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TY:

INDEX

Taxpayer
Date 1
Trust
\$a
Year 1
Law Firm
Attorney
Taxpayer's Accountant
Date 2

Dear :

This is in response to your letter dated April 28, 2004, sent on behalf of the estate of Taxpayer, 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 a timely allocation of generation-skipping transfer (GST) exemption with respect to a transfer made by Taxpayer to a charitable lead unitrust.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer created a charitable lead unitrust (hereinafter "Trust") and transferred to it cash and marketable securities having a fair market value of \$a.

Under the terms of Trust, the trustee of Trust shall select from time to time one or more organizations described in §§ 170(b)(1)(A), 2055(a) and 2522(a) (hereinafter "the charitable recipient") and pay to the charitable recipient each year a unitrust amount equal to 5 percent of the net fair market value of the trust assets, valued annually. Trust shall terminate at the expiration of 15 years from the date of Trust's creation. Upon termination of Trust, the trustee shall pay principal and income to Taxpayer's

grandchildren then living, in equal shares, per capita, and to the issue of any grandchild of Taxpayer who shall not then be living, divided among the issue per stirpes; however, if any beneficiary has not yet reached the age of thirty years, in lieu of distribution to the grandchild, distribution shall be made to a separate trust for the benefit of the grandchild. The trustee of any separate trust may make distributions of principal and income as the trustee deems necessary or desirable for the support, maintenance, education or other benefit of the grandchild in respect of whom the share shall be held.

For several years prior to the creation of Trust, Taxpayer had relied on Law Firm to handle her estate planning affairs. On Date 1, upon the advice and recommendation of Attorney, a member of Law Firm, Taxpayer created Trust. At that time, Attorney explained to Taxpayer that by creating a trust the remainder of which would be for the benefit of Taxpayer's descendants beyond Taxpayer's children's generation and allocating Taxpayer's GST tax exemption to it, the assets of the trust would be exempt from the GST tax. Indeed, Trust was funded with an amount specifically intended to result in a taxable gift equal to the GST tax exemption available to Taxpayer in Year 1. Taxpayer signed and timely-filed the United States Gift (and Generation-Skipping Transfer) Tax Return (Form 709) for Year 1. However, due to an apparent misunderstanding, Taxpayer's Accountant, who prepared the Form 709 for Year 1, did not allocate Taxpayer's exemption to cover the amount of the gift Taxpayer made in Year 1.

Taxpayer died on Date 2. After reviewing the Year 1 Form 709 upon Taxpayer's death, it was discovered that no allocation of Taxpayer's GST exemption had been made to the transfer to Trust.

The executors of Taxpayer's estate now request an extension of time under § 2642(g) to make an allocation of Taxpayer's GST exemption to the assets transferred to Trust in Year 1. In addition, the executors of Taxpayer's estate request that the allocation be based on the value of the assets transferred to Trust as of the date of the transfer.

Section 2601 imposes a tax on every GST. A GST 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 tax 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 2632(a)(1) provides that any allocation by an individual of his or her GST tax 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.

In general, the GST tax is computed by multiplying the taxable amount by the "applicable rate." The applicable rate is the highest federal estate tax rate multiplied by the inclusion ratio with respect to the transfer. Under § 2642(a)(1)(A), the inclusion ratio

is the excess (if any) of 1 over the applicable fraction determined for the trust from which such transfer is made. Under § 2642(a)(2), the applicable fraction is a fraction – (A) the numerator of which is the amount of the GST exemption allocated to the trust and (B) the denominator of which is – (i) the value of the property transferred to the trust reduced by (ii) the sum of – (I) the federal estate tax rate or state death tax actually recovered from the trust attributable to such property, and (II) any charitable deduction allowed under § 2055 or § 2522 with respect to such property.

Section 2642(b)(1)(A) provides that, except as provided in § 2642(f), if the allocation of the GST tax 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 tax 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, 2001-2 C.B. 189, provides that under § 2642(g)(1)(B), the time for allocating the GST tax 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 GST 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 six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except in subtitles E, G, H, and I.

Section 301.9100-3 provides the 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. In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an election 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 to 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's estate is granted an extension of time of 60 days from the date of this letter to file a supplemental Form 709 for the Year 1 transfer to Trust. The Form 709 should include a Notice of Allocation properly allocating Taxpayer's GST tax exemption to the transfer in Year 1. If Trust meets the requirements for a charitable deduction under § 2055 or § 2522, the value of the property transferred to Trust will be reduced in the denominator of the applicable fraction by the amount of this charitable deduction. The gift tax value of the transfer to Trust will be used in determining the amount of GST tax exemption to be allocated to the trust, and the allocation will be effective as of the date of the transfer. A copy of this letter should be attached to the supplemental Form 709 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy is included for this purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter, including whether Trust meets the requirements for a charitable deduction under § 2055 or § 2522.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to Taxpayer's estate.

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.

Sincerely,

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

Enclosure (1)