

## Internal Revenue Service

Department of the Treasury

Number: **200340013**

Washington, DC 20224

Release Date: 10/3/2003

Index Numbers: 2632.01-00; 2642.00-00  
9100.00-00

Person to Contact:

Telephone Number:

Refer Reply To:

**CC:PSI:9-PLR-110816-03**

Date:

**July 1, 2003**

### LEGEND:

Date 1 =

Taxpayer 1 =

Trust 1 =

Trust 2 =

Interest =

X =

Taxpayer 2 =

Year 1 =

Son 1 =

Son 2 =

Date 2 =

Year 2 =

Dear :

This is in response to your letter dated February 6, 2003, and prior correspondence, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make allocations of generation-skipping transfer (GST) tax exemption.

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The facts and representations submitted are summarized as follows: On Date 1, Taxpayer 1 created two irrevocable trusts, Trust 1 and Trust 2, for the benefit of each of his children. Taxpayer 1 transferred Interest to each trust, which he valued at \$X for gift tax purposes. Taxpayer 1 and Taxpayer 2 elected on their Year 1 Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns to treat Taxpayer 1's transfers as being made one-half by Taxpayer 1 and one-half by Taxpayer 2.

Pursuant to Item I, paragraph (a)(1) of Trust 1, during the beneficiary's lifetime, when a contribution is made to the trust, the beneficiary has a non-cumulative right to direct the trustee to distribute outright to the beneficiary or for the beneficiary's benefit, a sum of money or property, the amount not to exceed the lesser of the value of the contribution or the present interest exclusion to which the donor of the contribution is entitled under § 2503(b) of the Internal Revenue Code for gifts to the beneficiary during the calendar year in which the contribution is made.

Item I, paragraph (a)(2) provides that if the aggregate amount of the contributions to the trust in any calendar year exceeds the amount that the beneficiary is entitled to withdraw and/or the beneficiary disclaims all or any portion of his right to receive any contribution, each child of the beneficiary who is living at the time of each contribution, has the right to direct the trustee to distribute to such child or for such child's benefit, a sum of money or property, the amount of which may not exceed the lesser of such child's pro rata share of the excess of the aggregate amount of the contribution over the amount of the contribution which the beneficiary is entitled to withdraw or the present interest exclusion to which the donor of the contribution is entitled under § 2503(b) for gifts to such child during the calendar year in which the contribution was made.

Item I, paragraph (a)(3) provides that in making distributions to or for the benefit of the beneficiary and/or the beneficiary's children, the trustee, in his discretion, is authorized to make distributions from the contributions received by the trust during the calendar year and/or from other principal in the trust.

Item I, paragraph (b) provides that all property in the trust not withdrawn pursuant to the provisions of paragraph (a) becomes part of the principal of the trust. Paragraph (b)(1) provides that until the beneficiary's death, the trustee may distribute to or for the benefit of the beneficiary and/or any of the beneficiary's issue as much of the income or principal of the trust as the trustee deems necessary to provide for the health, maintenance, and support of the beneficiary and his issue. Any income not distributed is accumulated and added to the principal of the trust.

Item I, paragraph (b)(2) provides that the trust terminates upon the beneficiary's death. At such time, all property remaining in the trust is to be distributed to such persons as the beneficiary may direct in his will by express reference to this power;

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except the beneficiary may not appoint the property to himself, to his estate, to his creditors, or to the creditors of his estate. To the extent the beneficiary does not exercise this limited power of appointment, the property is to be distributed per stirpes among the beneficiary's issue who survive him, if any, and if none, per stirpes among Taxpayer 1's issue who survive the beneficiary, if any, and if none, to Taxpayer 1's heirs, excluding Taxpayer 2.

The terms of Trust 1 and Trust 2 are the same except the beneficiary of Trust 1 is Son 1 and the beneficiary of Trust 2 is Son 2.

Taxpayer 1 and Taxpayer 2 were advised by their attorney that Trust 1 and Trust 2 should have an inclusion ratio of zero so each trust could make distributions to their grandchildren free of GST tax. On Date 2, Taxpayer 1 and Taxpayer 2 timely filed their Forms 709 reporting the Date 1 transfers. Taxpayer 1 and Taxpayer 2's accountant, however, inadvertently failed to allocate a portion of their unused GST exemptions to Trust 1 and Trust 2 when preparing the Forms 709. The failure to allocate the GST exemption was discovered by Taxpayer 1 and Taxpayer 2's attorney in Year 2.

Taxpayer 1 and Taxpayer 2 have requested an extension of time under § 301.9100-3 to allocate a portion of their unused GST exemptions to the Date 1 transfers to Trust 1 and Trust 2.

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)) that 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 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 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) 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 such allocation shall be effective on and after the date of such

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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 § 2642(g)(1), which was enacted into law on June 7, 2001.

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.

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 § 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) 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.

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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 1 and Taxpayer 2 are granted an extension of time of 60 days from the date of this letter to make allocations of their available GST tax exemptions in respect to the Date 1 transfers to Trust 1 and Trust 2. The allocations will be effective as of Date 1, the date of the transfers to Trust 1 and Trust 2, and the gift tax value of the transfers will be used in determining the amount of GST exemption to be allocated to each trust.

The allocations should be made on supplemental Forms 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.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers 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 specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code. In addition, we express or imply no opinion regarding the value of the property transferred to the trusts.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to the taxpayers.

This ruling is directed only to the taxpayers 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