

## 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:B04

PLR-128234-12

Date:

December 19, 2012

Re:

### Legend

Husband =

Wife =

Son 1 =

Son 2 =

Daughter =

Granddaughter =

Trust 1 =

Trust 2 =

Trust 3 =

Accountant =

Law Firm =

Date 1 =

Date 2 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

Year 7 =

Year 8 =

Year 9 =

Year 10 =

Dear \_\_\_\_\_ :

This letter responds to correspondence, dated June 28, 2012, 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 two irrevocable trusts: Trust 1 for the benefit of Daughter, Son 1 and their descendants, and Trust 2 for the benefit of Son and his descendants. On Date 2, Husband established another irrevocable trust (Trust 3) for the benefit of Daughter and her descendants.

Husband made gifts to Trusts 1, 2, and 3 prior to the enactment of § 2632(c), the automatic allocation rules for applying GST exemption to GST trusts. Husband also made gifts to Trust 1 in Years 1 through 8. Husband made gifts to Trust 2 in Years 1 through 10, and Wife made gifts to Trust 2 in Years 2 through 5. Husband made gifts to Trust 3 in Years 1 through 10. Year 1 is the year in which the automatic allocation rules became effective. Husband and Wife anticipated that Trust 1 and Trust 2 would terminate during their children's lifetime and did not intend to allocate any of their GST exemption to Trusts 1, 2, or 3.

Accountant reported the gifts on Forms 709, United States Gift (and Generation-Skipping) Tax Returns. Husband and Wife elected to gift split the Years 1 through 10 gifts to the trusts on the Forms 709. All returns were timely filed. However, for years 1 through 9 Form 709s, Accountant did not advise Husband and Wife that, under § 2632(c)(5), they had to elect out of the automatic allocation rules of § 2632(c) in order not to have their GST exemption automatically allocated to the trusts. The error was discovered when Law Firm was reviewing the Forms 709 for Year 10. Husband and Wife elected to opt out of the allocation rules on their Year 10 Forms 709.

Husband and Wife request an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3) to opt out of the automatic allocation rules with respect to the Years 1 through 9 transfers to Trusts 1, 2, and 3.

### Law and Analysis

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 exceptions enumerated in (i) through (vi) apply.

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 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States. Section 2513(a)(1) only applies if both spouses have signified their consent to the application of this section in the case of all such gifts made during the calendar year by either while married to the other.

Section 2652(a)(2) provides 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 such individual, such gift shall be so treated for purposes of chapter 13. Under § 26.2652-1(a)(4), in the case of a transfer with respect to which the donor's spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513. The donor is treated as the transferor of one-half of the value of the entire property.

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 the trusts. Accordingly, Trusts 1, 2 and 3 are GST Trusts for purposes of § 2632(c).

Based upon the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Wife is granted an

extension of time of 120 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 the portion of the Years 1 through 10 transfers (for which she is treated as the transferor for purposes of chapter 13) to Trusts 1, 2, and 3.

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 specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

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.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Associate Chief Counsel  
(Passthroughs & Special Industries)

By:

\_\_\_\_\_  
Lorraine E. Gardner, Senior Counsel  
Branch 4  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure

Copy for section 6110 purposes

cc: