

Internal Revenue Service

Department of the Treasury
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Telephone Number:

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Date:
September 2, 2009

Donor 1	=
Donor 2	=
Date 1	=
Date 2	=
Exempt Trust	=
Non-exempt	=
Trust	
Accountant	=
X	=

Dear _____ :

This is in response to your submission dated February 10, 2009, and subsequent correspondence, requesting an extension of time pursuant to § 2642(g) of the Internal Revenue Code and § 301.9100-3 of the Procedure and Administration Regulations to allocate generation-skipping transfer (GST) tax exemption.

On Date 1, Donor 1 established Exempt Trust and Non-exempt Trust for the benefit of Donor 1 and Donor 2's children and their issue.

Under the terms of Exempt Trust, each child receives a separate share. Income from the share is payable to or for the benefit of the child for life, and upon the child's death, the share passes as the child appoints pursuant to a limited power of appointment. In default of appointment, the share passes to the child's issue.

Under the terms of Non-exempt Trust, each child also receives a separate share. Income from the share is payable to or for the benefit of the child, with the share passing outright to the child at age X. In the event of the child's death prior to age X, the share passes as the child appoints pursuant to a general power of appointment. In default of appointment, the share passes to the child's estate in an amount sufficient to pay the transfer taxes thereon, with the remainder passing to the child's Issue.

On Date 2, Donor 1 and Donor 2 funded the trusts, each transferring an amount approximating his or her available GST exemption to Exempt Trust and a smaller amount to Non-exempt Trust. On timely filed Forms 709 prepared by Accountant, each Donor erroneously allocated GST exemption to the transfer to Non-exempt Trust. No GST exemption was allocated to the transfer to Exempt Trust. In the interim, there have been no generation skipping transfers from Exempt Trust, no inconsistent allocations of GST exemption, and both Donor 1 and Donor 2 have sufficient GST exemption available to allocate to the Date 2 transfers to Exempt Trust.

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 2613 defines a skip person, in part, as a natural person assigned to a generation which is two or more generations below the generation assignment of the transferor.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines the applicable rate as the product of the maximum 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 GST exemption under § 2631 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), as effective in the year at issue, 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 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)(4)(i) 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. The allocation must clearly identify the trust to which the allocation is being made, the amount of GST exemption allocated to it, and if the allocation is late or

if an inclusion ratio greater than zero is claimed, the value of the trust assets at the effective date of the allocation. With respect to a timely allocation, an allocation of GST exemption becomes irrevocable after the due date of the return. Except as provided in § 26.2642-3 (relating to charitable lead annuity trusts), 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. An allocation is also void if the allocation is made with respect to a trust that has no GST potential with respect to the transferor making the allocation, at the time of the allocation. For this purpose, a trust has GST potential even if the possibility of a GST is so remote as to be negligible.

Section 2652(a)(1)(A) provides that in the case of property subject to the estate tax, the decedent is the transferor for GST purposes.

Section 2041(a)(2) includes in the gross estate property over which the decedent has at the time of his death a general power of appointment created after October 20, 1942.

Section 2642(b)(1) provides, in relevant part, that if the allocation of the GST exemption to any transfers of property is made on a timely filed gift tax return or is deemed to be made under § 2632(b)(1) or (c)(1), the value of such property for purposes of determining the inclusion ratio shall be its value as finally determined for gift tax purposes and such allocation shall be effective on and after the date of such transfer.

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 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.

Section 301.9100-3(a) provides, in part, that requests for relief subject to § 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 the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, except as provided in § 301.9100-3(b)(3)(i) through (iii), 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(c)(1) provides, in part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Initially, we note that at the time of the allocation of GST exemption to Non-exempt Trust, the trust had no GST potential with respect to either Donor 1 or Donor 2. As noted above, income from a child's share is payable to or for the benefit of the child, with the share passing outright to the child at age X. A child is not a skip person with regard to the child's parent. Section 2613. Thus, payments from Non-exempt Trust during a child's lifetime are not generation skipping transfers with respect to Donor 1 and Donor 2. On the other hand, in the event the child does not attain age X, payments made after a child's death are subject to the child's general power of appointment, causing the share to be includible in the child's gross estate. Section 2041(a)(2). One effect of this inclusion is to make the child, as opposed to Donor 1 or Donor 2, the transferor of those payments for GST purposes. Section 2652(a)(1)(A). Accordingly, Donor 1 and Donor 2's allocation of GST exemption to Non-exempt Trust is void. Section 26.2632-1(b)(4)(i).

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, an extension of time of 60 days from the date of this letter is granted in which to allocate Donor 1's and Donor 2's GST exemption to their respective Date 2 transfers to Exempt Trust. The allocations will be effective as of the date of the transfers to Exempt Trust. The allocations should be made on amended Forms 709 for the year including Date 2, and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each Form 709. Two copies of this letter are 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.

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.

Sincerely,

CURT G. WILSON
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures

Copy for § 6110 purposes (1)
Copy of this letter (2)

cc: