

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

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Refer Reply To:
CC:PSI:B09 / PLR-119218-02
Date:
June 27, 2002

Legend

- Date 1 =
- Taxpayer =
- Trust =
- Law Firm =
- Trust Company =
- Spouse =
- Date 2 =
- Year =
- LLC =
- Company =
- Partnership =

Dear Sir:

This is in response to your letter dated December 28, 2001, and subsequent correspondence 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.

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The facts and representations submitted are summarized as follows: On Date 1, Spouse created Trust as part of an estate plan presented to Spouse by Law Firm. Attorneys from Law Firm drafted the trust instrument. Spouse named Trust Company and Taxpayer as trustees of Trust. Spouse funded Trust on Date 2. The representatives of Law Firm explained to Taxpayer and Spouse the benefits of allocating their GST exemption to Trust. Taxpayer agreed to split Spouse's gift to Trust for gift tax purposes. Taxpayer and Spouse each timely filed a Form 709, United States Gift (& Generation-Skipping Transfer) Tax Return, for Year. Although documents prepared contemporaneously with the trust instrument indicate Taxpayer's intention to make Trust exempt from the generation-skipping transfer tax, a miscommunication between Taxpayer's legal and accounting advisors resulted in none of Taxpayer's GST exemption being allocated to Trust on Taxpayer's gift tax return. Taxpayer represents that she relied on her accounting advisors to prepare the gift tax return and, upon review of the return, was not aware that her GST exemption had not been properly allocated to Trust.

Article First, paragraph A, subparagraph 1 of Trust provides that during Spouse's life, the trustee may, in the trustee's discretion, pay or apply so much or all of the net income, if any, of the trust fund to or for the use of such member or members of a class of persons consisting of one or more organizations contributions to which are deductible for federal income tax purposes under § 170 of the Internal Revenue Code, Spouse's descendants, whenever born, and trusts for the primary benefit of any of them (hereinafter sometimes collectively referred to as the "Beneficiaries," and individually referred to as a "Beneficiary"), in such amounts and proportions as the trustee shall determine in the trustee's sole discretion, accumulating any net income not so paid or applied and adding the same to principal.

Article First, paragraph A, subparagraph 2 provides, in part, that during Spouse's life, the trustee may, at any time or times, pay or apply so much or all of the principal of the trust fund to or for the use of one or more of the Beneficiaries as the trustee shall determine in the trustee's sole discretion.

Article First, paragraph B, subparagraph 1 provides, in part, that ninety (90) days after Spouse's death, the trustee shall pay over to the legal representative of Spouse's estate any trust property, including, without limitation, any assets payable directly to the trustee at Spouse's death, that shall be includible in Spouse's gross estate for federal estate tax purposes.

Article First, paragraph B, subparagraph 2 provides that upon the date ninety days after the death of Spouse, the trustee shall hold any trust property, including, without limitation, any assets payable directly to the trustee at Spouse's death, that shall not be includible in Spouse's gross estate for federal estate tax purposes, as well as any property effectively bequeathed to the trustee pursuant to the provisions of

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Spouse's will, in trust, and shall dispose of the property under Article Second of this agreement.

Article Second, paragraph A provides, in part, that the trustee shall hold any property directed to be disposed of under this Article, in trust, and shall manage, invest and reinvest the same, shall collect the income therefrom and the trustee may, at any time or times, pay or apply so much or all of the net income therefrom and the principal thereof to or for the use of such one or more Beneficiaries in such amounts as the trustee shall determine in the trustee's sole discretion.

Article Second, paragraph B provides, in part, that Spouse directs the trustee to consider the trust under this Article as a family asset and to be liberal in the exercise of the discretion conferred upon the trustee and to use principal of such trust, even to the entire amount thereof, to meet the needs of Spouse's Beneficiaries, including, without limitation, to provide for their education, to purchase or provide a home for any of them, and to aid them at the time of marriage or in setting up a business, rather than to preserve such principal for the benefit of the persons entitled thereto at the termination thereof.

You have represented that Taxpayer has not allocated GST exemption after the filing of the Year gift tax return. In addition, no additions have been made to Trust and no distributions to skip persons have been made from Trust after the filing of the Year gift tax return.

You have requested the following: (1) an extension of time to allocate Taxpayer's GST tax exemption, and (2) a ruling that the gift tax value of the transfer as reported on the timely filed Year gift tax returns be used to determine the amount of GST exemption allocated.

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 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)(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.

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Section 26.2632-1(b)(2) of the Estate 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) 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) - (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, on and after the close of such 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 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 301.9100-2 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 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 allocate GST exemption to Trust. The allocation will be effective as of Date 2, the date of the transfers to Trust, and, under § 2642(b)(1), the gift tax value of the transfers to Trust will be used in determining the amount of GST exemption to be allocated to Trust.

The allocation should be made on a supplemental Form 709 and filed with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

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.

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

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the material submitted in support of the request for rulings it is subject to verification on examination.

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,

William P. O'Shea

William P. O'Shea
Acting Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy of this Letter for § 6110 purposes

Copy of this Letter