

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:

Telephone Number:

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Date:
April 03, 2017

Legend

Husband
Wife
Date 1
Date 2
Year 1
Year 2
Trust

a
Attorney

Dear _____ :

This letter responds to your authorized representative's letter dated October 14, 2016, and subsequent correspondence, requesting generation-skipping transfer (GST) tax rulings with respect to Trust.

The facts and representations submitted are as follows:

On Date 1, in Year 1, Husband created Trust. Trust is an irrevocable trust for the benefit of Husband's descendants. On Date 2, in Year 1, Husband funded Trust with \$a.

Husband and his wife, Wife, hired Attorney to prepare their Year 1 Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns. On each form, Husband and Wife signified their consent to treat the transfers as having been made

one-half by each spouse under § 2513. Husband elected out of the automatic allocation rules with respect to the gift to Trust in Year. Attorney correctly reported the transfer to Trust as an indirect skip on Schedule A, Part 3. Attorney also allocated GST exemption to the transfer on Schedule D, Part 2, Line 6. However, Attorney failed to attach a Notice of Allocation for this transfer.

You have requested a ruling that Husband substantially complied with the requirements for making an allocation of GST exemption to the Year 1 transfer to Trust.

LAW AND ANALYSIS

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 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall, for purposes of this chapter, 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)(2) provides that § 2513(a)(1) shall apply only if both spouses have signified (under the regulations provided for in § 2513(b)) their consent to the application of § 2513(a)(1) in the case of all such gifts made during the calendar year by either while married to the other.

Section 2513(b)(2)(A) provides that the consent under § 2513(a)(2) may be signified at any time after the close of the calendar year in which the gift was made. The consent may not be signified after the 15th day of April following the close of such year, unless before the 15th day no return has been filed for such year by either spouse, in which case 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 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) 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) provides that any allocation by an individual of his 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(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)(I) provides that an individual may elect to have § 2632(c) not apply to an indirect skip. Section 2632(c)(5)(B)(i) provides that an election under § 2632(c)(5)(A)(i)(I) shall be deemed to be timely if filed on a timely filed gift tax return for the calendar year in which the transfer was made.

Section 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides, in relevant part, 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 made after December 31, 2000, to which § 2642(f) 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). The 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 in forms or other guidance published by the Service, the transferor may prevent the automatic allocation of GST exemption with regard to an indirect skip (including indirect skips to

which § 2642(f) may apply) by making an election, as provided in § 26.2632-1(b)(2)(iii). Notwithstanding § 26.2632-1(b)(2)(iii)(B), the transferor may also prevent the automatic allocation of GST exemption with regard to an indirect skip by making an affirmative allocation of GST exemption on a Form 709 filed at any time on or before the due date for timely filing (within the meaning of § 26.2632-1(b)(1)(ii)) of an amount that is less than (but not equal to) the value of the property transferred as reported on that return, in accordance with the provisions of § 26.2632-1(b)(4).

Section 26.2632-1(b)(2)(iii)(A) provides that a transferor may prevent the automatic allocation of GST exemption (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; (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 paragraphs (b)(2)(ii)(A)(1) through (4) of this section.

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. Prior-year transfers that are subject to § 2642(f), and to which the election out is to apply, must be specifically described or otherwise identified in the election out statement. 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.

In this case, Husband elected out of the automatic allocation rules for Year 1. Nonetheless, Husband could still allocate GST exemption to the Year 1 transfer by properly reporting the allocation on a timely filed Form 709. Husband properly reported the allocation of GST exemption on Schedule D, Part 2, Line 6. However, Husband failed to attach a Notice of Allocation in accordance with the instructions for Form 709. Husband did not literally comply with the instructions to Form 709 or the requirements in the regulations for allocating GST exemption to an indirect skip in accordance with § 2632(c). However, literal compliance with the procedural instructions to make an election is not always required. Elections may be treated as effective where the taxpayer complied with the essential requirements of a regulation (or the instructions to the applicable form) even though the taxpayer failed to comply with certain procedural directions therein. See Hewlett-Packard Company v. Commissioner, 67 T.C. 736, 748 (1977), acq. in result, 1979-1 C.B. 1.

Thus, an election that does not strictly comply with the instructions on Form 709, or the applicable regulations, will be deemed valid if the information on the return is sufficient to indicate that the personal representative intended to make the election. Based upon the facts submitted and the representations made, we conclude that the Form 709 contains sufficient information to constitute substantial compliance with the requirements of § 2632(c) to allocate GST exemption to an indirect skip, and therefore Husband allocated GST exemption to the transfer to Trust.

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

Except as expressly provided herein, we neither express nor imply any opinion 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,

Leslie H. Finlow

Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for § 6110 purposes
Copy of this letter

cc: