

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:

Index Number: 2642.00-00, 9100.00-00,
9100.22-00

Telephone Number:

Refer Reply To:

CC:PSI:04

PLR-125301-09

Date:

October 30, 2009

TY:

Legend

- Donor =
- Spouse =
- Child 1 =
- Child 2 =
- Child 3 =
- Date 1 =
- Date 2 =
- Year 1 =
- Year 2 =
- Trust =
- Trust 1 =
- Trust 2 =
- Trust 3 =
- Company =
- Company's CFO =
- Attorneys =
- Accounting Firm =

Dear :

This responds to the letter dated May 14, 2009, and subsequent correspondence submitted by your authorized representative, requesting an extension of time under § 2642(g) of the Internal Revenue Code and § 301.9100-3 of the Procedure and Administration Regulations to allocate Donor's and Spouse's generation-skipping

transfer (GST) exemption to the transfer made to Trust 1, Trust 2, and Trust 3 on Date 2 in Year 1.

Facts

Donor created Trust for the benefit of his children and their issue on Date 1 in Year 1, which is prior to December 31, 2000. Trust has GST potential. On Date 2, Donor funded Trust with shares of stock in Company. Under the terms of Trust, the administrative trustee was directed to divide the trust estate into three equal shares, one for the benefit of each of Donor's and Spouse's children and their descendants. Pursuant to this provision, the administrative trustee established Trust 1 for the benefit of Child 1 and her descendants, Trust 2 for the benefit of Child 2 and her descendants, and Trust 3 for the benefit of Child 3 and his descendants. Company's CFO was responsible for directing and overseeing the preparation of all tax returns for Donor and Spouse. Attorneys informed Company's CFO that Donor and Spouse needed to file Forms 709, United States Gift (and Generation Skipping Transfer) tax returns, and to allocate GST exemption to the transfer to Trust 1, Trust 2, and Trust 3. Attorneys did not advise Donor or Spouse to file gift tax returns and allocate their GST exemption.

Company's CFO inadvertently failed to retain an accounting firm to prepare Donor's and Spouse's gift tax returns for Year 1 and to allocate GST exemption to Trust 1, Trust 2, and Trust 3. In Year 2, Donor and Spouse retained Accounting Firm to file gift tax returns for Year 2. Accounting Firm discovered that no prior gift tax returns had been filed for Donor or Spouse.

Donor and Spouse represent that to date, no taxable distributions, taxable terminations, or any other GST taxable events have occurred with respect to any of the trusts that would result in a GST tax liability on the part of any of the trusts or their beneficiaries. Both Donor and Spouse have sufficient GST tax exemption remaining and available to allocate with respect to the transfer to Trust 1, Trust 2, and Trust 3. Donor and Spouse intend to treat the transfer on Date 2 for gift tax purposes as made one-half by Donor and one-half by Spouse pursuant to § 2513.

Law and Analysis

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, for gift tax purposes, be considered as made one-half by the donor spouse and one-half by his or her spouse. Both spouses must consent to the application of gift-splitting with respect to all gifts made during the calendar year. Section 2513(b) provides that such consent may be signified at any time until the 15th of April following the close of the year in which the gift was made unless no return has been filed for such year by either spouse. The consent may not be signified after a return for such year is filed by either spouse. Thus, if a late return is filed, the consent must be made on the first return filed for such year.

Section 2601 imposes a tax on every GST. A GST 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 GST 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 2642(a) provides the method for determining the inclusion ratio.

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), in effect at the time of the transfer, 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)(4) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of GST exemption to property transferred during the transferor’s lifetime is made on Form 709.

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 of such gift 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 2654(b)(1) and (2) provide that for purposes of chapter 13, the portion of a trust attributable to transfers from different transferors shall be treated as separate trusts, and substantially separate and independent shares of different beneficiaries in a trust shall be treated as separate trusts.

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 the value of such property for purposes of determining the inclusion ratio under § 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of § 2001(f)(2)).

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). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1)(A), which was enacted into law on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief, 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. Section 2642(g)(1)(B) further provides that for purposes of determining whether to grant relief, the time for making the allocation 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 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) 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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Donor and Spouse intend to elect to split gifts with respect to the Year 1 transfer to Trust 1, Trust 2, and Trust 3. Assuming the requirements are satisfied under § 2513, Donor and Spouse will be treated as the transferors for GST purposes of one-half of the entire value of the property transferred by Donor, regardless of the interest Spouse is actually deemed to have transferred under § 2513. Therefore, Donor and Spouse are each granted an extension of time of sixty (60) days from the date of this letter to allocate Donor's and Spouse's available GST exemption to the portion of Trust 1, Trust 2, and Trust 3 for which Donor and Spouse are each the transferor. The allocations will be effective as of the date of transfer, and will be based on the gift tax value of the assets transferred to Trust 1, Trust 2, and Trust 3 on Date 2.

The allocations should be made on Forms 709 for Year 1 and filed with the Internal Revenue Service, Cincinnati Service Center—Stop 82, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Forms. Two copies 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) of the Code 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,

Curt G. Wilson
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures: Copy for § 6110 purposes
Two copies of this letter

cc: