

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:9-PLR-144483-02

Date:

January 9, 2003

In Re:

LEGEND:

Trusts =

Trust 1 =

Trust 2 =

Primary Beneficiary =

Trust 1

Primary Beneficiary =

Trust 2

Executor =

Estate =

Trustor =

Spouse =

Settlors =

Date 1 =

Date 2 =

Date 3 =

Company =

State =

Year 1 =

Dear Executor:

This is in response to your letter dated August 7, 2002, requesting, on behalf of Trustor's Estate, an extension of time under § 301.9100-3 of the Procedure and Administration Regulations and § 2642(g) of the Internal Revenue Code to make allocations of Trustor's generation-skipping transfer (GST) tax exemption to transfers made to irrevocable trusts.

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A summary of the facts and representations submitted is as follows. On Date 1, Trustor and Spouse (Settlors) formed two trusts, Trust 1 and Trust 2, one for the benefit of each of their children and their children's spouses and descendants. Article I, §§ 1.3.1 and 1.3.2 of each Trust provide that, during the life of the Settlor's child for whom the Trust was established (the Primary Beneficiary), trustee shall pay income and principal to the Primary Beneficiary and his or her issue to provide for their health, education, support, and maintenance. Article I, § 1.3.3 provides that trustee shall pay as much of the Trust's principal to the Primary Beneficiary's spouse, issue, and the spouses of the issue as requested in writing by the Primary Beneficiary.

Article I, § 1.3.4 provides the Primary Beneficiary with a testamentary limited power of appointment to appoint the remaining trust estate among the Primary Beneficiary's spouse, issue, and the spouses of the issue. Article I, § 1.3.5 provides the Primary Beneficiary with a testamentary general power of appointment over any portion of the trust estate that is not exempt from the GST tax.

Article I, § 1.4.1 provides that any portion of the trust estate not appointed under the provisions of Article I, §§ 1.3.4 and 1.3.5, is to be held in a single trust until the later of the death of the Primary Beneficiary's spouse or the date the Primary Beneficiary's youngest then living child attains age 21. During this period the trustee shall pay income and principal to the Primary Beneficiary's spouse, issue, and the issue's spouses to provide for their health, education, support, and maintenance.

Article I, § 1.4.2 provides that, upon the later of the Primary Beneficiary's spouse's death or the date the Primary Beneficiary's youngest then living child attaining age 21, the trust estate shall be divided into as many equal shares as there are then living children of the Primary Beneficiary and deceased children of the Primary Beneficiary leaving issue.

Article I, § 1.4.3(a) provides that the trustee of a trust held for the benefit of the Primary Beneficiary's then living child or the then living issue of a deceased child (beneficiary) shall pay the beneficiary thereof income and principal deemed necessary to provide for his or her health, education, support, and maintenance. Article I, § 1.4.3(b) provides that the trustee shall distribute so much of the principal from the beneficiary's trust to the beneficiary's spouse, issue, and spouses of the issue as the beneficiary shall request in writing. Article I, § 1.4.3(c) provides the beneficiary with a testamentary limited power of appointment to appoint the trust estate among the beneficiary's spouse, issue, and the spouses of the issue.

Article I, § 1.4.3(d) provides that if the beneficiary dies before his or her trust terminates the balance of the trust shall be divided equally, by right of representation, and held as separate trusts for the benefit of his or her surviving issue, by right of representation, if any; if none, the balance of the trust shall be divided equally, by right of representation, and distributed to the trusts established for his or her surviving siblings and the issue of

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any deceased siblings, if any; if none, the balance of the trust shall be divided equally, by right of representation, and distributed to the trusts established for the Primary Beneficiary's surviving issue.

Article I, § 1.5 provides that the Trust shall terminate at the earlier of the death of the last survivor of the Settlers' issue or 21 years after the death of the last survivor of the Settlers' descendants who were living on Date 1.

Article I, § 1.6.1 provides that if any issue of the Primary Beneficiary are living when the Trust terminates, the trust estate shall be distributed outright to the issue, by right of representation. Article I, § 1.6.2 provides that upon the termination of the Trust, if no issue of the Primary Beneficiary are living, the trustee shall distribute the trust estate outright to the then living issue of the Primary Beneficiary's siblings, by right of representation.

On Date 2, Settlers each transferred shares of stock in Company to each Trust. Settlers retained an accounting firm to prepare each of their United States Gift (and Generation-Skipping Transfer) Tax Returns, Forms 709, reporting these transfers. Settlers each elected under § 2513 to treat their gifts to the Trusts as having been made one-half by each of them. The accounting firm mistakenly failed to allocate Settlers' GST exemptions to the assets transferred to each Trust on the Forms 709. Further, a Notice of Allocation was not attached to the Forms 709. On Date 3 Trustor died.

During Year 1, Settlers' attorney discovered the failure to properly allocate Settlers' GST exemptions to the Date 2 transfers. It has been represented that Trustor had not made any transfers to trusts or skip persons, to which Trustor's GST exemption was or was required to be applied.

Trustor's Estate has requested an extension of time under §§ 2642(g)(1) and 301.9100-3 to make a late GST exemption allocation to the Date 2 transfers to the Trusts and that such allocation will be based on the value of the property transferred to the Trusts on Date 2.

LAW and ANALYSIS:

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 2631(a) as in effect for the year involved, 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

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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 2632(c)(1) provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such unused portion, the entire unused portion shall be allocated to the property transferred.

Section 2632(e)(1) provides generally that 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 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 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, 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 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.

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

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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.

Notice 2001-50, 2001-34 I.R.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 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.

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, Trustor's Estate is granted an extension of time of sixty (60) days from the date of this letter to allocate Trustor's available GST exemption to the Date 2 transfers to the Trusts. The allocations, once made, will be effective as of Date 2, the date of the transfers to the Trusts. The value of the assets transferred to the Trusts on Date 2 will be used in determining the amount of the Trustor's GST exemption to be allocated to the transfers.

The allocation should be made on a separate supplemental Form 709 for the Date 2 year, and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A

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

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.

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. 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 taxpayers.

Sincerely,

Heather C. Maloy

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

Enclosures: Copy for § 6110 purposes
One copy of this letter