

## Internal Revenue Service

Number: **201729007**

Release Date: 7/21/2017

Index Number: 2632.00-00, 2642.00-00,  
9100.00-00

## Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

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Refer Reply To:

CC:PSI:04

PLR-130239-16

Date:

March 20, 2017

Re:

### LEGEND

Taxpayer =

Date 1 =

Year 1 =

Trust 1 =

Year 5 =

Date 2 =

Child 1 =

Trust 2 =

Child 2 =

Trust 3 =

Year 2 =

x =

y =

a =

Corporation =

Year 3 =

Attorney =

Accountant =

Dear :

This letter responds to the letter dated September 28, 2016, submitted by your authorized representative, 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 make an election under § 2632(c)(5) to opt out of the generation-skipping transfer (GST) exemption automatic allocation rules under § 2632(c) with respect to transfers to certain trusts.

## FACTS

The facts and representations submitted are as follows.

On Date 1, Year 1 (a date after December 31, 2000), Taxpayer established an irrevocable grantor retained annuity trust, Trust 1. Taxpayer transferred marketable securities to Trust 1 (Year 1 Transfer). Trust 1 has GST tax potential.

Taxpayer's retained interest in Trust 1 terminated at the end of the annuity term on a date in Year 5. The estate tax inclusion period (ETIP) with respect to the Year 1 Transfer closed for GST tax purposes on the date in Year 5 that Taxpayer's retained interest in Trust 1 terminated.

On Date 2 (a date after December 31, 2000), Taxpayer established Trust 2 for the benefit of Child 1 and Child 1's lineal descendants and Trust 3 for the benefit of Child 2 and Child 2's lineal descendants. In Year 2, Taxpayer transferred x shares of Corporation to Trust 2 and y shares of Corporation to Trust 3 (Year 2 Transfers). In Year 3, Taxpayer transferred \$a to each of Trust 2 and Trust 3 (Year 3 Transfers). Trust 2 and Trust 3 have GST tax potential.

Attorney provided Taxpayer with legal and tax advice in connection with the creation and establishment of Trust 1, Trust 2, and Trust 3. Attorney advised Taxpayer of the rules under § 2632(c) regarding the automatic allocation of GST exemption and the ability to elect out of the automatic allocation of GST exemption by making an election under § 2632(c)(5). Pursuant to this discussion, Taxpayer decided that she did not want GST exemption allocated to any of the transfers to Trust 1, Trust 2, or Trust 3. Taxpayer retained Accountant to prepare and file Taxpayer's Year 1, Year 2, and Year 3 Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return. On timely-filed Forms 709 for Year 1, Year 2, and Year 3, Accountant inadvertently reported the respective Year 1 Transfer, Year 2 Transfers, and Year 3 Transfers on Schedule A, Part 1 (Gifts Subject Only to Gift Tax), instead of Schedule A, Part 3 (Indirect Skips), and failed to effectively elect out of the automatic allocation of GST exemption to the transfers to Trust 1, Trust 2, and Trust 3 pursuant to § 2632(c)(5)(A)(i).

Taxpayer requests the following rulings:

1. Taxpayer requests pursuant to § 2642(g) and § 301.9100-3 to elect out of the automatic allocation of Taxpayer's GST exemption to the Year 1 Transfer to Trust 1 under § 2632(c)(5).
2. Taxpayer requests pursuant to § 2642(g) and § 301.9100-3 to elect out of the automatic allocation of Taxpayer's GST exemption to the Year 2 Transfers and Year 3 Transfers to Trust 2 and Trust 3 under § 2632(c)(5).

## LAW AND ANALYSIS

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 tax imposed by § 2601 is the taxable amount multiplied by the applicable rate. Section 2641(a) defines the applicable rate as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, 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 2631(c) provides that, for purposes of § 2631(a), the GST exemption amount for any calendar year shall be equal to the applicable exclusion amount under § 2010(c) for such calendar year.

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 2632(a)(2) provides that the manner in which allocations are to be made shall be prescribed by forms or regulations issued by the Secretary.

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 is treated as 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.

Under § 2632(c)(3)(A), 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, as defined in § 2632(c)(3)(B). Under § 2632(c)(3)(B), a GST trust is a trust that could have GST potential with respect to the transferor unless the trust satisfies any of the exceptions listed in § 2632(c)(3)(B)(i)-(vi).

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) provides that an individual may elect to have the automatic allocation rules of § 2632(c)(1) not apply to an indirect skip, or any or all transfers made by such individual to a particular trust. Section 2632(c)(5)(B)(ii) provides that the election may be made on a timely filed gift tax return for the calendar year for which the election is to become effective.

Section 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides that in the case of an indirect skip made after December 31, 2000, to which § 2642(f) (relating to transfers subject to the estate tax inclusion period or ETIP) does not apply, the transferor’s unused GST exemption is automatically allocated to the property transferred (but not in excess of the fair market value of the property on the date of the transfer). This automatic allocation is effective whether or not a Form 709 is filed reporting the transfer, and is effective as of the date of the transfer to which it relates. An automatic allocation is irrevocable after the due date of the Form 709 for the calendar year in which the transfer is made.

Section 26.2632-1(b)(2)(ii) provides that, except as otherwise provided, the transferor may prevent the automatic allocation of GST exemption with regard to an indirect skip by making an election as provided in § 26.2632-1(b)(2)(iii).

Section 26.2632-1(b)(2)(iii)(A) provides, in part, that a transferor may prevent the automatic allocation of GST exemption (elect out) with respect to any transfer or transfers constituting an indirect skip made to a trust or to one or more separate shares that are treated as separate trusts under § 26.2654-1(a)(1). A transferor may elect out with respect to: (1) one or more prior-year transfers subject to § 2642(f) (regarding ETIPs) made by the transferor to a specified trust or trusts; (2) one or more (or all) current-year transfers made by the transferor to a specified trust or trusts; (3) one or more (or all) future transfers made by the transferor to a specified trust or trusts; and (4) all future transfers made by the transferor to all trusts (whether or not in existence at the time of the election out); or (5) any combination of (1) through (4) above.

Section 26.2632-1(b)(2)(iii)(B) provides that to elect out, the transferor must attach an election out statement to a Form 709 filed within the time period provided in

§ 26.2632-1(b)(2)(iii)(C). In general, the election out statement must identify the trust, and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Under § 26.2632-1(b)(2)(iii)(C), to elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing the Form 709 for the calendar year in which: (1) for a transfer subject to § 2642(f), the ETIP closes; or (2) for all other elections out, the first transfer to be covered by the election out was made.

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. The transferor may prevent the automatic allocation of GST exemption to a direct skip or an indirect skip by electing out of the automatic allocation rules at any time prior to the due date of the Form 709 for the calendar year in which the close of the ETIP occurs (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year).

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).

Section 2642(g)(1)(B) provides that in determining whether to grant relief under § 2642(g)(1), 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.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-1(a).

Section 301.9100-2 provides an automatic extension of time for making certain elections. Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose date is prescribed by a regulation (and not expressly provided by statute). 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) 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)(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. Accordingly, Taxpayer is granted an extension of time of 120 days from the date of this letter to make an election under § 2632(c)(5) that the automatic allocation rules do not apply to the Year 1 Transfer to Trust 1. Also, Taxpayer is granted an extension of time of 120 days from the date of this letter to make an election under § 2632(c)(5) that the automatic allocation rules do not apply to the Year 2 Transfers and Year 3 Transfers to Trust 2 and Trust 3. The election should be made on supplemental Forms 709 for Year 1, Year 2, and Year 3. The Forms 709 should be filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center - Stop 82, Cincinnati, OH 45999. You should attach a copy of this letter to each supplemental Form 709. We have enclosed a copy 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.

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,

Office of Associate Chief Counsel  
(Passthroughs & Special Industries)

By: Karlene M. Lesho  
Karlene M. Lesho  
Senior Technician Reviewer, Branch 4  
Office of Associate Chief Counsel  
(Passthroughs & Special Industries)

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

cc: