

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Third Party Communication: None
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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-153586-07

Date:

May 28, 2008

Legend:

| | |
|------------|---|
| Husband | = |
| Wife | = |
| Trust 1 | = |
| Trust 2 | = |
| Trust 3 | = |
| Accountant | = |
| Attorney | = |
| Date 1 | = |
| Date 2 | = |
| Date 3 | = |
| Year 1 | = |
| Year 2 | = |
| Year 3 | = |
| Year 4 | = |
| <u>x</u> | = |

Dear :

This is in response to correspondence, dated November 19, 2007, from your authorized representative requesting an extension of time under § 301.9100 of the Procedure and Administration Regulations to make an election under § 2632(c)(5)(A)(i)(II) of the Internal Revenue Code to opt out of the automatic allocation rules under § 2632(c) with respect to transfers to certain trusts.

Facts

On Date 1, Husband established an irrevocable trust (Trust 1), for the benefit of his descendants. On Date 2, Husband established a second irrevocable trust (Trust 2), for the benefit of Wife and his descendants. On Date 3, Wife established an irrevocable trust (Trust 3), for the benefit of her descendants.

Article II, paragraph B of Trusts 1 and 2 provides that during Husband's lifetime, the trustee may distribute all or any portion of the net income and principal of the trust to any one or more of Husband's children in such amounts and at such times as the trustee determines to be necessary for such child's support, health, maintenance, and education, and to one or more of Husband's descendant's (other than Husband's children) in such amounts, and at such times as the trustee, in the trustee's discretion, may determine.

Article II, paragraph B of Trust 3 provides that during Wife's lifetime, the trustee may distribute all or any portion of the net income and principal of the trust to any one or more of Wife's children in such amounts and at such times as the trustee determines to be necessary for such child's support, health, maintenance, and to any one or more of Wife's descendants (other than Wife's children) in such amounts, and at such times as the trustee, in the trustee's discretion, may determine.

Article IV, paragraph A of Trusts 1, 2, and 3 provides that upon the death of the grantor (Husband or Wife), the trusts will be divided into separate trusts for the grantor's children. Article IV, paragraph B of each trust provides that the trustee of each child's trust may distribute all or any portion of the net income and principal of the child's trust to any one or more of the group consisting of the child and the child's descendants in such amounts and at such times as the trustee, in the trustee's discretion, may determine. Further, paragraph B provides that the trustee shall distribute \$x per month to each child once they have attained the age of 25 (adjusted annually based on the consumer price index) and after a child reaches the age of 50, the trustee shall distribute all or any portion of the principal of the child's trust to a child and such other appointees, either outright or in trust, as child may appoint from time to time, but the aggregate amount so appointed is not to exceed one-third of the principal of the trust on the date the child reaches age 50 before the child reaches age 55, nor two-thirds of the principal of the trust on the date the child reaches age 55 before the child reaches the age of 60, when the remainder of the principal may be appointed.

Husband and Wife expected that Trusts 1, 2, and 3 would terminate during the children's lifetimes, and, as such, did not want to allocate their GST exemption to the trusts.

Husband made gifts to Trust 1 in Years 2 and 3 and to Trust 2 in Years 3 and 4. Wife made gifts to Trust 3 in Years 1, 2, 3 and 4. All gifts to Trusts 1, 2 and 3 were cash. Husband and Wife elected to gift split their gifts to the trusts. Accountant reported the gifts on Forms 709, United States Gift (and Generation-Skipping) Tax Returns. All returns were timely filed, but Husband and Wife were not advised by Accountant that, under § 2632(c)(5), it was necessary to elect out of the automatic allocation rules of § 2632(c) in order not to have their GST exemption automatically allocated to the trusts.

Husband and Wife relied on Accountant to properly prepare the Form 709s for Years 1 through 4 and both provided affidavits that they were not advised by Accountant about the automatic allocation rules or the need to elect out of such rules. Accountant

provided an affidavit in which she swore that she provided no advice and had no discussions with Husband and Wife regarding the allocation of their GST exemption to the transfers made to Trusts 1, 2, and 3 in Years 1 through 4. Accountant also swore that she did not advise Husband and Wife regarding the automatic allocation rules or the need to elect out of such rules. The error was discovered when Attorney was reviewing the Forms 709.

Husband and Wife request an extension of time (as authorized under § 2642(g) and §§ 301.9100-1 and 301.9100-3) to opt out of the automatic allocation rules with respect to their transfers to Trusts 1, 2, and 3 in Years 1, 2, 3 and 4.

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) provides that, for purposes of determining the GST tax, every individual shall be allowed a GST exemption amount 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(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(c)(3)(A) provides that for purposes of this subsection, the term "indirect skip" means any transfer of property (other than a direct skip) subject to the tax imposed by chapter 12 made to a GST trust. Section 2632(c)(3)(B) provides, in part, that the term "GST trust" means a trust that could have a generation-skipping transfer with respect to the transferor unless the trust instrument provides that more than 25 percent of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons (I) before the date that the individual attains age 46, (II) on or before on or more dates specified in the trust instrument that will occur before the date that such individual attains age 46, or (III) upon the occurrence of an event that, in accordance with regulations prescribed by the Secretary, may reasonably be expected to occur before the date that such individual attains age 46.

Section 2632(c)(5)(A)(i)(II) provides that an individual may elect to have this subsection not apply to any or all transfers made by such individual to a particular trust. Section 2632(c)(5)(B)(ii) provides that an election under § 2632(c)(5)(A)(i)(II) may be made on a timely filed gift tax return for the calendar year for which the election is to become effective.

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, 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 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 200150, 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.

A GST trust is defined in § 2632(c)(3)(B), in general, as any trust that could have a generation-skipping transfer. A trust is a GST Trust unless it meets one of the exceptions described in § 2632(c)(3)(B)(i) through (vi) where a sufficient possibility exists (based on the statutory criteria) that the trust corpus will not be distributed to lower generations. Based upon the facts submitted and the representations made,

none of the exceptions in § 2632(c)(3)(B) apply to Trust and, accordingly, Trusts 1, 2 and 3 are GST Trusts for purposes of § 2632(c).

Further, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Husband and Wife are granted an extension of time of 60 days from the date of this letter to elect out of the automatic allocation rules under § 2632(c)(5)(A)(i)(II) with respect to transfers to Trusts 1, 2, and 3 in Years 1, 2, 3 and 4.

The elections should be made on Supplemental Forms 709 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Forms 709s. A copy is enclosed for this purpose.

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 your authorized representative.

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.

Sincerely,

William P. O'Shea
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for § 6110 purposes
Copy of this letter

cc: