

PLR-161045-02

Dear :

This is in response to your letter dated October 20, 2003, and subsequent correspondence, in which you requested an extension of time pursuant to § 2642(g) of the Internal Revenue Code and § 301.9100-3 of the Procedure and Administration Regulations to allocate generation-skipping transfer (GST) tax exemption to transfers made to a trust.

The facts submitted and the representations made are as follows. On Date 1, which is in Year 1, Taxpayer 1 established Trust for the benefit of his spouse (Taxpayer 2) and their descendants.

Articles 5.01 and 7.03 of Trust provide, in part, that the trustee has the discretion to distribute trust net income and principal to any one or more of the group of beneficiaries consisting of Taxpayer 1's lineal descendants, the spouses of the lineal descendants, and Taxpayer 2 to provide for the support, maintenance, health, and education of the beneficiaries.

In Year 1, Taxpayers 1 and 2 retained Law Firm 1 for estate planning advice. It has been represented that Law Firm 1 advised Taxpayers 1 and 2 that it was not necessary to file Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns, to report transfers to Trust. On Date 2, which is in Year 2, Taxpayer 1 died.

Prior to Taxpayer 1's death, on Date 3, which is in Year 3, Taxpayer 1 transferred assets to Trust that Taxpayer 1's estate (Estate) valued at \$ A. Taxpayers 1 and 2 did not file Forms 709 for Year 3. Accordingly, Taxpayer 1's and Taxpayer 2's GST exemptions were not allocated to the Year 3 transfer to Trust.

On Date 4, which is in Year 4, Taxpayer 1 transferred assets to Trust that Estate valued at \$ B. Taxpayers 1 and 2 did not file Forms 709 for Year 4. Accordingly, Taxpayer 1's and Taxpayer 2's GST exemptions were not allocated to the Year 4 transfer to Trust.

On Date 5, which is in Year 5, Taxpayer 1 transferred assets to Trust that Estate valued at \$ C. Taxpayers 1 and 2 did not file Forms 709 for Year 5. Accordingly, Taxpayer 1's and Taxpayer 2's GST exemptions were not allocated to the Year 5 transfer to Trust.

In Year 6, Taxpayer 1 transferred assets to Trust that Estate valued at \$ D. Taxpayers 1 and 2 did not file Forms 709 for Year 6. Accordingly, Taxpayer 1's and Taxpayer 2's GST exemptions were not allocated to the Year 6 transfer to Trust.

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On Date 6, which is in Year 7, Taxpayer 1 transferred assets to Trust that Estate valued at \$ E. Taxpayers 1 and 2 did not file Forms 709 for Year 7. Accordingly, Taxpayer 1's and Taxpayer 2's GST exemptions were not allocated to the Year 7 transfer to Trust.

On Date 7, which is in Year 2, Taxpayer 1 and 2 retained Law Firm 2. In the course of its engagement, Law Firm 2 discovered the failure to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to Trust.

On Date 8, which is in Year 8, Forms 709 were prepared for Taxpayers 1 and 2 reporting the transfers Taxpayer 1 made to Trust in Years 3, 4, 5, and 7 and allocating Taxpayer 1's and Taxpayer 2's GST exemptions thereto. The returns reflected consent by Taxpayers 1 and 2 to treat gifts made by either in Years 3, 4, 5, and 7 to third parties as made by both pursuant to § 2513. Taxpayer 2 executed the returns on her own behalf and on behalf of Taxpayer 1, as the personal representative of Estate. It has been represented that the Forms 709 were filed with the Internal Revenue Service in Year 8.

Forms 709, however, were not filed with the Service for Year 6. It has been represented that Taxpayer 2, on her own behalf and on behalf of Taxpayer 1, intends to consent to treat gifts made by either in Year 6 as made by both pursuant to § 2513. It is further represented that Taxpayer 1 and 2 have sufficient available GST exemption to allocate to the transfers Taxpayer 1 made to Trust in Years 3 through 7.

Taxpayer 2, individually and as the personal representative of Estate, is requesting an extension of time under §§ 2642(g) and 301.9100-3 to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to the transfers Taxpayer 1 made to Trust in Years 3 through 7, and that such allocations will be based on the value of the property transferred to Trust in those years.

Law and Analysis:

Section 2501(a)(1) provides that a tax, computed as provided in § 2502, is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident, or nonresident.

Section 2511(a) provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2513(a)(1) provides, in part, that a gift made by one spouse to any person other than his 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.

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

Section 25.2513-1(b)(1) of the Gift Tax Regulations provides, in pertinent part, that where the consent is signified by an executor or administrator of a deceased spouse, the consent is not effective with respect to gifts made by the surviving spouse during the portion of the calendar period that his spouse was deceased.

Section 25.2513-1(b)(4) provides that if one spouse transfers property in part to his or her spouse and in part to third parties, "split gift" treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable and severable from the interest transferred to the spouse.

Section 25.2513-2(a)(1) provides, in part, that consent to the application of the provisions of § 2513 with respect to a "calendar period" (as defined in § 25.2502-1(c)(1)) 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--(i) the consent of the husband is signified on the wife's return, and the consent of the wife is signified on the husband's return; (ii) the consent of each spouse is signified on his own return; or (iii) the consent of both spouses is signified on one of the returns. If only one spouse files a gift tax return within the time provided for signifying consent, the consent of both spouses shall be signified on that return.

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. Section 2642(a) provides the method for determining the inclusion ratio.

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) 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 2642(b)(1) provided in relevant part that if the allocation of the GST exemption to any transfers of property is made on a timely filed gift tax return or is deemed to be made under § 2632(b)(1) [deemed allocations to certain lifetime direct skips] – (A) the value of such property for purposes of determining the inclusion ratio shall be its value for purposes of chapter 12, and (B) such allocation shall be effective on and after the date of such transfer.

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). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1)(A), which was enacted into law on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief, 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. Section 2642(g)(1)(B) further provides that for purposes of determining whether to grant relief, the time for making the allocation shall be treated as if not expressly prescribed by statute.

Section 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of the gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of the generation-skipping transfer tax.

Notice 2001-50, 2001-2 C.B. 189, provides that under § 2624(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 transfer 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 Code except 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 allocation described in § 2642(b)(1) 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 2, individually and as the personal representative of Estate, is granted an extension of time to allocate Taxpayer 1's and Taxpayer 2's available GST exemptions to the transfers Taxpayer 1 made to Trust in Years 3 through 7. The allocations will be effective as of the dates of the transfers, and should be made based on the gift tax value of the property transferred to Trust on those dates.

Forms 709 were filed with the Service in Year 8 reporting the transfers made to Trust in Years 3, 4, 5, and 7 and allocating Taxpayer 1's and Taxpayer 2's GST exemptions thereto. Accordingly, the extension of time granted to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to the Years 3, 4, 5, and 7 transfers to Trust is to the date the Forms 709 were filed with the Service.

Forms 709, however, were not filed with the Service reporting the transfer made to Trust in Year 6. Accordingly, the extension of time granted to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to the Year 6 transfer to Trust is sixty (60) days from the date of this letter. The allocation must be made on Forms 709 for Year 6 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each Form 709 filed. Copies are enclosed 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. Specifically, no opinion is expressed or implied as to the value of the assets Taxpayer 1 transferred to Trust in Years 3 through 7 for federal transfer tax purposes.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) 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 the taxpayer.

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

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

Enclosure: Copy for § 6110 purposes
Copies of this letter