

Internal Revenue Service

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B09
PLR-120940-05

Date:
September 14, 2005

In Re:

Legend:

Taxpayer 1	=
Taxpayer 2	=
Trust	=
Son	=
Daughter	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Year 1	=
Year 2	=
X	=
Y	=

Dear _____ :

This is in response to your letter dated April 14, 2005, and subsequent correspondence, requesting an extension of time under § 2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make allocations of generation-skipping transfer (GST) exemption to a trust.

The facts submitted and the representations made are as follows. On Date 1, Taxpayer 1 created Trust for the benefit of his spouse (Taxpayer 2), their two children (Son and Daughter), and the descendants of Son and Daughter.

Article III, Section 3.1 of Trust provides that during the lifetime of Taxpayer 1, Son and Daughter and their respective descendants are the beneficiaries of Trust. After

Taxpayer 1's death, the beneficiaries of Trust are Taxpayer 2, Son, and the descendants of Son and Daughter. Article III, Section 3.2 provides the trustees with the discretion to distribute trust income and principal to the beneficiaries.

On Date 2, in Year 1, Taxpayer 1 contributed \$ X in cash to Trust. Taxpayer 1 and Taxpayer 2 retained tax professionals to prepare their Year 1 Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns. On their gift tax returns, Taxpayer 1 and Taxpayer 2 consented to treat gifts made by either in Year 1 as made by both pursuant to § 2513. As a result of advice from a tax professional, Taxpayer 1's and Taxpayer 2's gift tax returns reflected that a gift of one-half of the interest of Son, Daughter, and the descendants of Son and Daughter in Trust during Taxpayer 1's lifetime was made by Taxpayer 2 pursuant to § 2513. In addition, their gift tax returns did not reflect an allocation of GST exemption to the Date 2 gift because the tax professionals failed to allocate or advise Taxpayer 1 and Taxpayer 2 to allocate their GST exemptions to the gift on the returns.

On Date 3, in Year 2, Taxpayer 1 contributed \$ Y in cash to Trust. Taxpayer 1 retained tax professionals to prepare his Year 2 gift tax return. In preparing the return, the tax professionals failed to allocate or advise Taxpayer 1 to allocate his GST exemption to the Date 3 gift to Trust.

Taxpayer 1 died on Date 4. The failure to allocate GST exemption to the gifts to Trust in Years 1 and 2 was discovered shortly before his death. As a result of Taxpayer 1's death, a portion of his GST exemption was automatically allocated to Trust pursuant to § 2632(e).

Taxpayer 1's estate and Taxpayer 2 are requesting a ruling that Taxpayer 1 is the transferor of the Date 2 gift to Trust for GST tax purposes. In addition, Taxpayer 1's estate is requesting an extension of time pursuant to § 2642(g), Notice 2001-50, and §§ 301.9100-1 and 301.9100-2, to allocate Taxpayer 1's GST exemption to the Date 2 and Date 3 transfers, that the GST exemption allocated to the Date 2 and Date 3 transfers will be effective as of Date 2 and Date 3, respectively, and that, as a result, Trust will have a zero inclusion ratio for GST tax purposes.

Law and Analysis – Ruling 1:

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, generally, that a gift made by one spouse to any person other than his spouse shall, for the purposes of chapter 12, 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 25.2513-1(b)(4) of the Gift Tax Regulations provides that if one spouse transferred property in part to his or her spouse and in part to third parties, split gift treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable at the time of the gift and severable from the interest transferred to the spouse.

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 such individual's spouse, then such gift shall also be treated as if made one-half by each spouse for purposes of the GST tax.

Section 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations 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 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.

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 Wang v. Commissioner, T.C. Memo. 1972-143, the court stated that in determining whether a remainder interest is ascertainable as of the time of the gift and thus eligible for split gift treatment under § 2513, the same principles are applied as are employed in determining whether a charitable remainder interest subject to an invasion power is ascertainable and thus deductible for estate tax purposes (under rules in effect prior to the enactment of § 2055(e)(1) and (2)).

Generally, prior to the enactment of § 2055(e), the charitable remainder interest would be ascertainable if the invasion power was limited by an ascertainable standard such that the possibility of invasion could be measured or stated in definite terms of money. Rev. Rul. 70-450, 1970-2 C.B. 195. See also Wang v. Commissioner, *supra*. If the remainder interest was ascertainable, then a charitable deduction was allowed in an amount in excess of the potential invasions. If the probability of invasion was so remote as to be negligible, a deduction would be allowed for the entire value of the remainder interest. Rev. Rul. 54-285, 1954-2 C.B. 302.

In the present case, Trust provides that during Taxpayer 1's lifetime the trustees have discretionary authority to distribute trust income and principal to Son, Daughter, and their respective descendants. After Taxpayer 1's death, Taxpayer 2, in addition to Son, Daughter, and their respective descendants, has the right to receive discretionary distributions of Trust income and principal. Since the distributions of Trust income and principal during Taxpayer 1's lifetime are discretionary, this lifetime interest is not susceptible of determination and, hence, severable from the distributions to occur after Taxpayer 1's death. Accordingly, based upon the facts submitted and the representations made, we conclude that Taxpayer 2 cannot treat the lifetime interest of Son, Daughter, and their respective descendants in Trust as being made one-half by her and one-half by Taxpayer 1 pursuant to § 2513. Therefore, based upon the facts submitted and the representations made, we conclude that Taxpayer 1 is the transferor of the Date 2 gift to Trust for GST tax purposes.

Ruling 2:

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 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 2642(a) provides the method for determining the inclusion ratio.

Section 2631(a), in effect at the time of the transfer, 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, shall be 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 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(e)(1) provides that any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2032(a) shall be deemed to be allocated as follows--(A) first, to property which is the subject of a direct skip occurring at such individual's death, and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after such individual's death.

Section 26.2632-1(b)(2) provides that an allocation of GST exemption to property transferred during the transferor's lifetime, other than in a direct skip, is made on Form 709.

Section 26.2632-1(d)(2) provides that a decedent's unused GST exemption is automatically allocated on the due date for filing Form 706 to the extent not otherwise allocated by the decedent's executor on or before that date. The automatic allocation occurs whether or not a return is actually required to be filed. Unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)), on the basis of the value of the property as finally determined for purposes of chapter 11 (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)) on the basis of the chapter 11 value of the non-exempt portion of the trust property (or in the case of trusts that are not included in the gross estate, on the basis of the date of death value of the trust) to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. The automatic allocation of GST exemption is irrevocable, and an allocation made by the executor after the automatic allocation is made is ineffective.

Section 2642(b)(1) provided 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) - (A) 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, and (B) such allocation shall be effective on and after the date of such transfer, or, in the case of an allocation deemed to have been made at the close of an ETIP, on and after the close of such ETIP.

Section 2642(g)(1)(A) provides 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). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1)(A), which was enacted into law on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief, 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. Section 2642(g)(1)(B) further provides that for purposes of determining whether to grant relief, the time for making the allocation shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-2 C.B. 189, provides that under § 2624(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 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 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) 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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Taxpayer 1's estate is granted an extension of time of sixty (60) days from the date of this letter to allocate Taxpayer 1's GST exemption to the Date 2 and Date 3 gifts. The allocation will be effective as of Date 2 and Date 3, respectively, and will be based on the value of the assets Taxpayer 1 contributed to Trust on Date 2 and Date 3. Trust will have an inclusion ratio of zero, provided the amount of GST exemption allocated to Trust is equal to the federal gift tax value of the assets contributed to Trust on Date 2 and

Date 3. Because Trust will have a zero inclusion ratio at Taxpayer 1's death, there will be no § 2632(e) automatic allocation to Trust.

The allocations should be made on gift tax returns for Year 1 and Year 2 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the returns. Copies are enclosed 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) provides that it may not be used or cited as precedent.

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.

Sincerely,

Heather C. Maloy

Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures: Copy for § 6110 purposes
Copies of this letter