

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04-PLR-168911-02

Date:

MAY 09, 2003

Re:

Legend:

Grantor =
Date 1 =
Date 2 =
Year 1 =
Trust =

Son =
Independent Trustee =
Law Firm =
CPAs =
a =

Dear :

This is in response to your letter dated December 16, 2002, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations and section 2642(g) of the Internal Revenue Code to make an allocation of the generation-skipping transfer (GST) exemption to a transfer to a trust.

The facts and representations submitted are summarized as follows:

On Date 1, Grantor established Trust for the benefit of Son and Son's lineal descendants. Law Firm drafted Trust. Son and Independent Trustee serve as Trustees of Trust.

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Article I, Paragraph 1 of Trust provides, in part, that during the lifetime of Son, the Independent Trustee shall from time to time pay to or for the benefit of Son and Son's lineal descendants, so much of the net income and principal of Trust in such proportions and amounts as Independent Trustee shall determine in his absolute discretion.

Article I, Paragraph 2 provides that during his lifetime, Son shall have the power, exercisable at any time and from time to time to appoint any part or all of the principal and income of Trust to any one or more of his lineal descendants, except that no appointment may be made to Son himself, his estate, his creditors, or the creditors of his estate.

Article I, Paragraph 3 provides that Son shall have the power to appoint by specific reference to this special power in his will all or any part of the principal and income of Trust to any one or more of Grantor's lineal descendants, except that no appointment may be made to Son himself, his estate, his creditors, or the creditors of his estate.

Article I, Paragraph 4 provides that upon the death of Son, to the extent that the special powers of appointment were not fully exercised, the trustees shall continue to hold, administer, invest, and reinvest the Trust property as provided in Article II, if Son has any then living lineal descendant. If Son has no then living lineal descendant, the trustees shall distribute the Trust Property to the Grantor's then living lineal descendants, in equal shares, per stirpes and not per capita, or if there be none, to Son's estate.

Article II provides that at any time that the trustees are directed to hold, administer and dispose of Trust property in accordance with Article II, the trustees shall divide the Trust property into separate equal shares so as to provide one share of each child of Son living at such time and one share for the then living lineal descendants, in equal shares, of each deceased child of Son. The share so allocated to each child shall be held in accordance with Article II and the share so allocated to the lineal descendants of a deceased child of Son shall be held in accordance with Article III.

Article II, Paragraph 1 provides that during the lifetime of each child with reference to whom a trust was created, the Independent Trustee shall, from time to

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time, pay to or for the benefit of any one or more of the group consisting of such child and such child's lineal descendants, so much of the net income and principal of such trust in such proportions and amounts as the Independent Trustee determines in his absolute discretion.

Article II, Paragraph 2 provides that each child of Son is granted the power during his lifetime, subsequent to obtaining the age of twenty-one years, to appoint any part or all of the principal and income of his trust to one or more of his lineal descendants, except that no appointment may be made to such child himself, his estate, his creditors, or the creditors of his estate.

Article II, Paragraph 3 provides that each child shall have the power to appoint by specific reference to this special power in his will all or any part of the principal and income of his trust remaining at the time of his death to one or more of the group consisting of Grantor's lineal descendants, in such manner and at such times as child shall so designate, except that such will must be executed, ratified or confirmed after said child has attained the age of twenty-one years, and except further that no appointment shall be made, in trust or otherwise, to said child himself, his estate, his creditors, or the creditors of his estate.

Article II, Paragraph 4 provides that upon the death of each child, to the extent that the special powers of appointment in paragraphs 2 and 3 were not fully exercised, the Independent Trustee shall continue to hold the Trust property as provided in Article III, if such child has any then living lineal descendant. If such child has no then living lineal descendant, the Trust property shall be held in accordance with Article II for the remaining lineal descendants of Son, or if there be none, the Trust property shall be divided among the Grantor's then living lineal descendants, in equal shares, per stirpes and not per capita, or if there be none, the Trust property shall be distributed to said deceased child's estate.

Article III provides that at any time that the trustees are directed to hold property for the then living lineal descendants of Son in accordance with Article III, the trustees shall divide the Trust property into separate equal shares so as to provide one share of each child of said deceased child living at such time and one share for the then living lineal descendants, in equal shares, per stirpes and not per capita, of each deceased child of said deceased child of Son. The share so allocated to each grandchild shall be held in accordance with Article III and the part of the share payable to any such lineal descendant of a deceased grandchild of Son who shall have attained the age of majority shall be paid to him or her absolutely, free and clear of any trust. The part of the shares so allocated to the lineal descendants of a deceased grandchild of Son shall be held in accordance with Article III.

Article III, Paragraph 1 provides that the Independent Trustee shall expend or apply so much of the net income and principal of each trust as the Independent Trustee, in his sole discretion, may deem necessary or advisable for the education,

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support, care, health, and general welfare of the grandchild of Son for whom such trust was created and such grandchild's lineal descendants, whether born before or after the date of execution of this Trust indenture.

Article III, Paragraph 2 provides that the trust for each grandchild of Son shall continue until such grandchild has attained thirty-five years of age, or has died without attaining such age, and shall then and there cease and terminate. As to each grandchild's trust, upon such termination, the Trustees shall transfer, convey, deliver, and pay over the Trust property then constituting such trust to such grandchild, absolutely, if such grandchild shall be alive at such time. If such grandchild shall not be alive at such time, then distribution shall be made to the then living lineal descendants of such grandchild, in equal shares, per stirpes and not per capita, to be theirs absolutely, or if there be none, such Trust property shall be held in accordance with Article III for the then living lineal descendants of the child of Son who was the parent of such deceased grandchild. If there is no then living lineal descendant of such parent of such deceased grandchild, the trust property shall be held in accordance with Article II for the remaining lineal descendants of Son, or if there be none, said Trust property shall be divided among the Grantor's then living lineal descendants, in equal shares, per stirpes and not per capita, or if there be none, the Trust property shall be distributed to said deceased grandchild's estate absolutely.

On Date 2, Grantor contributed \$a to Trust. CPAs were directed to prepare Grantor's gift tax return (Form 709) for Year 1 and to allocate GST exemption as appropriate. CPAs timely filed the gift tax return and reported the \$a gift but did not allocate any of Grantor's GST exemption to the gift. Law Firm did not review the gift tax return before it was filed.

You have requested an extension of time under section 2642(g) and sections 301.9100-1 and 301.9100-3 to make an allocation of Grantor's GST exemption for the Year 1 transfer to Trust.

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST 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 the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means, with respect to any GST transfer, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under section 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess (if any) of 1 over the "applicable fraction." The applicable fraction, as defined in section 2642(a)(2) is a fraction, the numerator of which is the amount of the GST exemption

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allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust or involved in the 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 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)(1) provides that any allocation by an individual of his 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)(i) 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) provides that, except as provided in section 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 section 6075(b) for such transfer or is deemed to be made under section 2632(b)(1) or (c)(1)— (A) the value of such property for purposes of section 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of section 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 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, 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 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 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 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.

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 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). 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. In accordance with section 2642(g)(1)(B) and Notice 2001-50, 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, Grantor is granted an extension of time of 60 days from the date of this letter to make an

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allocations of his available GST exemption, with respect to the Year 1 gift of \$a to Trust. The allocation will be effective as of the date of the transfer to Trust, and the gift tax value of the transfer to Trust will be used in determining the amount of GST exemption to be allocated to Trust.

This allocation 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.

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

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.

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.

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter