

Internal Revenue Service

Department of the Treasury
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Person To Contact:

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Telephone Number:

Refer Reply To:

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Date: AUGUST 31, 2004

Re:

Legend

Husband =

Wife =

Child A =

Child B =

Trust =

Trust A =

Trust B =

Date 1 =

Year 1 =

Year 2 =

X =

Amount 1 =

Law Firm =

Accounting Firm =

Dear _____ :

This is in response to a letter from your authorized representative dated December 10, 2003, requesting an extension of time under § 301.9100 of the Procedure and Administration Regulations to make an allocation of generation-skipping transfer (GST) exemption.

The facts and representations submitted are summarized as follows: Husband established an irrevocable trust, Trust, under a trust agreement dated Date 1 in Year 1.

During Year 1, Husband transferred certain assets to Trust. Under Article IV of Trust, the Trust corpus was divided into two separate trusts: Trust A with respect to which Child A was the "Primary Beneficiary" and Trust B with respect to which Child B was the "Primary Beneficiary." Trust A and Trust B were each funded with x assets.

Article VI of the trust instrument generally provides that until a Primary Beneficiary reaches the age of 23, the trustee shall distribute income and principal to such beneficiary as in the trustee's discretion is deemed necessary for the health, support, education, and maintenance of the beneficiary. Any income not distributed is added to principal. Once a Primary Beneficiary reaches age 23, the trustee is to distribute income to the beneficiary and make discretionary distributions of principal according to the above-referenced standard. In addition, the trustee may make discretionary distributions of principal to a Primary Beneficiary's spouse or descendants. Provided Trust does not terminate as a result of such discretionary distributions, Trust A and Trust B will continue until the death of the respective Primary Beneficiary. On termination, each Primary Beneficiary has a limited power of appointment over 50% of the trust. The remaining principal, including any unappointed property, is to be distributed to such Primary Beneficiary's then living descendants, per stirpes, or if there are none, to the then living descendants of Husband per stirpes.

Pursuant to Trust's terms, whenever a contribution is made to Trust, certain beneficiaries are granted a right to withdraw the contribution.

Husband retained Law Firm in connection with the creation of Trust, and Law Firm assisted in the planning and preparation of the trust instrument. For the Year 1 calendar year, Accounting Firm prepared and Husband and Wife timely filed separate Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return. Husband and Wife treated the gift by Husband as made one-half by Husband and one-half by Wife under § 2513. In preparing the gift tax returns, Accounting Firm inadvertently failed to allocate Husband's or Wife's available GST exemption to Trust. In Year 2, Law Firm discovered the failure by Accounting Firm to make the allocations.

To date, income has been distributed from Trust A to Child A and from Trust B to Child B. However, no taxable distributions, taxable terminations, or any other events have occurred with respect to Trust A and Trust B that would give rise to a GST liability on the part of either trust or any of the beneficiaries. Husband and Wife had, and still have, sufficient GST tax exemption remaining and available to allocate sufficient GST tax exemption to Trust A and Trust B in order for each trust to have an inclusion ratio of zero.

Section 2501 imposes a tax on the transfer of property by gift by an individual, resident or nonresident. Section 2513(a) provides generally that, for gift tax purposes, if the parties consent, a gift made by one spouse to any person other than his or her

spouse shall be considered as made one-half by donor spouse and one-half by his or her spouse.

Section 2601 imposes a tax on every generation-skipping transfer made by a “transferor” to a “skip person.”

Under § 2652(a)(1) and § 26.2652-1(a)(1), generally, the transferor for purposes of the GST tax is the individual with respect to whom the property was last subject to Federal estate or gift tax. Section 2652(a)(2) and § 26.2652-1(a)(4) provide that, if, under § 2513, one-half of a gift is treated as made by an individual and one-half is treated as made by the spouse of the individual, then for purposes of the GST tax, each spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor spouse, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines “applicable rate” as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the “applicable fraction.” The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of the GST exemption allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust (or involved in the direct skip).

Section 2631(a), as in effect for the tax years at issue, provided 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) 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 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) 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 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) 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, 2001-2 C.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 transfer 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.

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.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose date is prescribed by a regulation (and not expressly provided by statute). 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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Husband is granted an extension of time of 60 days from the date of this letter to make an allocation of Husband's available GST exemption, with respect to one-half of the assets Husband transferred to Trust in Year 1 treated as attributable to Husband in accordance with § 2513. The allocation will be effective as of the respective date of the transfer to Trust, and the inclusion ratios of Trust A and Trust B will be determined based on the value of the transfer to Trust as determined for federal gift tax purposes and the amount of exemption allocated to Trust.

The allocation should be made on a supplemental Form 709 and filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center – Stop 82, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 709.

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 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.

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.

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter