

**Internal Revenue Service**

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:  
CC:PSI:B04-PLR-107769-02  
Date:

JULY 30, 2002

Re:

Legend:

|            |   |
|------------|---|
| Settlor    | = |
| Wife       | = |
| GST Trust  | = |
| Attorney   | = |
| Accountant | = |
| Date 1     | = |
| Date 2     | = |
| Date 3     | = |
| Date 4     | = |
| Date 5     | = |
| Year 1     | = |
| <u>a</u>   | = |

Dear :

This is in response to your letter dated January 31, 2002, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations to make an allocation of the generation-skipping transfer (GST) tax exemption.

The facts and representations submitted are as follows:

On Date 1, Settlor established the GST Trust and funded the trust with \$a.

Article First of the GST Trust provides that until such time as a grandchild of Settlor attains age 21, the trustee shall distribute trust income to or among Settlor's children and grandchildren in such proportions as the trustee determines in its discretion. Prior to termination of the GST Trust, if there is a grandchild of Settlor who

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reaches age 21 or more, the trustee shall pay or apply all the trust net income, in equal shares, to or for the benefit of Settlor's living grandchildren (with an equal share for the children of any deceased grandchild).

Article Second authorizes trustee to distribute principal to or for the benefit of any beneficiary to whom the income of the GST Trust may be paid, for purposes of maintenance, education, and welfare of such beneficiary.

Article Third provides that the GST Trust is to terminate at the later of (a) 21 years from the date of its creation or (b) at such time as there is no living grandchild of Settlor under age 21. Upon termination, the trustee shall divide the principal of the GST Trust into equal shares for the then living grandchildren of Settlor and a like equal share for the collective issue of any deceased grandchild. The trustee shall distribute to each living grandchild the share so provided for them and shall distribute to the issue of a deceased grandchild, per stirpes, the share so provided with respect to them.

Article Fourth provides that the GST Trust is irrevocable.

Settlor hired Attorney to draft the GST Trust. Attorney had years of experience in trust, probate, and estate planning matters. Attorney represents that Settlor's intent was to treat the \$a transferred to the GST Trust as a gift made one-half by each, and that Settlor and Wife would allocate their respective GST tax exemptions to the GST Trust. Attorney represents that he expressed to Settlor that gift tax returns would be required to effect the intended allocations of GST tax exemptions to the GST Trust, but there was no discussion as to who would prepare those returns. Attorney assumed that Accountant, who prepared Settlor's and Wife's income tax returns for that year, would prepare the gift tax returns.

Wife died on Date 2. Attorney was engaged as counsel for Wife's estate. In the course of assembling information relative to her estate tax liability, Attorney discovered that gift tax returns had not been filed for the transfer to the GST Trust.

By Date 3, the trustee, as authorized by State Law, divided the trust into three separate trusts: two GST-Exempt trusts, and one GST-Nonexempt trust. The assets of the original trust were divided on a fractional basis such that each separate trust participated ratably in all appreciation and depreciation of the original trust assets since Year 1. Each new trust continues to have the same terms as the original trust. In an earlier private letter ruling, the Service ruled that the division of the GST Trust into three separate trusts will be respected for GST purposes.

On Date 4, Attorney filed the Year 1 gift tax returns for Settlor and Wife and attempted to allocate Taxpayers' GST exemptions to the two GST-Exempt trusts. On Settlor's return, the executor of Wife's estate signified consent to split the gifts, and on Wife's return, Settlor signified consent to split the gifts.

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Settlor died on Date 5. No allocation of Settlor's and Wife's GST tax exemptions were made to the GST Trust on Settlor's or Wife's estate tax returns. The trustee sued Attorney's law firm for failing to make timely GST allocations on timely filed Year 1 gift tax returns. Attorney's law firm ultimately accepted primary responsibility for the failure to file timely gift tax returns for Settlor and Wife. Pursuant to a settlement agreement executed on Date 6, the law firm established a reimbursement trust, the assets of which are to be employed to defray any GST tax which the GST Trust or its beneficiaries may ultimately incur.

You have requested the following rulings: (1) an extension of time under section 2642(g) of the Internal Revenue Code and sections 301.9100-1 and 301.9100-3 to make allocations of Taxpayers' GST exemptions to the GST Trust; and (2) that such allocations are to be made based on the value of the transferred assets to the GST Trust as of Date 1, the date of the transfer to the GST Trust.

Section 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall, for purposes of chapter 12, 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. Section 2513(a)(2) provides that paragraph (1) shall apply only if both spouses have signified their consent to the application of paragraph (1) in the case of all such gifts during the calendar year by either while married to the other.

Section 2513(b)(2)(A) provides that the consent under section 2513(a)(2) may be signified at any time after the close of the calendar year in which the gift was made. The consent may not be signified after the 15th of April following the close of such year, unless before such 15th day no return has been filed for such year by either spouse, in which case the consent may not be signified after a return for such year is filed by either spouse. Thus, if a late return is filed, the consent must be made on the first return filed for such year.

Section 25.2513-2(c) of the Gift Tax Regulations provides that the executor or administrator of a deceased spouse may signify the consent under section 2513(a)(2).

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

Section 2602 provides that the amount of tax imposed by section 2601 is the "taxable amount" multiplied by the "applicable rate."

Section 2642(a)(1)(A) provides that except for direct skip transfers, the inclusion ratio is the excess (if any) of 1 over the "applicable fraction" determined for the trust from which such transfer is made.

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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 section 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 section 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under section 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 26.2632-1(d)(2) provides that a decedent's unused GST exemption is automatically allocated on the due date for filing the decedent's federal estate tax return to the extent not otherwise allocated by the decedent's executor on or before that date.

Section 2652(a)(1) provides that for purposes of the GST tax, the term "transferor" means the decedent in the case of any property subject to the estate tax and the donor in the case of any property subject to the gift tax.

Section 2652(a)(2) provides that if, under section 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of chapter 13.

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 section 2642(b)(1) or (2), and an election under section 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 sections 301.9100-2 and

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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.

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). In accordance with section 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 GST trust are to be treated as if not expressly prescribed by statute. Under section 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. Accordingly, taxpayers may seek an extension of time to make an allocation described in section 2642(b)(1) or (b)(2) or an election described in section 2632(b)(3) or (c)(5) under the provisions of section 301.9100-3.

Requests for relief under section 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 section 301.9100-3 have been satisfied. Therefore, the estates of Settlor and Wife are granted an extension of time of 60 days from the date of this letter to make an allocation of Settlor's and Wife's unused GST exemption to the GST Trust, which comprises the two GST-Exempt Trusts and the one GST-Nonexempt Trust. The allocation will be effective as of Date 1, and the gift tax value of the transfer to the GST Trust will be used in determining the amount of GST tax exemption to be allocated to the two GST-Exempt trusts and the one GST-Nonexempt trust.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

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.

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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.

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. 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, OH 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Sincerely yours,

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

Enclosures:

Copy of letter for section 6110 purposes  
Copy of this letter