

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B09 / PLR-114251-01
Date:
March 12, 2002

LEGEND:

- Decedent =
- Date 1 =
- Spouse =
- Son =
- Daughter =
- Trust A =
- Trust B =
- Trust C =
- Date 2 =
- Y =
- Z =
- Trust 1 =
- Trust 2 =

Dear :

This is in response to your authorized representative's letter, dated January 26, 2001, and subsequent correspondence, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of generation-skipping transfer (GST) exemption.

The facts and representations submitted are summarized as follows: Decedent died on Date 1, survived by Spouse, Son, and Daughter. Decedent's will provided for the establishment of three trusts: Trust A, Trust B, and Trust C. Decedent's federal

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estate tax return was not timely filed, but rather was filed on or about Date 2. On Schedule M of Decedent's estate tax return, an election under § 2056(b)(7) was made to treat Trust A as qualified terminable interest property (QTIP). A reverse QTIP election was also made for Trust A and the executor attempted to allocate Decedent's \$1,000,000 GST exemption to Trust A. No generation-skipping transfers have been made from Trust A, Trust B, or Trust C.

Shortly after Date 2, you submitted a private letter ruling request. You have requested an extension of time under § 2642(g) and § 301.9100-3 to make allocations of Decedent's GST exemption as follows. Specifically, you propose to allocate \$Y to Trust A, \$Z to Trust B, and \$Z to Trust C. You also propose to sever Trust A, pursuant to § 2642(a)(3), and create Trust 1 and Trust 2. Trust A will be divided on a fractional basis and Trust 1 will receive a fractional share of the total of all trust assets equal to the applicable fraction of the single trust (Trust A) immediately before the severance. You also request a ruling that as a result of the proposed qualified severance of Trust A into Trust 1 and Trust 2, pursuant to § 2642(a)(3), Trust 1 will have an inclusion ratio of zero and Trust 2 will have an inclusion ratio of one.

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides the general rule that no deduction shall be allowed for an interest passing to the surviving spouse if, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest will terminate or fail.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, the entire property shall be treated as passing to the surviving spouse for purposes of § 2056(a), and no part of the property shall be treated as passing to any person other than the surviving spouse for purposes of § 2056(b)(1)(A).

Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" as property: (1) that passes from the decedent, (2) in which the surviving spouse has a qualifying income interest for life, and (3) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the

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property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and no person has a power to appoint any part of the property to any person other than the surviving spouse.

Section 2056(b)(7)(B)(v) provides that an election under this paragraph with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that the election referred to in § 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001 (or § 2101). For purposes of this paragraph, the term "return of tax imposed by § 2001" means the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Section 2652(a)(1) provides that for purposes of chapter 13 (GST), except as provided in § 2652(a) or § 2653(a), the term "transferor" means: (A) in the case of any property subject to the tax imposed by chapter 11, the decedent; and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides that in the case of any trust with respect to which a deduction is allowed to the decedent under § 2056 by reason of § 2056(b)(7), and any trust with respect to which a deduction to the donor spouse is allowed under § 2523 by reason of § 2523(f), the estate of the decedent or the donor spouse, as the case may be, may elect to treat all of the property in such trust for purposes of this chapter as if the election to be treated as qualified terminable interest property had not been made.

Section 26.2652-2(b) provides that an election to treat property as if the QTIP election had not been made (reverse QTIP election) is made on the return on which the QTIP election is made.

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 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, is 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

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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(d)(1) of the Generation-Skipping Transfer Tax Regulations provides, in part, that except as otherwise provided in § 26.2632-1(d), an allocation of a decedent's unused GST exemption by the executor of the decedent's estate is made on the appropriate United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706 or Form 706NA) filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions actually granted (the due date)). An allocation of GST exemption with respect to property included in the gross estate of a decedent is effective as of the date of death.

Section 2642(a)(3)(A) provides, generally, that if a trust is severed in a qualified severance, the trusts resulting from such severance shall be treated as separate trusts thereafter for purposes of this chapter.

Section 2642(a)(3)(B)(i) provides, generally, that for purposes of § 2642(a)(3)(A), the term "qualified severance" means the division of a single trust and the creation (by any means available under the governing instrument or under local law) of two or more trusts if the single trust was divided on a fractional basis, and the terms of the new trusts, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust.

Section 2642(a)(3)(B)(ii) provides that if a trust has an inclusion ratio of greater than zero and less than 1, a severance is a qualified severance only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before the severance. In such case, the trust receiving such fractional share shall have an inclusion ratio of zero and the other trust shall have an inclusion ratio of 1. Section 2642(a)(3)(B)(iii) provides that the term "qualified severance" includes any other severance permitted under regulations prescribed by the Secretary.

Section 2642(a)(3)(C) provides that a severance pursuant to this paragraph may be made at any time. The Secretary shall prescribe by forms or regulations the manner in which the qualified severance shall be reported to the Secretary.

Section 2642(b)(2)(A) provides that if property is transferred as a result of the death of the transferor, the value of such property for purposes of § 2642(a) shall be its value as finally determined for purposes of chapter 11; except that, if the requirements prescribed by the Secretary respecting allocation of post-death changes in value are not met, the value of such property shall be determined as of the time of the distribution concerned. Section 2642(b)(2)(B) provides that any allocation to property transferred as a result of the death of the transferor shall be effective on and after the date of the death of the transferor.

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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 this paragraph.

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 under this paragraph, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

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), 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. Accordingly, 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. See Notice 2001-50, 2001-34 I.R.B. 189.

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.

Pursuant to § 20.2056(b)(7)(B)(4)(i), the QTIP election can be made on the first estate tax return filed by the executor after the due date, if a timely return is not filed. The reverse QTIP election is made on the return on which the QTIP election is made under § 26.2652-2(b).

In the present situation, the QTIP and reverse QTIP elections were made on the late return filed on or about Date 2 and were effective. Section 2632(a) provides that an individual's GST exemption may be allocated at any time before the date prescribed

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for the filing of the estate tax return for the individual's estate. Because Decedent's federal estate tax return was not timely filed, the executor's attempted allocation of all the GST exemption to Trust A was ineffective.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, the executor of Decedent's estate is granted an extension of time of 60 days from the date of this letter to allocate \$Y to Trust A, \$Z to Trust B, and \$Z to Trust C. The allocation will be effective as of Date 1, the date of the Decedent's death, and the value of the property, for purposes of determining the amount of GST exemption to be allocated to the trusts, shall be its value as finally determined for purposes of chapter 11.

This election should be made on a supplemental Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return and filed with the Cincinnati Service Center. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for this purpose.

Provided the amount of GST exemption allocated to Trust B and Trust C is equal to the value of each trust for federal estate tax purposes, Trust B and Trust C will each have an inclusion ratio of zero. Also, provided that the proposed qualified severance of Trust A satisfies all requirements of § 2642(a)(3) (i.e., Trust A is divided on a fractional basis in accordance with the applicable fraction and the terms of Trust 1 and Trust 2, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust), Trust 1 will have an inclusion ratio of zero and Trust 2 will have an inclusion ratio of one.

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.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code. In addition, we express or imply no opinion regarding whether the proposed severance of Trust A will satisfy the requirements of a qualified severance under § 2642(a)(3).

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

Pursuant to the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

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Sincerely,
Paul F. Kugler
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy of this Letter
Copy for § 6110 purposes