

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B09-PLR-102293-02

Date:

April 17, 2002

Re:

LEGEND

Taxpayer =

Date 1 =

Spouse =

State =

Trust =

Child 1 =

Child 2 =

Subtrust 1 =

Subtrust 2 =

Date 2 =

\$x =

Year =

Date 3 =

\$y =

Dear

This is in response to your letter dated December 17, 2001, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of Taxpayer's generation-skipping transfer ("GST") tax exemption.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer and Spouse, both residents of State, established Trust for the benefit of Child 1 and Child 2 and their descendants.

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Section 1.1 of Trust provides that the trustee shall divide the property into two separate trusts, equal in value, with one trust, known as Subtrust 1, to be held for the primary benefit of Child 1, and the other trust, known as Subtrust 2, to be held for the primary benefit of Child 2.

Section 1.3 provides that while either Taxpayer or Spouse is serving as trustee, all of the net income of Subtrust 1 and Subtrust 2 shall be accumulated. In addition, neither Taxpayer or Spouse, while serving as trustee of Trust, shall have any power to distribute any income or principal of any trust created under Trust to any beneficiary other than the withdrawals provided for in sections 1.5 and 1.6.

Section 1.4 provides that if at any time neither Taxpayer nor Spouse is serving as trustee, the trustee, in the exercise of discretion, may distribute to the beneficiary of such trust and to such beneficiary's descendants such amounts of income and principal as are necessary, when added to the funds reasonably available to such beneficiary and such beneficiary's descendants from all other sources known to the trustee to provide for their health, support, maintenance and education. Taxpayer and Spouse particularly desire that each of their descendants be afforded every opportunity to obtain as complete an education, including attendance at graduate and professional schools, as he or she may reasonably desire and be qualified to obtain.

Section 1.5 provides that each beneficiary has the right to withdraw cash or other property from such beneficiary's trust at any time during the calendar year in which a gift is made to such beneficiary's trust in an amount not to exceed the lesser of (i) the value at the time of transfer of any gift to or for the benefit of such beneficiary's trust during any calendar year or (ii) such sum as may be allowed as the annual gift tax exclusion with regard to the gift by each donor, reduced by the amount of any prior gifts to or for the benefit of such beneficiary which qualify for the annual exclusion in the same calendar year by such donor; provided, however, that for purposes of determining the maximum amount that qualifies for withdrawal, if a donor is married at the time a gift is made, the donor's spouse shall be considered a donor for purposes of clause (ii). Such withdrawal right shall be exercisable by acknowledged instrument delivered to the trustee no later than 60 days after the date of the gift giving rise to the withdrawal right that indicates the amount of money or property such beneficiary desires to withdraw. Generally, to the extent the beneficiary's withdrawal right is not fully exercised, it shall lapse to the extent of the greater of \$5,000 or 5 percent of the aggregate value of the trust principal.

Section 1.6 of Trust provides that if the total amount of all gifts made to or for the benefit of a beneficiary's trust exceeds the largest amount that the beneficiary is entitled to withdraw pursuant to section 1.5, then each of the beneficiary's descendants may withdraw cash or property from the trust not to exceed the lesser of (i) an amount determined by subtracting the total amount the beneficiary is entitled to withdraw from the total amount of gifts made to or for the benefit of such trust in such calendar year and dividing the result by the number of the beneficiary's descendants who are then living, or (ii) such sum as may be allowed by the annual gift tax exclusion with regard to

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the gift by each donor, reduced by the amount of any prior gifts to or for the benefit of such descendants which qualify for the annual exclusion amount by said donor; provided, however, that for purposes of determining the maximum amount that qualifies for withdrawal, if a donor is married at the time a gift is made, the donor's spouse shall be considered a donor for purposes of clause (ii). Such withdrawal right shall be exercisable by acknowledged instrument delivered to the trustee no later than 60 days after the date of the gift giving rise to the withdrawal right that indicates the amount of money or property such beneficiary desires to withdraw. Generally, to the extent the beneficiary's withdrawal right is not fully exercised, it shall lapse to the extent of the greater of \$5,000 or 5% of the aggregate value of the trust principal.

Section 1.7 provides that each trust created for a beneficiary who is a child of Taxpayer and Spouse shall continue for such child's lifetime and shall terminate upon such child's death. Every other trust shall terminate when the beneficiary thereof attains age 40 or upon the death of the last to die of Taxpayer and Spouse, whichever is later.

Section 1.8 provides that each beneficiary shall have a special testamentary power to appoint (outright, in trust or otherwise) all or any part of the property remaining in such beneficiary's trust to any one or more of the descendants of Taxpayer and Spouse; provided, however, that this power shall not be exercisable in favor of such beneficiary, such beneficiary's estate, or the creditors of such beneficiary's estate.

Section 1.10 provides that if a beneficiary's death terminates such beneficiary's trust or if a beneficiary dies prior to the termination of such beneficiary's trust, then upon such beneficiary's death all the remaining unappointed property of such trust shall be divided into shares and portions of shares among and distributed to the then living descendants of such beneficiary, per stirpes.

On Date 2, Taxpayer and Spouse each made annual exclusion gifts of \$x to Trust; \$x was allocated to Subtrust 1 and \$x was allocated to Subtrust 2.

On Date 3, the attorney who drafted Trust mailed a letter to Taxpayer and Spouse advising them of the necessity of filing gift tax returns for Year to exempt the gifts to Trust from the GST tax. Upon receiving this letter, Taxpayer and Spouse consulted with their accountant of ten years. The accountant advised Taxpayer and Spouse that no gift tax returns were necessary for the annual exclusion gifts made in Year to Child 1 and Child 2. Acting upon the advice of Taxpayer's accountant, Taxpayer elected not to file a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return or a Notice of Allocation for Year.

You now request an extension of time under § 2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file a Form 709 and a Notice of Allocation for Year on which Taxpayer will allocate \$y of his GST exemption to Subtrust 1 and \$y of his GST exemption to Subtrust 2.

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Section 2601 imposes a tax on every generation-skipping transfer made after October 22, 1986.

Section 2611(a) provides that the term “generation-skipping transfer” means: (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 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 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 2632(e)(1) provides that, in general, any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows— (A) first, to property which is the subject of a direct skip occurring at such individual's death, and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after such individual's death.

Section 26.2632-1(b)(2) of the GST Regulations provides that an allocation of GST exemption to property transferred during the transferor's lifetime, other than a direct skip, is made on Form 709. The allocation must clearly identify the trust to which the allocation is being made, the amount of GST exemption being allocated to it, and if the allocation is late or if an inclusion ratio greater than zero is claimed, the value of the trust assets at the effective date of allocation.

Section 2642(b)(1) provides that, if the allocation of 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)— (A) 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 (B) 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, 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 a election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for

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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, 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.

Under § 301.9100-1(c), the Commissioner may 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 301.9100-2 provides an automatic extension of time for making certain elections.

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, 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 GST trust are to be treated as if not expressly prescribed by statute. Accordingly, Taxpayer 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 subject to § 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 the grant of 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

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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 a Form 709 and a Notice of Allocation for Year on which Taxpayer will allocate \$y of his GST exemption to Subtrust 1 and \$y of his GST exemption to Subtrust 2. The allocation will be effective as of Date 2, the date of the transfers to Trust.

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 your authorized representative.

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,
Paul F. Kugler
Associate Chief Counsel
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure

Copy of letter
Copy for 6110 purposes