

A check written in 2012 that does not clear until 2013 is at risk of being a 2013 gift, not a 2012 gift, since the donor could have stopped payment in 2013 before it cleared. The issue with using checks to make gifts is that until the check clears the bank, the donor can revoke the gift by issuing a stop payment or by removing adequate funds from the bank account. A gift that can be revoked is not complete until revocability ends. The U.S. Supreme Court said as much in the case of *Smith v. Shaughnessy*, 318 U.S. 176 (1943).

The Tax Court and the Federal Court of Appeals (of the 4th Circuit) spell out when gifts by check will “good” gifts. Those cases are *Gagliardi Est. v. Comr.*, 89 T.C. 1207 (1987); *Metzger Est. v. Comr.*, 100 T.C. 204 (1993), *aff’d* 38 F.3d 118 (4th Cir. 1994).

The IRS in 1996 issued Revenue Ruling 96-56, 1996-2 C.B. 161 which provides a safe harbor mechanism to assure last minute 2012 gift tax treatment in the waning days of this year. Under that ruling a gift by check delivered in 2012 will be a gift as of the date the check is deposited or presented for payment if:

- 1) the check was deposited, cashed, or presented in 2012 and within a reasonable time of issuance;
- 2) the donor intended to make a gift;
- 3) the check was paid by the drawee bank when first presented to the drawee bank for payment;
- 4) delivery of the check by the donor was unconditional; and
- 5) the donor was alive when the check was paid by the drawee bank.

So, to be certain your 2012 gift will be treated as made in 2012 and not 2013, you need to (a) deliver the check to the donee in 2012 (with adequate funds in the bank for it to clear), (b) assure the donee deposits it in 2012 and within a reasonable time of issuance, and (c) stay alive at least until after the check clears.

For more information about Death and Taxes ®, call Mitchell A. Port at 310.559.5259 for a free consultation.