Internal Revenue Service

Number: **201523003**
Release Date: 6/5/2015

Index Number: 2513.00-00, 2632.00-00, 2652.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-130266-14

Date:
January 28, 2015

RE:

Legend

Husband
Wife
Family Trust
Trust 1
Trust 2
Trust 3
Trust 4
Year 1
Year 2
Year 3
Year 4
Date 1
Date 2
Date 3
Date 4
Date 5
Date 6
Date 7
Date 8
Date 9
Date 10
Date 11
a
b
c

Dear :

This letter responds to your authorized representative's letter dated July 24, 2014, requesting rulings regarding the effect of gift splitting under § 2513 of the Internal Revenue Code to certain transfers to trusts and the application of the Generation-Skipping Transfer (GST) allocation rules under § 2632(c) to the transfers to the trusts.

The facts and representations submitted are summarized as follows:

On Date 1 (during Year 1), Husband created Family Trust for the benefit of his spouse (Wife) and their descendants. On Date 2 (during Year 1), Husband transferred $a to Family Trust.

Article 2, section 2.1 of Family Trust provides that the trustee may pay to or use for the benefit of any one or more of Husband's descendants and the spouses of his descendants so much or all of the income and principal of the trust in such proportions as the trustee, in the trustee's discretion, determines to be required for their respective support, health, and education. The independent trustee may pay to or use for the benefit of any one or more of Wife, Husband's descendants, and his descendant's spouses so much or all of the income and principal of the trust in such proportions as the independent trustee, in the trustee's discretion, determines to be desirable for their respective welfare and best interests. Any income not so paid or used shall be added to principal.

On Date 1 (during Year 1), Husband created and funded Trust 1 and Trust 2 for the benefit of Husband during the annuity periods. Trust 1 and Trust 2 were grantor retained annuity trusts (GRATs). Trust 1's annuity term ended on Date 4 (during Year 2). Trust 2's annuity term ended on Date 8 (during Year 3). When the annuity terms ended, the remaining principal of Trust 1 and Trust 2 became payable to Family Trust. The end of the annuity terms represented the close of the estate tax inclusion period (ETIP) for purposes of chapter 13.

Husband and Wife each filed a Year 1 Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return on Date 3. On each form, Husband and Wife signified their consent to treat the Year 1 gifts to Family Trust, Trust 1, and Trust 2 as having been made one-half by each spouse under § 2513. Husband and Wife each attached a statement to his and her Year 1 Form 709 electing out of the automatic allocation rules of § 2632(c) with respect to the $a transfer to Family Trust. On each Year 1 Form 709, Husband and Wife each affirmatively allocated his and her GST exemption to $b, a portion of the total amount $a transferred to Family Trust. Husband and Wife did not allocate his or her GST exemption to the remaining portion equal to $c

that was transferred to Family Trust. Husband and Wife did not allocate his or her GST exemption to the transfers to Trust 1 or Trust 2 because Trust 1 and Trust 2 were subject to ETIPs.

Husband filed a Year 2 Form 709 on Date 6 and, in an attachment, reported the transfer of property from Trust 1 to Family Trust. Husband did not allocate his GST exemption to this transfer. Wife did not file a Year 2 Form 709 and, accordingly, did not allocate her GST exemption to any portion of the transfer of property from Trust 1 to Family Trust.

On Date 5 (during Year 3), Husband created and funded Trust 3, a GRAT, for the benefit of Husband during the annuity period. Trust 3's annuity term ended on Date 10 (during Year 4). When the annuity term ended, the remaining principal of Trust 3 became payable to Family Trust.

On Date 7 (during Year 3), Husband created and funded Trust 4, a GRAT, for the benefit of Husband during the annuity period. Trust 4's an annuity term ended on Date 11 (during Year 4). When the annuity term ended, the remaining principal of Trust 4 became payable to Family Trust.

Husband and Wife each filed a Year 3 Form 709 on Date 9. On each form, Husband and Wife signified their consent to treat the Year 3 gifts to Trust 3 and Trust 4 as having been made one-half by each spouse under § 2513. Husband and Wife did not allocate his or her GST exemption to the transfers to Trust 3 and Trust 4 because both Trusts were subject to ETIPs. Husband and Wife affirmatively allocated his and her GST exemption to one-half of the transfer of property from Trust 2 to Family Trust. Further, in an attachment to the forms, Husband and Wife reported that his and her GST exemption was automatically allocated to one-half of the Year 2 transfer of property from Trust 1 to Family Trust under § 2632(c).

Husband and Wife have not filed a Form 709 for Year 4 to report the transfer from Trust 3 to Family Trust or the transfer from Trust 4 to Family Trust.

All years at issue are subsequent to August 5, 1997 and December 31, 2000. The period of limitations under § 6501 has expired with respect to the Years 1 and 2 Forms 709. The period of limitations has not expired with respect to the Years 3 and 4 Forms 709.

You have requested the following rulings:

1) The election to split gifts in Year 1 is effective with respect to Family Trust, Trust 1, and Trust 2.

2) Husband and Wife's allocation of his and her GST exemption equal to $b to the Year 1 transfer to Family Trust is effective.

3) At the close of the ETIP in Year 2, Husband's and Wife's GST exemption was automatically allocated to one-half of the transfer of property from Trust 1 to Family Trust.

4) At the close of the ETIP in Year 3, Husband's and Wife's GST exemption was affirmatively allocated to one-half the transfer of property from Trust 2 to Family Trust.

5) The election to split gifts in Year 3 is ineffective with respect to the transfers to Trust 3 and Trust 4.

6) Husband may file a Form 709 to allocate his remaining GST exemption to the Year 4 transfers of property from Trust 3 and Trust 4 to Family Trust.

LAW AND ANALYSIS

Rulings 1, 2, and 5

Section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during the calendar year by any individual, resident or nonresident. Section 2511(a) provides that subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2504(c) provides that if the time has expired under § 6501 within which a tax may be assessed under chapter 12 on the transfer of property by gift made during a preceding calendar period, the value thereof shall, for purposes of computing the tax under this chapter, be the value as finally determined (within the meaning of § 2001(f)(2)) for purposes of this chapter.

Section 25.2504-2(b) of the Gift Tax Regulations provides that if the time has expired under § 6501 within which a gift tax may be assessed under chapter 12 on the transfer of property by gift made during a preceding calendar period and the gift was made after August 5, 1997, the amount of the taxable gift or the amount of the increase in taxable gifts, for purposes of determining the correct amount of taxable gifts for the preceding calendar periods is the amount that is finally determined for gift tax purposes and such amount may not be thereafter adjusted. The rule in this paragraph applies to adjustments involving all issues relating to the gift including valuation issues and legal issues involving the interpretation of the gift tax law.

Section 2513(a)(1) provides, generally, that a gift made by one spouse to any person other than the donor's spouse is considered for purposes of the gift tax as made one-half by the donor and one-half by the donor's spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

Section 25.2513-1(b)(4) provides that the consent is effective only if both spouses signify their consent to treat all gifts made to third parties during that calendar period by both spouses while married to each other as having been made one-half by each spouse. Such consent, if signified with respect to any calendar period, is effective with respect to all gifts made to third parties during such calendar period except, in part, if one spouse transferred property in part to his or her spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and severable from the interest transferred to his spouse.

Section 25.2513-1(b)(5) provides that the consent applies alike to gifts made by one spouse alone and to gifts made partly by each spouse, provided such gifts were to third parties and do not fall within any of the exceptions set forth in § 25.2513-1(b)(1) through (b)(4). The consent may not be applied only to a portion of the property interest constituting such gifts. If the consent is effectively signified on either the husband's return or the wife's return, all gifts made by the spouses to third parties (except as described in subparagraphs (1) through (4) of this paragraph), during the calendar period will be treated as having been made one-half by each spouse.

In Rev. Rul. 56-439, 1956-2 C.B. 605, a gift is made in trust pursuant to which the trustee is to distribute any part or all of the income or principal of the trust to or among the spouse of the donor and other descendants of the donor at such times and in such proportions and amounts as the trustee determines in its sole discretion. The ruling concludes that, under the facts presented, the value of the right to receive the income or principal to be distributed to the spouse is not susceptible of determination. Therefore, the gift to the spouse is not severable from the gifts to the other beneficiaries, and the gift may not to any extent be considered as made one-half by the donor and one-half by his spouse within the meaning of § 2513.

In this case, in Year 1, Husband transferred property to Family Trust, Trust 1, and Trust 2. On their Year 1 Forms 709, Husband and Wife each elected gift split treatment for those gifts. The property of Trust 1 and Trust 2 was transferred to Family Trust at the end of the annuity terms of those trusts. Wife is an income and principal beneficiary of Family Trust. Family Trust provides that the independent trustee may pay to or use for the benefit of any one or more of Wife, Husband’s descendants, and his descendant’s spouses so much or all of the income and principal of the trust in such proportions as the independent trustee, in the trustee’s discretion, determines to

be desirable for their respective welfare and best interests. Wife's interests in the income and principal of Family Trust are not susceptible of determination and, therefore, Wife's interests are not severable from the interests that the other beneficiaries have in Family Trust. *See* Rev. Rul. 56-439. However, under § 2504(c), the time for determining whether gift split treatment is effective with respect to the Year 1 through Year 3 transfers of property to Family Trust has expired. Therefore, the gift split treatment is irrevocable for purposes of the Year 1 transfer to Family Trust and the Years 2 and 3 transfers of property from Trust 1 and Trust 2 to Family Trust.

In Year 3, on their Forms 709, Husband and Wife each elected gift split treatment for the transfers to Trusts 3 and 4. Under § 25.2513-1(b)(4), the election to split gifts is not effective. The period of limitations has not expired for Year 3. Accordingly, Husband is not precluded under § 2504(c) from filing a supplemental Year 3 Form 709 to report the Year 3 transfers to Trust 3 and Trust 4 as being made solely by him.

Rulings 3, 4, and 6

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 imposed by § 2601 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), as in effect for the years at issue, 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(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)(4)(i) 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 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.

Section 2632(c)(3)(A) provides that for purposes of § 2632(c), 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)(4) provides that for purposes of § 2632(c), an indirect skip to which § 2642(f) applies shall be deemed to have been made only at the close of the ETIP. The fair market value of such transfer shall be the fair market value of the trust property at the close of the ETIP.

Section 2632(c)(5)(A)(i)(1) provides, in part, that an individual may elect to have § 2632(c) not apply to an indirect skip or any or all transfers made by such individual to a particular trust.

Section 26.2632-1(b)(2)(i) provides that an indirect skip is a transfer of property to a GST trust as defined in § 2632(c)(3)(B) provided that the transfer is subject to gift tax and does not qualify as a direct skip. In the case of an indirect skip to which § 2642(f) does apply, the indirect skip is deemed to be made at the close of the ETIP and the GST exemption is deemed to be allocated at that time. In either case, except as otherwise provided in paragraph (b)(2)(ii) of this section, the automatic allocation of exemption applies even if an allocation of exemption is made to the indirect skip in accordance with § 2632(a).

Section 26.2632-1(c)(1)(i) provides that a direct skip or an indirect skip that is subject to an ETIP is deemed to have been made only at the close of the ETIP. Under § 26.2632-1(c)(1)(ii), an affirmative allocation of GST exemption cannot be revoked, but becomes effective as of (and no earlier than) the date of the close of the ETIP with respect to the trust. If an allocation has not been made prior to the close of the ETIP, an allocation of exemption is effective as of the close of the ETIP during the transferor's lifetime if made by the due date for filing the Form 709 for the calendar year in which the close of the ETIP occurs (timely ETIP return).

Section 26.2632-1(c)(3) provides, in part, that an ETIP terminates at the time at which no portion of the property is includible in the transferor's gross estate (other than by reason of § 2035) or, in the case of an individual who is a transferor solely by reason of an election under § 2513, the time at which no portion would be includible in the gross estate of the individual's spouse (other than by reason of § 2035).

Section 2642(b)(1)(A) 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 ETIP, its value at the time of the close of the ETIP.

Section 2642(f)(1) provides that 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 § 2503), any allocation of GST exemption to such property shall not be made before the close of the ETIP (and the value of such property shall be determined under paragraph (2)). Section 2642(f)(2)(B) provides, in part, that the value of such property shall be its value as of the close of the ETIP.

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 paragraph (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.

Section 2652(a)(1) provides, in part, that except as provided in this subsection or § 2653(a), the term "transferor" means in the case of any property subject to the tax imposed by chapter 12, the donor.

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 this chapter.

Section 26.2652-1(a)(4) provides that 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 election 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. *See also Example 2* of § 26.2632-1(c)(5).

In this case, Family Trust is a GST Trust for purposes of § 2632(c). On the Year 1 Forms 709, Husband and Wife each attached a statement electing not to have the automatic allocation rules under § 2632(c) apply with respect to the $a transfer to Family Trust, as provided in § 2632(c)(5)(A). On the forms, consistent with gift split treatment, Husband and Wife each affirmatively allocated his and her GST exemption equal to $b to the transfer to Family Trust. Husband and Wife did not allocate his or her GST exemption to an amount equal to $c that was transferred to Family Trust. As discussed above, the transfer to Family Trust did not qualify for gift split treatment because Wife's income and principal interests in Family Trust are not susceptible to

determination and, therefore, her interests are not severable from the interests that the other beneficiaries have in Family Trust. However, as stated above, under § 2504(c), the time for determining whether gift split treatment is effective with respect to the Year 1 through Year 3 transfers to Family Trust has expired. Therefore, under § 2652(a)(2), Husband and Wife will be treated as the transferor of one-half of the value of the entire property transferred to Family Trust in Years 1 through 3. Accordingly, Husband and Wife's allocations of his and her $b GST exemption in Year 1 to the transfer to Family Trust are effective. We decline to rule on whether 9100 relief is available to Husband and Wife to allocate his and her GST exemption to $c. Further, we rule that the automatic allocation rules under § 2632(c) applied to allocate Husband and Wife's GST exemption to one-half of the transfer of property from Trust 1 to Family Trust in Year 2 at the close of the ETIP. Finally, we rule that Husband's and Wife's affirmative allocation of his and her GST exemption to one-half of the transfer of property from Trust 2 to Family Trust in Year 3 at the close of the ETIP is effective for purposes of chapter 13.

As discussed above, the statute of limitations under § 6501 has not expired with regard to the Year 3 Forms 709. Assuming Husband files a supplemental Form 709 to report the Year 3 transfers to Trusts 3 and 4 as being made solely by him, then Husband may file a Year 4 Form 709 to allocate his available GST exemption to the Year 4 transfers from Trusts 3 and 4 to Family Trust at the close of the ETIPs for those trusts.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

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.

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 requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

_____

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

Enclosures
Copy for § 6110 purposes
Copy of this letter