

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B09

PLR-129646-04

Date:

November 30, 2004

### Legend:

Taxpayer =

Date 1 =

Trust =

Spouse =

Year 1 =

Date 2 =

Year 2 =

Date 3 =

Year 3 =

X =

Year 4 =

Date 4 =

Date 5 =

Date 6 =

Dear :

This is in response to your authorized representative's letter dated May 25, 2004, requesting an extension of time under § 2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make allocations of Taxpayer's generation-skipping transfer (GST) tax exemption.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer established the Trust, an irrevocable trust for the benefit of Taxpayer's lineal descendants and Spouse.

Article I(1) of the Trust provides that during the lifetimes of Taxpayer and Spouse, the trustee shall pay to or for the benefit of one or more of the group consisting of Taxpayer's lineal descendants and Spouse so much of the net income and principal of the Trust, in such proportions as the trustee shall determine.

Article I(2) provides that during the lifetimes of Taxpayer and Spouse, Spouse shall have the annual, noncumulative power to appoint to himself part or all of the principal of the trust representing Taxpayer's additions to the Trust for such year up to an amount equal to the largest amount which when added to all other gifts by Taxpayer to Spouse during the applicable calendar year would qualify for the exclusion from taxable gifts under §§ 2503(b) and 2523(i)(2). The trustees are required to notify Spouse in writing on an annual basis of this power of appointment. Spouse shall exercise this power by submitting written notice to the trustees within thirty days of such notice by the trustees or, in any event, by November 30 of each calendar year if no trustee notice is given.

Article I(3) provides that upon the first to die of Taxpayer and Spouse, the trustee shall dispose of the trust property as follows: if Taxpayer survives Spouse, the Trust shall be administered in accordance with Article II; if Taxpayer predeceases Spouse, the Trust shall be administered in accordance with Article III.

Article II provides that during the lifetime of Spouse, the trustee shall pay to or for the benefit of any one or more of the group consisting of Taxpayer's lineal descendants and Spouse so much of the net income and principal of the Trust as the trustee shall determine. Article II(2) provides that Spouse shall have a special testamentary power to appoint all or any part of the principal and income of the Trust remaining at the time of his death to any one or more of the group consisting of Taxpayer's lineal descendants. Upon the death of Spouse, if he survives Taxpayer, to the extent that Spouse did not exercise this power of appointment, the trustees shall continue to hold and administer the Trust as provided in Article III.

Article III provides that the trustees shall divide the trust property into separate, equal shares so as to provide one share for each of Taxpayer's children living at that time, and one share for the then living lineal descendants of each of Taxpayer's deceased children. Article III(1) provides that during the lifetime of each child for whom a trust was created, the trustee shall pay to or for the benefit of any one or more of the group consisting of that child and that child's lineal descendants so much of the net income and principal of the trust as the trustee shall determine. Article III also provides each child with special inter vivos and testamentary powers of appointment. Upon the death of a child and to the extent that the special powers of appointment are not fully exercised, the trustee shall continue to hold and administer the trust for the benefit of the deceased child's living lineal descendants, or if none, held and administered for the benefit of Taxpayer's remaining lineal descendants. If Taxpayer has no remaining lineal descendants, the trust property shall be distributed to the then living lineal descendants of the children of Taxpayer's parents, in equal shares, per stirpes.

On Date 1 in Year 1, Date 2 in Year 2, and Date 3 in Year 3, Taxpayer transferred publicly traded stock valued at \$x to the Trust. Taxpayer, who resided outside of the country at the time, relied upon her financial advisor, attorney, and accountant regarding any necessary tax filings. Taxpayer was not advised to file a

Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return (“gift tax return”) for Year 1, Year 2, or Year 3. As a result, no gift tax return was filed for Year 1, Year 2, or Year 3, and no allocation of Taxpayer’s GST exemption was made for the transfers to the Trust.

In Year 4, Taxpayer’s attorneys reviewed the Trust and discovered that gift tax returns had not been filed for Year 1, Year 2, or Year 3 and that none of Taxpayer’s GST exemption had been allocated to the Trust.

Taxpayer has requested an extension of time to make allocations of her GST exemption with respect to the Year 1, Year 2, and Year 3 transfers to the Trust and that the allocations will be effective upon and made based on the value of the property transferred to the Trust at the close of the estate tax inclusion periods (ETIPs) that occurred when Spouse’s withdrawal right lapsed.

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 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.

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)) which 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 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides, in part, 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. An allocation of GST exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust.

Section 26.2632-1(c)(1) provides, in part, that where an allocation has not been made prior to the termination of the ETIP, an allocation is effective at the termination of the ETIP during the transferor’s lifetime if made by the due date for filing a Form 709 that would apply to a taxable gift occurring at the time the ETIP terminates (timely ETIP return).

Section 26.2632-1(c)(2)(i) provides, generally, that an ETIP is the period during which, should death occur, the value of transferred property would be includible (other than by reason of § 2035) in the gross estate of the transferor or the spouse of the transferor.

Section 26.2632-1(c)(2)(ii)(B) provides that for purposes of § 26.2632-1(c)(2), the value of transferred property is not considered as being subject to inclusion in the gross estate of the spouse of the transferor, if the spouse possess with respect to any transfer to the trust, a right to withdraw no more than the greater of \$5,000 or 5 percent of the trust corpus, and such withdrawal right terminates no later than 60 days after the transfer to the trust.

Section 26.2632-1(c)(3)(iv) provides that in the case of an ETIP arising by reason of an interest or power held by the transferor's spouse under § 26.2632-1(c)(2)(i)(B), the ETIP terminates at the first to occur of: (A) the death of the spouse; or (B) the time at which no portion of the property would be includible in the spouse's gross estate (other than by reason of § 2035).

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, on and after the close of such estate tax inclusion period.

Section 2642(f)(1) provides, generally, that except as provided in regulations, for purposes of determining the inclusion ratio, if an individual makes an inter vivos transfer of property, and the value of such property would be includible in the gross estate of such individual under chapter 11 if such individual died immediately after making such transfer (other than by reason of § 2035), any allocation of GST exemption to such property shall not be made before the close of the estate tax inclusion period (and the value of such property shall be determined under § 2642(f)(2)).

Section 2642(f)(2) provides that in the case of any property to which § 2642(f)(1) applies, the value of such property shall be its value for purposes of chapter 11 if such property is includible in the gross estate of the transferor (other than by reason of § 2035), or its value as of the close of the estate tax inclusion period (or, if any allocation of GST exemption to such property is not made on a timely filed gift tax return for the calendar year in which such period ends, its value as of the time such allocation is filed with the Secretary).

Section 2642(f)(3) provides that for purposes of § 2642(f), the term "estate tax inclusion period" means any period after the transfer described in § 2642(f)(1) during which the value of the property involved in such transfer would be includible in the gross

estate of the transferor under chapter 11 if he died. Such period shall in no event extend beyond the earlier of the date on which there is a generation-skipping transfer with respect to such property, or the date of the death of the transferor.

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 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 GST 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 six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except in subtitles E, G, H, and I.

Section 301.9100-3(a) provides that, in general, requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3.

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 election 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 to 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 is granted an extension of time of 60 days from the date of this letter to make allocations of Taxpayer's available GST exemption with respect to the transfers to the Trust in Year 1, Year 2, and Year 3. The allocations will be effective as of the close of the respective ETIPs in Year 1, Year 2, and Year 3. Specifically, the Year 1 allocation will be effective as of Date 4, the Year 2 allocation will be effective as of Date 5, and the Year 3 allocation will be effective as of Date 6. For purposes of determining the inclusion ratio and the amount of GST exemption to be allocated to the Trust, the value of the transferred property shall be its value at the close of the ETIPs.

The allocations should be made on Forms 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 each Form 709. Copies are enclosed for this purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In addition, we express or imply no opinion regarding the value of the property transferred to the Trust.

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.

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

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 & Special Industries)

Enclosures

Copy for § 6110 purposes  
Copy of this letter