

Internal Revenue Service

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Person To Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-123638-02

Date: JULY 28, 2004

Re:

Legend:

- Date 1 =
- Date 2 =
- Date 3 =
- Date 4 =
- Date 5 =
- Date 6 =
- Date 7 =
- Date 8 =
- Date 9 =
- Date 10 =
- Grantor =
- Grantor's Spouse =
- Trust =
- Executor =
- Attorney =
- Accountant =
- \$ X =
- \$Y =
- \$Z =
- Year 1 =
- Year 2 =
- Year 3 =
- Year 4 =
- Year 5 =
- Year 6 =
- Year 7 =
- Year 8 =

Dear :

This is in response to your letter dated April 29, 2004, and other correspondence requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations and § 2642(g) of the Internal Revenue Code to make an allocation of the generation-skipping transfer (GST) exemption. This letter responds to your request. The facts and representations submitted are summarized as follows: On Date 1, Grantor established an irrevocable trust (Trust), for the benefit of Grantor's descendants. Trust was funded with a life insurance policy on the life of Grantor. Grantor made gifts on Dates 2, 3, 4, 5, 6, 7 and 8 to Trust. Grantor died on Date 9.

Article V, paragraph 5.1 of Trust, provides for distributions of income and principal of Trust to Grantor's descendants as advisable for their education, and maintenance in health and reasonable comfort. Article V, paragraph 5.2(a)(i) provides that after each transfer to Trust which is treated as a gift under the federal gift tax law, each living child of Grantor shall have the right to withdraw an amount equal to the lesser of (A) the amount specified as a gift tax exclusion in § 2503(b) determined as of the date of transfer and (B) the amount of such transfer divided by the number of the Grantor's then living children. Article V, paragraph 5.2(a)(ii) provides that if any transfer to Trust exceeds the amounts withdrawable by Grantor's children pursuant to subparagraph (i), each living grandchild of Grantor will have the right to withdraw an amount equal to the lesser of (A) the amount specified as a gift tax exclusion in § 2503(b) determined as of the date of transfer, and (B) the amount of such transfer in excess of the amounts withdrawable by the Grantor's children divided by the number of Grantor's then living grandchildren. Article V, paragraph 5.2(a)(iii) provides that if any transfer to Trust exceeds the amounts withdrawable by Grantor's children and grandchildren pursuant to subparagraph (i) and (ii) each living spouse of a child of Grantor will have the right to withdraw an amount equal to the lesser of (A) the amount specified as a gift tax exclusion in § 2503(b) determined as of the date of transfer, and (B) the amount of such transfer in excess of the amounts withdrawable by the Grantor's children and grandchildren divided by the number then living spouses of the Grantor's children.

Article V, paragraph 5.2(e) provides the aggregate withdrawal rights held by each withdrawal beneficiary with respect to any transfers will lapse on December 31 of each calendar year as to the greater of five thousand dollars or five percent of the aggregate value of the trust on such date, or the amount subject to the aggregate withdrawal rights and remaining unwithdrawn, unless the timing would cause the withdrawal right to lapse less than 30 days after notice concerning the withdrawal right has been given. In such case, the lapse will be suspended until the end of the 30 day notice period.

Article VI provides for the creation of equal, separate trusts at Grantor's death for the benefit of Grantor's children and descendants of deceased children.

Article XII, paragraph 12.3 provides that the trusts under Trust instrument shall terminate not later than twenty-one years after the death of the last survivor of the Grantor and the Grantor's descendants who are living on the date of the trust agreement.

During her life, Grantor, in Years 1 to 7, annually contributed cash to Trust (Date 2 through Date 8 transfers respectively) in the amount necessary to pay the premiums due to maintain the insurance policy owned by Trust. No distributions were made from Trust to Grantor's grandchildren during Grantor's lifetime under either Article V, paragraph 5.1, or paragraph 5.2(a). Following Grantor's death, her grandchildren withdrew the aggregate amount

of \$X, in Year 8, the year after Grantor's death. You have represented that each grandchild will repay all amounts they have received from Trust in Year 8, within 60 days of the grant of relief pursuant to this letter ruling request.

Grantor hired Accountant to prepare Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns for Grantor and Grantor's Spouse for Years 1 to 6. Grantor and Grantor's Spouse elected under § 2513 to treat each gift (Date 2 through Date 7 transfers) to Trust in Years 1 to 6 as if made one-half by Grantor and one-half by Grantor's Spouse. Grantor and Grantor's Spouse timely filed the gift tax returns for Years 1 to 6 and reported no federal gift tax due. Grantor and Grantor's Spouse relied on Accountant to prepare the Year 1 to 6 gift tax returns. Accountant did not allocate GST exemption with respect to the Date 2 to Date 7 transfers to Trust on any of the returns.

In Year 7, Grantor and Spouse elected under § 2513 to treat each gift (Date 8 transfers) to Trust as made one-half by Grantor and one-half by Grantor's Spouse and filed Forms 709, and each allocated \$Y of GST exemption to the returns. Also, on Grantor's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, \$Z of Grantor's GST exemption was allocated to other gifts. Furthermore, on Grantor's Form 706, additional GST exemption was allocated to trusts for the grandchildren. These trusts (grandchildren trusts) do not exist under Trust instrument. Accountant did not allocate GST exemption with respect to the Date 8 transfer to Trust on this return.

In Year 7, after Grantor's death, Grantor's Executor relied on Grantor's Attorney to file Forms 709 for Grantor and Grantor's Spouse on Date 10, under extension. Attorney allocated GST exemption to Trust on the Year 7 returns (Date 8 transfers) for Grantor and Grantor's Spouse.

Grantor and Spouse have insufficient remaining GST exemption to exempt all the Date 2, 3, 4, 5, 6, and 7 transfers. Consequently, Trust will have an inclusion ratio between zero and one.

You have requested the following rulings:

1. An extension of time under § 301.9100 and § 2642(g) to allocate Grantor's and Spouse's GST exemption to the Date 2 through Date 7 transfers to Trust to the extent Grantor and Spouse have remaining GST exemption.
2. That the allocation of GST exemption on Grantor's Form 706 to trusts for the grandchildren (which do not exist under the trust instrument) equals zero and that the automatic allocation of Grantor's GST exemption that would have occurred at her death will not apply.

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

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines "applicable rate" as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the “applicable fraction.” The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the 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 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 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) 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 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of GST exemption to property transferred during the transferor’s lifetime, other than in a direct skip, is made on Form 709.

Section 26.2632-1(b)(2)(ii)(B) provides that if other transfers exist with respect to which GST exemption could be allocated under paragraphs (b)(2)(ii)(A)(1)(ii) and (iii), any GST exemption allocated under paragraph (b)(2)(ii)(A)(1)(i) of this section is allocated in an amount equal to the value of the transferred property as reported on the Form 709. Thus, if the GST exemption allocated on the Form 709 exceeds the value of transfers reported on that return that have generation-skipping potential, the initial allocation under paragraph (b)(2)(ii)(A)(1)(i) of this section is in the amount of the value of those transfers as reported on that return. Any remaining amount of GST exemption allocated on that return is then allocated pursuant to paragraphs (b)(2)(ii)(A)(1)(ii) and (iii) of this section, notwithstanding any subsequent adjustment in value of the transfers reported on the return.

Section 26.2632-1(d)(1) provides that the executor may allocate GST exemption with respect to a lifetime transfer by a decedent of property that is not included in the transferor’s gross estate on a Form 709.

Section 26.2632-1(d)(2) provides that a decedent’s unused GST exemption is automatically allocated on the due date for filing Form 706 to the extent not otherwise allocated by the decedent’s executor on or before that date. The regulation also supplies the method for the automatic allocation of any unused GST exemption. First, the exemption is allocated pro rata to direct skips on the basis of their values for estate tax purposes. The balance is then allocated pro rata, on the basis of estate tax values, to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. No automatic allocation is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the trust. The automatic allocation is irrevocable.

Section 2652(a)(2) provides that, if under § 2513, one-half of a gift is treated as made by the individual, and one-half if treated as being made by the individual’s spouse, then such gift shall be so treated for GST tax purposes.

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, its value at the time of the close of the estate tax inclusion period, and such allocation shall be effective on and after the date of such transfer, 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 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.

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 not 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.

Section 301.9100-3 provides standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). 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. Notice 2001-50, 2001-34 I.R.B. 189, 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.

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, and specifically the representation that the \$X amount withdrawn from Trust are repaid to Trust within 60 days from the date of issuance of this letter ruling, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Grantor's Executor and Grantor's Spouse are granted an extension of time of 60 days from the date of this letter to allocate their remaining GST exemption, with respect to the Date 2 through Date 7 transfers to Trust in Years 1 to 6. The allocations will be effective as of Dates 2, 3, 4, 5, 6, and 7, the dates of the transfers to Trust in Years 1 to 6, and the gift tax value of the transfers to Trust will be used in determining inclusion ratio with respect to Trust. In addition, the allocation made on Grantor's Form 706 in Year 8 to the grandchildren trusts is void under § 26.2632-1(b)(2)(ii)(B) because such trusts do not exist under the Trust instrument. As a result of the § 301.9100-3 relief, the deemed allocation rules will not apply because Grantor will have used her entire GST exemption and there will be no additional exemption to allocate under § 26.2632(1)(d)(2).

The ruling contained in this letter is 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.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

These rulings are directed only to the taxpayers requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent. This election should be made on a supplemental Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: