

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

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date: April 30, 2012

to: Lisa Piehl, Policy Manager  
Specialty Estate and Gift Tax  
(Small Business/Self-Employed)

from: Richard G. Goldman  
Branch Chief  
(Procedure & Administration)

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subject: Gift Imaging System (GIS)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

This responds to your request for our comments on a proposed Gift Imaging System (GIS) that is intended to replace original paper gift tax returns with electronic copies. The GIS project that you propose would scan historical and current Gift Tax Returns, Forms 709, that are currently stored at the C-site in Independence, Missouri, into a searchable computer database.

You have told us that the GIS project would involve the scanning of gift tax returns and attachments into a computer database. After scanning, the original documents would be destroyed. The electronic copies would then be used by Internal Revenue Service employees as though the copies were the original documents. Paper duplicates could be created from the electronic copies. You have also told us that the records will be maintained in accordance with the Records Disposition Handbook, IRM 1.15.29, though the specific storage media for the electronic records has not yet been determined.

You have proposed that the historical gift tax returns that will be stored in electronic records could be used in the following situations:

- 1) the examination of an estate tax return that may or may not include penalties;
- 2) the examination of a gift tax return of the taxpayer, including spouse;

- 3) the request of the executor in the preparation of a complete estate tax return; and
- 4) special requests for other divisions, e.g., Disclosure, LB&I, SBSE Exam, and/or SOI.

In addition to scanning gift tax returns, you have also proposed purging gift tax returns where the donor's date of death is prior to 2007. You would determine returns to be purged by searching IDRS for dates of death.

You have asked for our guidance on the following questions regarding retention of the scanned returns and the purge process.

#### Scanned Returns:

- 1) A return and attachments will be prepared for scanning by removing all staples, clips, covers, binders, etc. After the return and attachments are run through the scanner, what type of reassembly is required?
- 2) What is the retention period of the paper return after it has been scanned?
- 3) Can the scanned copy be used as evidence in court proceedings or in response to FOIA requests?
- 4) Can we destroy the original documents and rely on the duplicate copies for all of the situations listed above?

#### Purged Returns:

- 1) When a taxpayer has been confirmed as deceased prior to 2007, can the paper return be destroyed without scanning? You believe that authorization for this is already in place in IRM Exhibit 1.15.29 Item No. 62(b)(2)(a) if the taxpayer does not have a filing requirement.
- 2) If so, what is the process for destruction? You believe that Records Management has a process already in place, see SF 115 Job Number N1-058-04-2.

To address your questions, we have coordinated with Beth Levine in the Ethics & General Government Law Branch in Chief Counsel's General Legal Services Division, and Daniel Bennett, Chief of the Office of Records and Information Management Servicewide Records Officer.

#### Analysis

#### Scanned Returns:

- 1) A return and attachments will be prepared for scanning by removing all staples, clips, covers, binders, etc. After the return and attachments are run through the scanner, what type of reassembly is required?

See the below discussion of quality review and the process for destruction after scanning on page 6.

2) What is the retention period of the paper return after it has been scanned?

If there is no separate business need for the paper gift tax return after it has been scanned into an electronic recordkeeping system meeting the National Archive and Records Administration's (NARA) requirements, and the scanned version contains all of the information that appears on the original and can be authenticated if necessary, then the electronic copy of the paper gift tax return will become the official record and will be subjected to the 75 year retention schedule.<sup>1</sup>

3) Can the scanned copy be used as evidence in court proceedings or in response to FOIA requests?

Whether the electronic copy resulting from a scan of the original paper return can be used as evidence in court proceedings or in response to FOIA requests requires an examination of whether the electronic copy would be admissible as an "original" or "duplicate" under the so-called "best evidence rule" as codified in the Federal Rules of Evidence. The "best evidence" rule provides that "to prove the content of a writing ... the original writing ... is required, except as otherwise provided in the [Rules of Evidence] or by Act of Congress." Fed. R. Evid. 1002. Additionally "[t]he original is not required, and other evidence of the contents of the writing ... is admissible if ... all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." Fed. R. Evid. 1004(1). A duplicate is admissible "to the same extent as an original" unless the authenticity of the original is questionable or "it would be unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003. An electronic record that is considered to be a duplicate under the Federal Rules of Evidence will generally be treated as an original and be admissible as such. See Brodsky v. Commissioner, T.C. Memo. 2001-240 (duplicates offered at trial would be admissible to the same extent as the originals); Thorpe v. Commissioner, T.C. Memo. 1992-160 (a duplicate or copy is admissible to the same extent as an original unless a genuine question is raised regarding the authenticity of the original).

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<sup>1</sup> A gift tax return that can be matched and associated with an estate tax return is required to be disposed of in accordance with the disposition authority for estate tax returns (IRM 1.15.29, item 61) rather than the authority for gift tax returns (IRM 1.15.29, item 62). Estate tax returns are destroyed 75 years after the end of the processing year. IRM 1.15.29, item 61(1)(b). Gift tax returns that are not associated with an estate tax return are retired to a Federal Records Center (FRC) when no longer needed for current business. IRM 1.15.29, item 62(B). Gift tax returns will be retained at the FRC until they are associated with an estate tax return or the taxpayer is deceased and the gift tax returns are purged from the collection for destruction under IRM 1.15.29, item 62(B)(2)(a). Item 62 (B)(2)(a) provides that gift tax returns previously filed by a taxpayer who is deceased and whose estate was not required to file an estate tax return will be purged every 5 years and destroyed 3 months after confirmation that the gift tax returns will not be associated with an estate tax return.

Fed. R. Evid. 1001(3) provides that “if data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’” However, if an electronic record is prepared from an existing paper record, for example, when information from a paper record is entered by hand or electronically by scanning or faxing the information into computer memory, the electronic record could be considered a “duplicate.” See Fed. R. Evid. 1001(4); see also United States v. Mulinelli-Navas, 111 F.3d 983, 989 (1st Cir. 1997) (microform copy of a check was a “duplicate” of the original check and was admissible subject to the limitations of Fed. R. Evid. 1003); United States v. Real Prop. Located at Incline Village, 976 F. Supp. 1327, 1340 (D. Nev. 1997) (photographic reproductions or copies are considered “duplicates” under Fed. R. Evid. 1001(4)). This distinction was illustrated in the Notes of the Advisory Committee for proposed Rule 1004(4): “a bank’s microfilm records of checks cleared is the original as a record. However, a print [of the microfilm] offered as a copy of a check whose contents are in controversy is a duplicate.”

In addition to the Federal Rules of Evidence, specific statutory provisions confirm the admissibility of electronic copies of scanned documents to the same extent as originals. Section 7513 of the Code authorizes the Service to employ the services of federal agencies for processing microfilm and other storage media for reproducing returns, documents, and other materials. Section 6103(p)(2)(C) provides that reproductions of Service documents will be afforded the same legal status as originals and will be admissible in evidence in any judicial or administrative proceeding regardless of whether the original is lost, provided they are properly authenticated. Section 1732 of Title 28 provides that original documents may be destroyed if a department or governmental agency keeps accurate reproductions of the originals in the regular course of business, for example on microfilm. Under section 1733, copies of Government records and papers, when properly identified, are admissible to the same extent as the original itself.

Based on your description of your plans to scan and maintain returns and attachments, we conclude that electronic copies of these documents will be generally admissible in evidence under the Federal Rules of Evidence and other federal evidentiary law, and are the equivalent of originals for other purposes, such as FOIA. Since the scanned copies would be admissible to the same extent as the original documents, you can rely on the scanned copies for all of the situations you have described.

4) Can we destroy the original documents and rely on the duplicate copies of all of the situations described above?

You may destroy the original paper return and rely on an electronic version if the electronic version is a federal record and the system used to maintain it meets NARA’s recordkeeping requirements.

A “federal record” includes books, papers, and other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States

Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government, or because of the informational value of the data in them. 44 U.S.C. § 3301. An electronic record is any information that is recorded in a form that only a computer can process and that satisfies the definition of a federal record in 44 U.S.C. § 3301. The term includes both record content and associated metadata that the agency determines is required to meet agency business needs. 36 C.F.R. §§ 1220.18; see also IRM 1.15.6.2.

An electronic version of an original paper document created or received by the Service may serve as the official record provided the electronic recordkeeping system on which it is stored and retrieved provides:

- (1) a method of all authorized users of the system to retrieve desired documents, such as an indexing or text system;
- (2) an appropriate level of security to ensure integrity of all documents;
- (3) a standard interchange format when necessary to permit the exchange of documents on electronic media between agency computers using different software/operating systems and the conversion or migration of documents on electronic media from one system to another; and
- (4) for the disposition of the documents including, when necessary, the requirements for transferring permanent records to NARA.

IRM 1.15.6.5(1); see also 36 C.F.R. § 12.36.20 (appropriate recordkeeping systems for electronic records must contain functionalities allowing it to declare records, capture/import records from other sources, organize records with an approved records control schedule, maintain records security, manage access and retrieval, preserve records and executive disposition).

The agency is required to maintain adequate and up-to-date technical documentation for its recordkeeping systems that produce, use, and store data files. 36 C.F.R. § 1234.20(b).

The use of an electronic recordkeeping system can become out-of-date or obsolete. Given that gift tax returns are maintained for 75 years, the agency will be required to ensure that all gift tax returns can be retrieved and are usable for the length of their NARA-approved retention period. See 36 C.F.R. § 1236.12(b)(where records will be maintained beyond the life of the system, agencies must plan for the migration of records and associated metadata to new storage media to avoid loss due to media decay or technology obsolescence).

If the electronic recordkeeping system into which the original paper gift tax returns are scanned and stored meets NARA's electronic recordkeeping requirements and the scanned version contains all the information that appears on the original gift tax return and can be authenticated if necessary, then the original paper document can be destroyed if it serves no additional purpose. The agency can treat the electronically scanned/stored version as its official record. We are not aware of any regulation that would prohibit the agency from designating an electronic version of a document to be its official record provided the electronic recordkeeping system meets NARA's standards.

We suggest, however, that you confirm with the IRS Records Officer's staff, Records Information Management Office (AWSS), that the electronic recordkeeping system to be used by the GIS project either meets NARA's requirements or is a NARA-compliant electronic recordkeeping system.<sup>2</sup> The IRS currently has licenses for EMC Documentum, which is a DOD 5015.2 STD-certified Compliant Records Management Application, and may meet Estate and Gift Tax's recordkeeping needs. IRM 1.15.6.5(2); NARA Bulletin 2002-03, RE: *Endorsement of DoD Electronic Records Management Application (RMA) Design Criteria Standard, version 2*, <http://www.archives.gov/records-mgmt/bulletins/2003/2003-03.html>.

#### Purged Returns:

1) When a taxpayer has been confirmed as deceased prior to 2007, can the paper return be destroyed without scanning? You believe that authorization for this is already in place in IRM Exhibit 1.15.29 Item No. 62(B)(2)(a) if the taxpayer does not have a filing requirement.

Gift tax returns are appropriately scheduled under IRM 1.15.29, Item 62. Item 62(B)(2)(a) stipulates that the gift tax returns of deceased taxpayers whose estate at the time of death did not exceed the threshold for filing of a Form 706, United States Estate Tax Return, can be destroyed 3 months after confirmation that they will not be used to calculate taxes owed on an estate (*i.e.*, will not be associated with a Form 706). Because culling the files is a labor intensive task that can only be efficiently conducted with accumulated volume, the Service is advised under the Retention Instructions contained in Item (B)(2) to conduct a purge approximately every five years. There is no statutory requirement to do so (*i.e.*, wait five years), the only such requirement being that the forms cannot be destroyed earlier than 3 months following identification that there is no tax administrative requirement to associate a particular Form 709 with a taxpayer's Form 706. Therefore, program personnel are correct in their assessment that present plans to destroy all pre-2007 returns for taxpayers identified as deceased

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<sup>2</sup> NARA's FAQ page contains questions and answers about the advantages and disadvantages of imaging systems. One significant disadvantage is technological obsolescence, particularly for images that have a significant retention period, such as Gift Tax Returns associated with Estate Tax Returns. NARA, Frequently Asked Questions About Imaged Records, <http://www.archives.gov/records-mgmt/faqs/imaged.html#imaging>.

and whose Forms 709 were not required to be associated with a Form 706, can be destroyed are compliant with NARA-approved records disposition under NARA Federal Records Appraisal Job Number N1-058-04-02.

2) If so, what is the process for destruction? You believe that Records Management has a process already in place, see SF 115 Job Number N1-058-04-2.

It has been determined by both GLS and the Records Officer that the original paper (textual) records can be destroyed following a quality review that ensures the scanned image is fully viable, including, of course, fully readable. The Records Officer has worked with program offices to put into place processes that ensure this by requiring the use of PDF-A or TIF, and other adopted international standards, such as a filming standard of at least 120 dpi (dots per inch), quality review, and other similar requirements. Once the quality review has ensured viability, the textual records can be destroyed. Subsequently, the only requirement for reassembly of the scanned textual records is found in the need to relocate and use them should a scanned image or images not meet appropriate quality reviews. In that case, the documents would need to be re-scanned, and locating them, arranging them, etc. would be paramount to this process.

Please call (202) 622-3600 if you have any further questions.