

Internal Revenue Service

Department of the Treasury

Number: **200309005**
Release Date: 2/28/2003
Index Number: 2642.00-00

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B09 / PLR-135076-02

Date:

November 14, 2002

Legend

Taxpayer =
Spouse =
Year 1 =
Year 2 =
Date 1 =
Trust A =

Corporation =
School 1 =
 a =
 b =
Trust B =

Date 2 =
 c =
 d =

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Dear Sir:

This is in response to your letter dated June 10, 2002, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of Generation-Skipping Transfer (GST) Tax exemption. This letter responds to your request.

The facts and representations submitted are summarized as follows: Taxpayer and Spouse were married during Year 1 and Year 2.

On Date 1, Taxpayer and Spouse created Trust A. Trust A was funded with gifts of Corporation stock. Date 1 is in Year 1. The Year 1 transfers were the only transfers Taxpayer made to Trust A.

Article 1-2 of the Trust A instrument provides that the beneficiaries of the trust shall be the children of Taxpayer and Spouse and their natural born, but not adopted, descendants.

Article 1-4 provides that during the term of the trust, the trustee shall annually distribute the trust's net income equally to the beneficiaries who are then alive, and may pay to or apply for the benefit of any one, all or none of the beneficiaries, so much of the principal (to a maximum of five percent of the principal in a twelve-month period) of the trust as the trustee, in its sole discretion, shall deem advisable for the support, health, maintenance and education of such beneficiary, or beneficiaries, accumulating the surplus, if any. Distributions of principal need not be equalized or pro-rated, and the trustee may consider other assets and sources of income reasonably available to the beneficiary in deciding whether or not to make a distribution. Payments of principal to or for any such beneficiary shall not be taken into account in any later or final distribution of trust principal to such beneficiary.

Article 1-4.3 provides that Trust A shall terminate twenty-one years after the death of the last survivor of the group of Taxpayer, Taxpayer's spouse, and Taxpayer's issue who were alive when the trust was executed.

Article 1-4.4 provides that upon termination, the trust estate then remaining, including accumulated and accrued but undistributed income, shall be distributed, free of any trust, to Taxpayer's issue, per stirpes, or if none, under Article 1-4.5.

Article 1-4.5 provides that if, at any time, the foregoing provisions do not provide persons qualified to take the trust estate, then the trust estate shall be distributed to School 1.

Taxpayer timely filed a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return ("gift tax return"), for Year 1. Taxpayer reported gifts totaling \$a to

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Trust A during Year 1. A Notice of Allocation was not attached to Taxpayer's gift tax return, and accordingly, none of Taxpayer's generation-skipping transfer tax exemption was allocated to the transfers made to Trust A on Taxpayer's Year 1 gift tax return. On the gift tax return, Taxpayer and Spouse consented, under § 2513 of the Internal Revenue Code, to have the gifts treated as if one-half (\$b) had been made by each of them.

On Date 2, Taxpayer created Trust B. Trust B was funded with gifts of Corporation stock. Date 2 is in Year 2. The Year 2 transfers were the only transfers Taxpayer made to Trust B.

Article II, Section 2.1 of the Trust B instrument provides that trust or trusts established by the instrument shall be known collectively as Trust B. Each separate trust established hereunder for the primary benefit of a person shall be known by the name of that person.

Article III, Section 3.1 provides the trustee shall hold the trust estate in a single trust (the "Common Trust"), administered and distributed as follows. Section 3.1A provides the primary purpose of the Common Trust is to provide for the needs of Taxpayer's Children and their descendants.

Section 3.1.B.1 provides that the Family Trustee may distribute to Taxpayer's children and their descendants so much of the net income as will provide for their needs. The Distribution Trustee may distribute to Taxpayer's children and their descendants so much of the income as will provide for their best interests. Section 3.1.B.2. provides that the Family Trustee may distribute to Taxpayer's children and their descendants so much of the principal as will provide for the beneficiaries' needs. The Distribution Trustee may distribute to Taxpayer's children and their descendants so much of the principal as will provide for their best interests.

Section 3.1.C provides that subject to Article V, Taxpayer's children and each of their descendants shall have a withdrawal right with respect to all gifts to the Common Trust.

Section 3.1.D provides that the Common Trust shall continue until the second anniversary of the date of death of the last to die of Taxpayer and Spouse, at which time the Common Trust shall terminate. If any descendant of Taxpayer is then living, the remaining trust estate shall be held and administered in accordance with the provisions of Section 3.2. If all of Taxpayer's descendants die, the Common Trust shall terminate and the remaining trust estate shall be distributed in accordance with the provisions for contingent beneficiaries.

Section 3.2 provides that if one or more of Taxpayer's descendants are living at the date of termination of the Common Trust (the "Division Date"), the trustee shall

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divide the trust property into separate equal shares, one share for each then living child and one share the then living descendants, collectively, of each deceased child.

Taxpayer timely filed a gift tax return for Year 2. Taxpayer reported gifts totaling \$c to Trust B during Year 2. A Notice of Allocation was not attached to Taxpayer's gift tax return, and accordingly, none of Taxpayer's generation-skipping transfer tax exemption was allocated to the transfers made to Trust B on Taxpayer's Year 2 gift tax return. On the gift tax return, Taxpayer and Spouse consented, under § 2513, to treat the gifts as if one-half (\$d) had been made by each of them.

A memorandum written by Taxpayer to his accountant in Year 1 indicates that Taxpayer intended to allocate sufficient generation-skipping transfer tax exemption to the transfer to Trust A in Year 1 that would result in Trust A having an inclusion ratio of zero. Taxpayer represents that he intended that both Trust A and Trust B have an inclusion ratio of zero and that he discussed his intentions with his accountant. Taxpayer's accountant inadvertently did not properly allocate Taxpayer's generation-skipping transfer tax to the transfers to Trust A for Year 1 and to Trust B for Year 2.

Taxpayer has requested an extension of time to make allocations with respect to transfers of \$b to Trust A in Year 1 and \$d to Trust B in Year 2.

Section 2513(a)(1) of the Internal Revenue Code provides that a gift made by one spouse to any person other than the other spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

Section 2513(a)(2) provides that paragraph (1) shall apply only if both spouses have signified (under the regulations provided for in subsection (b)) their consent to the application of paragraph (1) in the case of all such gifts made during the calendar year by either while married to the other.

Section 25.2513-2(a)(1)(ii) of the Gift Tax Regulations provides that consent to the application of the provisions of § 2513 with respect to a "calendar period" shall, in order to be effective be signified by both spouses. If both spouses file gift tax returns within the time for signifying consent, it is sufficient if the consent of each spouse is signified on his own return.

Section 2601 imposes a tax on every generation-skipping transfer. A generation-skipping transfer is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation

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under § 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2632(a)(1) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Section 2642(b)(1) provides that, except as provided in § 2642(f), if the allocation of the GST exemption to any transfers of property is made on a gift tax return filed on or before the date prescribed by § 6075(b) for such transfer or is deemed to be made under § 2632(b)(1) or (c)(1) the value of such property for purposes of § 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of § 2001(f)(2)), or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, on and after the close of such estate tax inclusion period.

Section 2642(g)(1)(A) provides, generally, that the Secretary shall, by regulation, prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief under this paragraph, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-34 I.R.B. 189, provides that under § 2642(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a generation-skipping trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

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Section 301.9100-3(a) provides that, in general, requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3.

Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Taxpayer is granted an extension of time of 60 days from the date of this letter to file supplemental Forms 709 and Notices of Allocation for Year 1 and Year 2 on which Taxpayer will allocate GST exemption to the trusts. The allocation will be effective as of the date of the individual transfers to Trust, and the gift tax value of the transfers to Trust will be used in determining the amount of GST exemption to be allocated to Trust. A copy of this letter should be attached to each supplemental Form 709 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, we have reviewed no evidence and make no conclusions regarding the accuracy of the valuation of Corporation stock on the Year 1 and Year 2 returns.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings it is subject to verification on examination.

Pursuant to the Power of Attorney on file with this office, a copy of this letter is being sent to your attorney.

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This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Heather C. Maloy

Heather C. Maloy
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy of this Letter
Copy for § 6110 Purposes