the trust and (2) the product of the value of all the property in the trust before the second transfer and the pre-transfer applicable fraction: $500,000 plus ($2,000,000 times 1/3), or $1,500,000. The denominator will be the sum of the value of the newly transferred property (as adjusted, if necessary under the statute) plus the value of the property already in the trust: $4,000,000. Thus, the applicable fraction will be 3% or 37.5 percent, and the inclusion ratio will be 1% or 62.5 percent. Sixty-two and one-half percent of subsequent distributions or deemed distributions to the grandchildren will be taxable, and 62.5 percent of the trust property will be taxable on termination of the children's interest in the trust.

III. Basic GST Exemption Allocation Choices and Consequences

The planning potential inherent in the operation of the GST exemption is further enhanced by the transferor's ability to decide how to allocate his GST exemption among various transferred properties. In the absence of an express allocation, however, the statute deems the allocation of GST exemption to certain categories of transferred property, and it is best to explore these deemed allocation rules first. Absent an election to the contrary, the "unused portion" of GST exemption is deemed allocated by section 2632(b) to lifetime direct skips in the order in which they occur until the

15. A similar recomputation is required if, without adding to the trust, the grantor decides at a later date to allocate more GST exemption to the trust. Id. § 2642(d)(4). See also House Report No. 426, supra note 1, at 826. Reducing the allocation of GST exemption at a later date is not possible insomuch as section 2631(b) provides that an allocation, once made, is irrevocable. See I.R.C. § 2631(b) (Supp. 1986).

16. This product is the amount of the trust property that would have been exempt from the generation-skipping transfer tax if the trust had terminated at the time used in making the second allocation without receiving the second transfer of property or any additional allocation of GST exemption. The product is defined as the "nontax portion." I.R.C. § 2631(b) (Supp. 1986).
entire GST exemption is exhausted. For example, assume an individual gives his grandniece $700,000 on December 10, 1988, transfers $700,000 in trust for the benefit of his children and grandchildren on January 30, 1989 (as to which the individual retains no powers as fiduciary or otherwise), gives his grandnephew $700,000 on November 12, 1989, and dies on December 31, 1991, leaving a will providing a specific bequest of $500,000 to his great-grandchild. Absent an election to the contrary or an express allocation of GST exemption to the property transferred in trust, $700,000 of GST exemption will be deemed allocated to the gift to the grandniece and the remaining $300,000 of GST exemption will be deemed allocated to the gift to the grandnephew. No GST exemption will be treated as allocated to the transfer in trust or to the bequest to the great-grandchild.

A deemed allocation of GST exemption to a lifetime direct skip may be avoided in one of two ways, depending on the circumstances: either the transferor may expressly allocate the GST exemption under section 2632(a) (an “express allocation”) to property transferred prior to the direct skip, or the transferor may elect under section 2632(b)(3) not to have the deemed allocation rule apply to the direct skip in question (a “lifetime skip non-allocation election”). Thus, if the transferor in the above example believes that the value of the property transferred in trust may increase to as much as $7,000,000 by the time the trust terminates and the property is distributed to the grandchildren in a taxable termination, the transferor may want to exempt the entire transfer in trust by allocating $700,000 of his GST exemption to the property transferred in trust. To do this, the transferor must take two steps. First, he must make a lifetime skip non-allocation election with respect to the direct skip to his grandniece. Second, he must make an express allocation of $700,000 of GST exemption to the transfer in trust. These steps, in light of the Technical and Miscellaneous Revenue Act of 1988, will assure that $700,000 of GST exemption is allocated to the transfer in trust. Note, however, that if the transferor takes the two specified steps and no more, the remaining $300,000 of GST exemption will be deemed allocated to the direct skip to the grandnephew; a lifetime skip non-allocation election is made with respect to a given

17. To insure that the inter vivos allocation will exempt the entire property transferred in trust, it should be made on a timely filed gift tax return. Otherwise, the applicable fraction and the inclusion ratio will be determined using the value of the property at the time the allocation is filed instead of at the time of the transfer. See I.R.C. § 2642(b)(3) (Supp. 1986). For special rules applicable to inter vivos transfers of property that would result in the inclusion of the value of the property in the transferor’s gross estate, see id. § 2642(f) (as amended in 1988). For the uncertain treatment of a deemed allocation to such a trust under section 2632(c)(1)(B), see supra text accompanying notes 19-24.

18. I.R.C. § 1014(g)(16) (as amended in 1988) (correcting the definition of “unused portion” in section 2632(b)(2)).
“transfer,” not with respect to all lifetime direct skips.

If any portion of an individual’s GST exemption has not been allocated or deemed allocated on or before the due date (not including extensions) for the estate tax return for the individual’s estate, section 2632(c) deems the remaining GST exemption allocated first to property which is the subject of a direct skip occurring at the individual’s death, and second, to trusts with respect to which the individual is the transferor and which might produce a taxable distribution or a taxable termination at or after the individual’s death. Thus, in the above example, if lifetime skip non-allocation elections had been filed with respect to the two lifetime direct skips, but no express allocation was ever filed with respect to the transfer in trust, $500,000 of GST exemption would be allocated to the bequest to the great-grandchild under section 2632(c)(1)(A), and the remaining $500,000 of GST exemption would be allocated under section 2632(c)(1)(B) to the trust (providing a taxable distribution or a taxable termination might occur from the trust at or after the individual’s death). However, in determining the applicable fraction and the inclusion ratio in the case of a deemed allocation to a trust, section 2642(b)(2)(A) mandates use of the property’s value for estate tax purposes\(^{19}\) if the property is transferred as a result of the individual’s death, provided that requirements prescribed by the Secretary of the Treasury regarding allocations among beneficiaries of post-death changes in value are satisfied.\(^ {20}\) Section 2642(f)(2)(A) also calls for use of the estate tax value of property if the property was transferred inter vivos but is includible in the gross estate of the transferor (other than by reason of section 2035).\(^ {21}\)

These provisions would not apply to the transfer in trust in our example. The original version of the statute seemed to require use of the value of the property at the time of the original transfer to the trust\(^ {22}\) to determine the applicable fraction and the inclusion ratio in such a case; in the example, this would yield an inclusion ratio of

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19. In general, this refers to the property's date-of-death value, but the election of alternate valuation under section 2032 or special use valuation under 2032A would require use of the values determined under such provisions to be used here as well. See I.R.C. §§ 2032, 2032A (Supp. 1986).

20. Otherwise, the property is to be valued on the date it is distributed by the estate. See Senate Report No. 445, supra note 1, at n.92 (suggesting that the Secretary of the Treasury require that distributions from the estate be fairly representative of the appreciation or depreciation in the value of all property available for distribution, along the lines of Rev. Proc. 64-19, 1964-1 C.B. 682-83 (distributions in satisfaction of marital bequest)).

21. See Senate Report No. 445, supra note 1, at 369. Thus, this valuation rule would apply to a transfer of a remainder interest in property to a great-grandchild, subject to a retained life estate in the transferor because section 2035 would include the entire property in the transferor’s gross estate. See I.R.C. § 2036 (1952).

2/7, i.e., 1 minus $500,000/$700,000). Assuming the trust property had increased in value to $1,500,000 as of the time immediately preceding the individual's death, this result was very strange; an express allocation of $500,000 of GST exemption to the trust filed immediately before the individual's death would have used the $1,500,000 value for the property to produce an inclusion ratio for the trust of 2/7.23 Hence, the taxpayer would have been better off (if an earlier valuation for this purpose would have produced a larger applicable fraction and, hence, a smaller inclusion ratio) not making a late express allocation, but instead allowing the section 2632(c)(1) deemed allocation to govern. It would probably be preferable for the statute to make deemed allocations under section 2632(c)(1)(B) by reference to the property's value on the date of death (a standard that would presumably yield an inclusion ratio of 2/7 in this case),24 but the statute does not so provide. Indeed, the 1988 legislation eliminated the original statutory answer to this issue (however peculiar it may have been) without providing any new answer.

The above examples are summarized in the Table on the following page. Column 1 illustrates the results if no elections/allocations are made. Column 2 shows the results when a lifetime skip non-allocation election is made for the first lifetime skip and an express allocation of $700,000 of GST exemption is made with respect to the property transferred in trust on a timely filed gift tax return. Column 3 shows the results if lifetime skip non-allocation elections are made with respect to both lifetime skips, but no express allocations are made. Column 4 shows the results if lifetime skip non-allocation elections are made for both lifetime skips and an express allocation of $500,000 of GST exemption to the trust is filed immediately before the individual’s death, when the property in the trust has appreciated in value to $1,500,000. The Column 4 results indicate what the results should be in the Column 3 situation when Congress clarifies the statute. Since the possible allocations of GST exemption among two or more transfers aggregating more than $1,000,000 are literally infinite in number, the Table merely suggests categories of possibilities.

23. See id. § 2642(b)(3).

24. But see id. § 2632(c)(2) (allocation of GST exemption among properties in same category by reference to value of property at “time of allocation” under section 2632(c)). One could interpret “time of allocation” in section 2632(c)(2) as referring to the time of the deemed allocation, i.e., immediately after the estate tax return due date. It seems more likely, however, that this hurriedly written statute was intended to make the deemed allocation as of the date of death for all purposes. In any event, the express valuation-at-time-of-allocation rule of section 2642(b)(3) refers to when the allocation “is filed,” a standard of no relevance in the context of a deemed allocation.
Table

<table>
<thead>
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<th>Transfer/Change in Property Value</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Elections/No Allocations</td>
<td>2632(b)(3) Election for (1); Express Allocation to (2) on Timely Gift Tax Return</td>
<td>2632(b)(3) Election for (1) and (3); No Express Allocations</td>
<td>2632(b)(3) Election for (1) and (3); Express Allocation to (2) Immediately before Death</td>
<td></td>
</tr>
<tr>
<td>(1) 12/88 $700,000 Direct Skip</td>
<td>Exempt</td>
<td>Taxable</td>
<td>Taxable</td>
<td>Taxable</td>
</tr>
<tr>
<td>(2) 1/89 $700,000 to Trust</td>
<td>Inclusion Ratio = 1</td>
<td>Inclusion Ratio = 0</td>
<td>Inclusion Ratio = 1 until 2632(c) Effective; Inclusion Ratio then Uncertain</td>
<td>Inclusion Ratio = 1</td>
</tr>
<tr>
<td>12/91 Value Is $1,500,000</td>
<td>No Change</td>
<td>No Change</td>
<td>Unclear</td>
<td>Inclusion Ratio Becomes 2/3</td>
</tr>
<tr>
<td>2/95 Amount Effectively Taxed If Terminates with Value of $7,000,000</td>
<td>$7,000,000</td>
<td>Zero</td>
<td>Unclear</td>
<td>$4,666,667</td>
</tr>
<tr>
<td>(3) 11/89 $700,000 Direct Skip</td>
<td>$300,000</td>
<td>$300,000</td>
<td>Taxable</td>
<td>Taxable</td>
</tr>
<tr>
<td>(4) 12/91 $500,000 Bequest</td>
<td>Taxable</td>
<td>Taxable</td>
<td>Exempt</td>
<td>Exempt</td>
</tr>
</tbody>
</table>

Despite the unlimited number of ways the GST exemption may be allocated among two or more transfers, deciding on the most advantageous allocation involves analysis similar to that used in planning to use the marital deduction. To the extent the GST exemption is allocated to a transfer that would otherwise be subject to an immediate tax (a direct skip), payment of the tax is deferred; however, the used portion of the exemption is not available for allocation to a transfer in trust from which a later taxable termination or taxable distribution might occur, thus leaving such a taxable termination or taxable distribution taxable. To the extent the GST exemption is allocated to the transfer in trust instead of to the direct skip, the direct skip will result in an immediate tax liability; if the value of the trust assets increases before the taxable termination or taxable distribution occurs, the allocation of GST exemption with respect to the original transfer in trust will protect a proportionate part of the
asset appreciation (as well as the underlying property value originally transferred) from the generation-skipping transfer tax, as discussed and illustrated above.

In summary, the stakes in any given allocation decision will often be deferral of tax payment (by allocating or allowing a deemed allocation of GST exemption to a direct skip) in exchange for a larger dollar amount of tax liability later (i.e., if potentially taxable trust property appreciates in value) as opposed to incurring immediate tax liability (by precluding an allocation of GST exemption to a direct skip) in exchange for a potentially greater reduction in tax liability later (when the exempt portion of a trust to which GST exemption was allocated has appreciated substantially in value as of the time of a taxable termination or taxable distribution).\textsuperscript{25}

Planning in this context, however, should take into account a number of other considerations. First of all, since there are unlimited permutations and combinations of transfers in trust and direct skips that any given taxpayer may make, both in time sequence and in amounts, a decision concerning the allocation of GST exemption with respect to any given transfer must be made in light of the possibility that the taxpayer may make subsequent transfers. In particular, unlike the simple situation alluded to above (a direct skip and a transfer in trust resulting in a later taxable termination or taxable distribution), a transfer in trust may precede a direct skip, altering the sequence significantly, particularly if the transfer in trust results in a taxable termination or a taxable distribution before the direct skip occurs.

Second, in some cases the taxpayer may have to weigh the possibility that an allocation of GST exemption to a particular transfer in trust which initially offers the possibility of resulting in a taxable termination or a taxable distribution may end up wasted because no taxable termination or taxable distribution ever occurs. For example, remaindermen grandchildren may predecease the income beneficiary child with the result that the corpus is distributed to someone in either the child's generation or the transferor's generation upon the child's death. An allocation of GST exemption to the property originally transferred in trust would then have no generation-skipping transfer to exempt from tax.\textsuperscript{26} Even if the allocated GST exemption is not wasted because of an unanticipated survival sequence, property transferred in trust may decline in value after the allocation of GST exemption has been made, thus eroding the value.

\textsuperscript{25} The leveraging of the GST exemption available through allocations to property transferred in trust offers substantial planning opportunities. \textit{See} Kalik & Schneider, \textit{supra} note 1, at 16-35.

\textsuperscript{26} \textit{See} Harrington, \textit{supra} note 1, at 816 (illustrating and criticizing this aspect of the statute).
of the allocated GST exemption.\textsuperscript{27}

Third, the planner should bear in mind that to the extent a generation-skipping transfer is taxable, the taxable amount in the case of a direct skip does not include the amount of the tax, while the taxable amount in the case of a taxable termination or a taxable distribution includes the amount of the tax.\textsuperscript{28} This difference in effect multiplies the value of the exemption in the case of a taxable termination or a taxable distribution inasmuch as the GST exemption exempts from tax not only the net amount of the transfer in such cases but also the amount of the tax that would otherwise have been pay-able with respect to the transfer. In the analysis discussed above, this consideration bolsters the case for paying the tax earlier in ex-change for exempting a portion of a trust from tax later.

Fourth, coordinating the allocation of the GST exemption with other estate planning techniques such as Crummey trusts and irrevocable insurance trusts may reduce potential generation-skipping transfer taxes.\textsuperscript{29} For example, a direct skip which is a nontaxable gift as a result of the application of the gift tax exclusion under section 2503(b) will have an inclusion ratio of zero.\textsuperscript{30} In appropriate cases, a direct skip made through a transfer to a trust for the sole benefit of a grandchild could combine this exclusion with an allocation of GST exemption for a total exemption of $1,010,000, of which only $10,000 would have to qualify for the present interest exclusion under 2503(b).\textsuperscript{31} If the trust contained a so-called Crummey withdrawal power,\textsuperscript{32} the transferor could make annual gifts of $10,000 to the trust without incurring any gift tax or generation-skipping transfer tax liability.\textsuperscript{33}

Fifth, allocation of GST exemption may affect the basis of the property transferred. The basis of property subject to a generation-skipping transfer tax is generally increased by the portion of the tax

\begin{itemize}
\item \textsuperscript{27} The author has not met any individual with estate planning needs who owns any assets of substantial value that he believes have a significant possibility of declining in value.
\item \textsuperscript{28} See I.R.C. §§ 2621-2623 (Supp. 1986).
\item \textsuperscript{29} The opportunities prior to the 1988 amendment of section 2642(c) were much greater. See generally Mulligan & Boulton, Planning Opportunities That Take Advantage of the New Generation-Skipping Tax Provisions, 14 EST. PLAN. 66 (1987). For the 1988 changes, see Senate Report No. 445, supra note 1, at 376-77.
\item \textsuperscript{30} I.R.C. § 2642(c)(1) (Supp. 1986).
\item \textsuperscript{31} Section 2642(c)(2), as amended in 1988, however, severely limits the situations in which a transfer in trust constituting a direct skip and a nontaxable gift will receive a zero inclusion ratio. See I.R.C. § 2642(c)(2) (as amended in 1988).
\item \textsuperscript{32} A Crummey power is a power in the trust beneficiary to demand from the trustee the amount of any gift made to the trust during the year up to an aggregate annual withdrawal of $10,000 per donor. Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968).
\item \textsuperscript{33} This assumes, of course, that no other gifts qualifying for the present interest exclusion are made during the years involved.
\end{itemize}
attributable to the appreciation in the property immediately before the taxable transfer. A larger basis adjustment will arise if the taxable property includes proportionately more unrealized appreciation at the time of the taxable transfer. At least in a direct skip gift context then, GST exemption should be allocated to gifts of less highly appreciated property, leaving gifts of highly appreciated property to bear the tax and receive basis adjustments. In the case of lifetime transfers in trust which may result in a future taxable termination or taxable distribution, the benefit of allocating GST exemption to property likely to appreciate in value is partly offset by the basis increase that will result if the property appreciates in value before the taxable termination or taxable distribution and is not exempted.

When property is transferred in a taxable termination occurring at the same time as, and as a result of, the transferor's death, only the basis of the portion of the property subject to the generation-skipping transfer tax is increased or decreased to its fair market value. There may be an advantage to not allocating GST exemption to property transferred in trust that is likely to appreciate prior to resulting in such a taxable termination; if the taxable termination is fully taxable, the property will receive a full fair market value basis. Of course, the possibility that the property will decline in value, thus producing a lower fair market value basis, must also be considered.

Finally, in view of the planning opportunities that may be available with regard to the allocation of GST exemption upon the taxpayer's death and the extent to which these opportunities may create problems for the conscientious executor, the taxpayer may be well advised to include specific authority with regard to the allocation of GST exemption in his will. For example, the will might grant the executor the power to allocate GST exemption to property transferred in trust which is likely to appreciate, to separate the exempt and non-exempt portions of a trust into two separate trusts, to make an appropriate gift-splitting election (which would also be effective for generation-skipping transfer tax purposes under section 2652(a)(2)), and to make the special election with respect to QTIP property under section 2652(a)(3), discussed in the next section of the article. In the alternative, the will might specifically provide how the GST exemption is to be allocated by the executor as well as any other pertinent directions related to generation-skipping transfer tax elections.

35. Id. § 2654(a)(2).
IV. Sharing GST Exemptions with a Spouse

A married couple facing potential generation-skipping transfer tax liability with respect to their aggregate estate will often want to make full use of both spouses' GST exemptions. Gift-splitting may be useful in achieving this goal. Section 2513(a) permits a married couple to elect to treat qualifying gifts\(^{37}\) made to a third party by either spouse as if made one-half by each spouse instead of as made entirely by the actual donor. This election, for gift tax purposes, allows the application of both spouses' exclusions for gifts of present interests (under section 2503(b)) and both spouses' unified credits against the gifts and/or tentative gift tax liability arising from the gifts of either spouse.\(^{38}\) Under section 2652(a)(2), a gift-splitting election under section 2513 is also effective for generation-skipping transfer tax purposes. When the election is in effect, each spouse is treated as transferring half of any property transferred by gift by either spouse, and each spouse's $1,000,000 GST exemption may be allocated with respect to the portion of the property treated as transferred by that spouse. Schedule C of the Internal Revenue Service's Form 709 provides space for making such allocations.\(^{39}\)

Although interspousal gifts and bequests can also be used to assure that each spouse makes full use of his or her GST exemption, such gifts and bequests are often unacceptable planning options in this context. As with planning to fully use the estate and gift tax unified credit and to split the remaining property between the estates of the two spouses, the spouse with the "extra" property may be unwilling to surrender control of enough of the property to the other spouse. Sections 2056(b)(7) and 2523(f) offer planners a solution to this problem with respect to the estate and gift tax. These elective provisions\(^{40}\) allow the transferor spouse to retain control over the ultimate disposition of property (known as "QTIP property") while at the same time giving the transferee spouse the use of the property (through a transfer to the transferee spouse of the right to all of the income from the property) and including the property's value in the transfer tax base of the transferee spouse rather than

\(^{37}\) For the limitations on the gifts which may be subject to gift-splitting, see Treas. Reg. § 25.2513-1 (as amended in 1983).

\(^{38}\) In addition, once the unified credits are exhausted, the lowest brackets of the gift tax rate schedule may be used by both spouses. For the phase out of the unified credit and these lower rates, however, see Pub. L. No. 100-203, § 10401(b) (codified at I.R.C. § 2001(c)(3)). For a somewhat dated analysis of gift-splitting, see Littenberg, Gift-Splitting as a Tax Planning Device: Advantages and Drawbacks, 27 N.Y.U. Inst. Fdn. Tax. 355 (1969).

\(^{39}\) I.R.S. Form 709 was revised in January 1987.

\(^{40}\) The election is generally made by the donor in the case of a transfer of QTIP property by gift and by the executor in the case of a transfer of QTIP property by bequest.
that of the transferor spouse. 41

However, if a QTIP provision is used to shift all of one spouse's estate in excess of the $600,000 exemption equivalent sheltered by the unified credit to the tax base of the beneficiary spouse, it is likely that, absent further action, $400,000 of the first spouse's GST exemption will be lost. Section 2652(a)(3) offers a solution to this problem. The donor spouse or his executor, as appropriate, can elect under this provision to treat a QTIP election as ineffective for generation-skipping transfer tax purposes, with the result that the donor or decedent spouse is then treated as the transferor of the property for generation-skipping transfer tax purposes.

The statute does not authorize partial elections under section 2652(a)(3), but instead provides that the election must be made as to "all of the property in the trust". However, it seems clear that the requirement that the election be made with respect to all the property in the trust is for administrative purposes only and that the effect of a partial election may be achieved by creating separate QTIP trusts to hold the QTIP property and by so indicating on the estate tax return. 42 Hence, in the situation alluded to above, the executor (or donor spouse) should be able to elect under section 2652(a)(3) as to a trust holding $400,000 of the QTIP property in order to fully use the remaining $400,000 of the decedent's GST exemption; the remaining QTIP property would presumably be placed in another QTIP trust. To assure the availability of the election, a spouse's will could expressly empower or direct the executor to make the election 43 or to create separate QTIP trusts, making the section 2652(a)(3) election as to only one such trust.

The above approach to planning is not without drawbacks, however. By allocating GST exemption to QTIP property, some of the GST exemption may end up wasted later on. Upon the death of the surviving spouse, (after exhaustion of any remaining unified credit) estate tax may be imposed on the QTIP property, some of which will likely be used to pay the estate tax. Consequently, some of the GST exemption may ultimately be allocated to property used to pay estate taxes rather than to property passed on to a younger genera-

41. See I.R.C. § 2044 (1982) (gross estate of transferee spouse); id. § 2519 (gift tax base of transferee spouse who transfers part or all of income interest in property with respect to which QTIP election in effect).

42. See Senate Report No. 445, supra note 1, at 375. The section 2652(a)(3) election could then be made with respect to only one of the trusts. See Kalik & Schneider, supra note 1, at 16-76 (discussion pre-dating 1988 amendment; noting the additional advantage of this approach that invasions for the surviving spouse could be made from the trust to which no GST exemption was allocated). In view of the Committee Report language, it seems unlikely that the two trusts would have to be qualitatively different in some important way to avoid recharacterization as a single trust.

43. For a sample clause, see Katzenstein, supra note 37, at 262 (pre-1988 discussion).
tion. It is not clear that this problem can be avoided completely without allocating all of the GST exemption to property not qualifying for the marital deduction in the estate of the first spouse to die and thus paying some estate tax at that time; the long term potential savings in generation-skipping transfer tax may justify this course in some cases.\footnote{See Kalik & Schneider, supra note 1, at 16-74.}

The section 2652(a)(3) election may be made with respect to a QTIP transfer in trust which is not entirely exempted by an allocation of GST exemption. Indeed, once the election is made, the donor or his executor may allocate part or all of any remaining GST exemption to the QTIP transfer. Regardless of the extent to which the QTIP transfer is allocated GST exemption, the section 2652(a)(3) election will have a number of other important consequences. First, making the election will change the time for determining the inclusion ratio from the surviving or beneficiary spouse’s death (or disposition of the income interest, or such other date as may result from the application of the special rules of section 2642) to the time the QTIP is created (or the date of the creating spouse’s death, if applicable, or another date if the special rules of section 2642 apply). The earlier valuation date is likely to increase the value of the exemption because of the leveraging potential inherent in allocating GST exemption to property likely to appreciate. (This is an additional benefit of using the section 2652(a)(3) election only to the extent of assuring full use of the creating spouse’s GST exemption.)

Second, by changing the transferor, the election may convert what would have been a direct skip by the surviving or beneficiary spouse into a taxable termination upon the beneficiary spouse’s death.\footnote{See Kalik & Schneider, supra note 1, at 16-15 (stating that this is “by no means certain,” without explanation).}

This would make the generation-skipping transfer tax ultimately imposed a tax-inclusive tax (i.e., the amount of the tax would be included in the tax base) rather than a tax-exclusive tax.\footnote{Compare I.R.C. § 2622(a) (Supp. 1986) (taxable termination taxable amount includes tax) with id. § 2623 (direct skip taxable amount limited to value of property received by transferee) (discussed supra text accompanying note 28).} It might also affect the availability of the exclusion for transfers to a grandchild with a dead parent who is a lineal descendant of the transferor or his spouse or former spouse because the exclusion is only available for direct skips.\footnote{See Kalik & Schneider, supra note 1, at 16-16. The authors note that since the dead parent exclusion is available for transfers to grandchildren of the transferor’s former spouse, whether a transfer qualifies may depend on the identity of the transferor (and hence that of the former spouse). They also note that the $2,000,000 per grandchild direct skip exemption transitional rule, discussed supra note 3, is limited to direct skips and that which spouse is treated as transferor may determine whether a transfer is protected by the effective date rules of the generation-skipping tax. Id.}

\footnote{See Kalik & Schneider, supra note 1, at 16-74.}
Finally, making the election may change the generation assignment of a beneficiary who is not a lineal descendant of a grandparent of either spouse. This is true because beneficiaries who are not lineal descendants of a grandparent of the transferor, the transferor’s spouse or the transferor’s former spouse and have not been married at some time to such a lineal descendant are assigned to a generation according to the extent to which their ages differ from that of the transferor. As a result, the identity of the transferor may directly affect such a beneficiary’s generation assignment.

V. Procedure

An express allocation of GST exemption must be made no later than the estate tax return due date (including extensions) for the transferor’s estate; this deadline applies even if the filing of an estate tax return is not required. An express allocation with respect to property transferred inter vivos which would not be includible in the transferor’s gross estate if the transferor were to die immediately after making the transfer (other than by reason of section 2035) should be made on Schedule C of Form 709 (annual gift tax return) in the case of a direct skip, or, by way of a Notice of Allocation attached to Form 709 in the case of a transfer in trust that is not a direct skip. The instructions to Form 709 indicate that such a Notice of Allocation should include the trust’s employer identification number, a list of the item numbers from Schedule A of part 1 of Form 709 for the gifts to the trust, the values of the gifts to the trust, the annual exclusion (if any) claimed against each gift, the net value of each gift after reduction by any annual exclusion applicable, and the amount of GST exemption allocated to each gift. The 1988 amendments to section 2642(c), however, limit the number of situations in which the gift tax annual exclusion will be relevant for generation-skipping transfer tax purposes; the Notice of Allocation should probably only follow the described format in such situations. In other cases, the Notice of Allocation, even if including information relating to the gift tax annual exclusion, should reflect the fact that the entire value of the gift (not reduced by the annual exclu-

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48. See I.R.C. § 2651(d) (Supp. 1986). For an example of the rather unusual situation in which this would occur, see Kalik & Schneider, supra note 1, at 16-16 to 16-17 (creator of QTIP age 70, creator’s spouse age 55, unrelated beneficiary age 30).

49. I.R.C. § 2632(a)(1) (Supp. 1986). Temporary Treasury Regulation section 26.2662-1(b)(3) strangely provides no guidance for filing a return for a direct skip that is not subject to either an estate tax or a gift tax. See Temp. Tres. Reg. § 26.2662-1(b)(3). Presumably, I.R.S. Form 706 or Form 709, whichever is appropriate, should be filed in such a case.


51. See supra note 31 and accompanying text.
sion) may result in a later taxable termination or taxable distribution.

The statute clearly envisions the possibility of allocating GST exemption with respect to inter vivos transfers of property in trust not constituting direct skips (and which are not later included in the donor-decedent's gross estate) other than on a first filed gift tax return. Indeed, an additional allocation of GST exemption to such a transfer may be made on Form 706 (estate tax return), even if some GST exemption was previously allocated with respect to the transfer in trust. Nonetheless, the Internal Revenue Service has not indicated how to make a lifetime allocation with respect to such an inter vivos transfer in trust that is not a direct skip on other than the first filed gift tax return for the year of the transfer. Such an allocation probably should be made by filing an amended Form 709 with an appropriate Notice of Allocation. Once an allocation is made, however, it is irrevocable.

Express allocations not made on or with Form 709 must be made by completing Schedule R of Form 706. In addition, Schedule R includes space for allocating more GST exemption than the direct skip amount to direct skips to individuals involving property subject to special use valuation pursuant to an election under section 2032A.

Since an express allocation, once made, is irrevocable, it may be wise in some cases to delay making an express allocation until all the facts about the transferor's transfers of property, during lifetime...
and at death, are known. However, the benefit of GST exemption allocated to transfers in trust that may later result in taxable terminations or taxable distributions depends on when the property is valued for purposes of determining the inclusion ratio.\textsuperscript{59} Since an earlier allocation may lead to an earlier valuation\textsuperscript{60} and a greater benefit from the same amount of GST exemption, in many instances taxpayers may want to make earlier, albeit irrevocable, allocations.

Both the lifetime skip non-allocation election under section 2632(b)(3) and the QTIP non-application election under section 2652(a)(3) are apparently subject to the provisions of Temporary Treasury Regulation section 5h.5. In addition, the lifetime skip non-allocation election is at least partly dealt with by Form 709 and the QTIP non-application election is addressed by Form 706, but only in the context of QTIP elections under section 2056(b)(7), that is, under the estate tax provison rather than under the gift tax provision. The discussion below will first address the temporary regulation. On each issue the impact of the Forms and their instructions will then be examined.

Some aspects of the temporary regulation are difficult to interpret in the context of the elections under sections 2632(b)(3) and 2652(a)(3) because the temporary regulation was apparently drafted with income tax elections in mind. For example, Temporary Treasury Regulation section 5h.5(a)(2) provides that an election must be made by the due date (including extensions) of the “tax return for the first taxable year for which the election is to be effective.”\textsuperscript{61} In the case of the lifetime skip non-allocation election this probably means the taxable year in which the direct skip occurs since it is for that year, or for a calendar year that overlaps with that year, that a combined gift tax and generation-skipping transfer tax return (i.e., Form 709),\textsuperscript{62} if required, would have to be filed. It would seem that the due date referred to should be that of the transfer tax return including the direct skip involved. However, in the Internal Revenue Code the term “taxable year” clearly refers to the accounting period for which an income tax return is filed.\textsuperscript{63} Hence, the deadline for the lifetime skip non-allocation election under the temporary regulation is apparently the due date (including extensions) for the transferor’s income tax return for the taxable year in which the direct skip occurs. Although nothing on Form 709 directly conflicts with this conclusion, since Form 709 apparently provides for the lifetime skip

\textsuperscript{59} See supra notes 10 & 19-24 and accompanying text.
\textsuperscript{60} See I.R.C. § 2642(b) (Supp. 1986) (discussed supra text accompanying notes 9-11 & 17-24).
\textsuperscript{61} Temp. Treas. Reg. § 5h.5(a)(2).
\textsuperscript{62} See I.R.C. § 2642(b)(1) (Supp. 1986) (assuming allocations will often be made on the gift tax return).
\textsuperscript{63} Id. § 7701(a)(23) (1982).
non-allocation election,\textsuperscript{64} the deadline for filing Form 709 reporting the lifetime skip involved will probably also be the deadline for filing the lifetime skip non-allocation election with respect to that skip.

The deadline for the QTIP non-application election is even less clear. Is such an election first effective when the QTIP is created by gift or at the death of the first spouse (with the donor spouse or personal representative making the QTIP election, as the case may be\textsuperscript{65}) or at the time the generation-skipping transfer occurs, that is, in the usual case, no earlier than the death of the surviving spouse? It seems more sensible to assume that the deadline would be related to the creation of the QTIP inasmuch as the property will usually be valued for purposes of determining the inclusion ratio at the time of the gift in the event of an allocation of GST exemption on a timely filed gift tax return,\textsuperscript{66} or at the value at which it is included in the gross estate of the decedent spouse,\textsuperscript{67} whichever is applicable. Under this view, the temporary regulation requires that the QTIP non-application election be made no later than the due date for the income tax return for the taxable year in which the QTIP interest is created.

On the other hand, the QTIP non-application election will not truly be effective in the sense of exempting an actual generation-skipping transfer from tax until the generation-skipping transfer occurs, usually no earlier than, and often much later than, the death of the surviving spouse. May the election be postponed until the taxable year in which such a generation-skipping transfer occurs? The answer seems to be no, not so much because of the temporary regulation, but rather because section 2652(a)(3) indicates that the election is to be made by the donor spouse or the estate of the decedent spouse; either party is likely to have passed from the scene long before the generation-skipping transfer actually occurs.

Although Schedule R, part 1B of Form 706 (the estate tax return) provides a box to check to make the section 2652(a)(3) election in the case of section 2056(b)(7) QTIP property, neither the form nor its instructions expressly provide a deadline for the election. In all likelihood, the deadline will eventually (and sensibly) coincide with the deadline for filing the estate tax return, the contrary rule in the temporary regulation notwithstanding. On the other hand, the ele-

\textsuperscript{64} See infra text accompanying note 74.

\textsuperscript{65} The QTIP election would, of course, be retroactive to the date of the gift or the date of death, as the case may be.


\textsuperscript{67} Id. § 2642(b)(2)(A). For an exception to this rule, see supra note 9. If an express allocation to property not transferred as a result of the death of the transferor is not made on a timely filed gift tax return, the property is valued, for the purpose of determining the inclusion ratio, as of the time the allocation is filed with the Internal Revenue Service. Id. § 2642(b)(3).
tion may be permitted even on a late estate tax return.68

The temporary regulation provides that a lifetime skip non-allocation election or a QTIP non-application election must be made by attaching a statement to the "tax return for the taxable year for which the election is to be effective."69 Despite the apparent regulatory reference to income tax returns,70 a lifetime skip non-allocation election statement should probably be attached to a timely filed gift tax return, if any, with respect to the direct skip.71 In fact, current Form 709 allows the donor to make the lifetime skip non-allocation election less formally by simply not allocating any GST exemption to the skip when completing Schedule C, part 4.72 In view of the design of current Form 709, the statement filing requirement of the temporary regulation is probably superfluous in the context of the lifetime skip non-allocation election.

Similarly, since current Form 706 provides a box to check on Schedule R, part 1B for making the QTIP non-application election, the statement filing requirement probably can also be disregarded in this context, except to the extent it is necessary to identify to which of two or more QTIP trusts the election applies. However, since Form 709 provides no method for making the QTIP non-application election for gifts of QTIP property (gifts as to which an election is made under section 2523(f)) the statement filing requirement probably then applies. Nonetheless, even in this case, the statement probably should accompany the gift tax return on which the QTIP election itself is made. The statement should then explain that, notwithstanding that the temporary regulation indicates that the statement should be attached to an income tax return, its overall relevance to transfer taxes with respect to a transfer reported on Form 709 (combined gift and generation-skipping transfer tax return) counselled attaching the statement to Form 709 instead.

The statement of election should contain the names, addresses and taxpayer identification numbers of the electing donor spouse, the trustee (if any), and the donee spouse; the statement should identify the election, indicate that it is made pursuant to section 2652(a)(3) and that it is made in accordance with Temporary Treas-

68. Cf. Temp. Treas. Reg. § 22.2056-1(a) (as amended in 1988) (QTIP election under section 2056(b)(7) to be made on the estate tax return; no mention of deadline).


70. The term "taxable year" is particularly significant. See supra note 63 and accompanying text.

71. Section 2642(b)(1) indicates that making an express allocation on the gift tax return is appropriate. I.R.C. § 2642(b)(1) (Supp. 1986). It is hard to understand why a lifetime skip non-allocation election might be made elsewhere.

72. The instructions make it clear that the donor may allocate "some, all, or none" of the available GST exemption among the listed gifts. Instructions for Form 709, reprinted in 1 Tax Mgmt. (BNA) Tax Forms, at 709.10 (Rev. Jan. 1987).
sury Regulation section 5h.5; the statement should also identify the trust or property (if not held in trust) to which the election is to apply.\textsuperscript{73}

The temporary regulation does not indicate whether either the lifetime skip non-allocation election or the QTIP non-application election may be made on a partial basis. Form 709, however, allows the donor to allocate some, all, or none of his GST exemption to any particular lifetime skip.\textsuperscript{74} Hence, the result of a partial lifetime skip non-allocation election may be easily achieved.

Inasmuch as the QTIP election itself may be made on a partial basis,\textsuperscript{75} it is surprising that the Code now provides that the QTIP non-application election must apply to "all of the property in [the QTIP] trust."\textsuperscript{76} This is clearly intended to preclude an election with respect to only part of the QTIP property in a single trust. However, it clearly allows the election to be limited to one trust when the estate includes more than one trust with property for which a QTIP election was allowed.\textsuperscript{77} If this possibility is confirmed, planning a partial QTIP non-application election will simply involve setting up more than one QTIP trust, with property as to which the QTIP non-application election is to be made being placed in a separate trust. If, despite the legislative history of section 2652(a)(3), the Internal Revenue Service chooses to reject the separate trust gambit, other questions will arise, particularly in the context of QTIPs created with respect to inter vivos gifts; the pre-1988 Instructions to Form 706 do not even purport to address the QTIP non-application election in such cases. Assuming one QTIP non-application election would not be treated as covering all QTIP transfers by a given donor/decedent, would an election with respect to an inter vivos QTIP transfer in trust be treated as covering all such transfers, or would its effect be limited to all transfers bearing a certain relationship to each other, e.g., part of the same transaction, close in time, or transferred pursuant to the same document? In any event, similar questions will arise with respect to either inter vivos gifts or transfers of property included in the decedent spouse's estate when the QTIP properties involved are not held in trust. Regulations are needed to answer these questions.

\textsuperscript{73} Temp. Treas. Reg. § 5h.5(a)(3)(i) (somewhat amplified by the author to deal with these elections).

\textsuperscript{74} Instructions for Form 709, reprinted in 1 Tax Mgmt. (BNA) Tax Forms, at 709.10 (Rev. Jan. 1987) (referring to Schedule C, part 4, column C).

\textsuperscript{75} See Temp. Treas. Reg. § 22.2056-1(b) (as amended in 1988) (partial election must relate to a fractional or percentile share of the property).


\textsuperscript{77} See Senate Report No. 445, supra note 1, at 375.
The QTIP non-application election is irrevocable.\textsuperscript{78} The lifetime skip non-allocation election is "freely revocable," which apparently means without the Commissioner's consent.\textsuperscript{79} While it is very unusual for the Internal Revenue Service, in the absence of a statutory mandate, to announce that an election is freely revocable, in this case the election could be indirectly revoked anyway through a subsequent express allocation of GST exemption to the direct skip as to which the non-allocation election was made. Under current practice, this would apparently be done by filing an amended Form 709, and it seems doubtful that any particular statement of revocation is required since electing not to allocate GST exemption to the lifetime skip requires no particular statement of election in the first instance, but simply completion of Schedule C on Form 709. Neither the temporary regulation nor Form 709 gives any hint of when a revocation must be filed to be effective.

\textsuperscript{78} Temp. Treas. Reg. § 5h.5(a)(4)(i).
\textsuperscript{79} Temp. Treas. Reg. § 5h.5(a)(4)(iii).