

## Internal Revenue Service

## Department of the Treasury

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Person to Contact:

Telephone Number:

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Date:

AUGUST 20, 2002

Re:

### LEGEND:

Taxpayer -  
Spouse -  
Trust -  
Co-trustees -

Company -  
Date 1 -  
Date 2 -  
Year 1 -  
Year 2 -  
m dollars -  
n dollars -  
p percent -  
x shares -  
y shares -

Dear :

This is in response to your letter dated May 9, 2002, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of generation-skipping transfer (GST) tax exemption. This letter responds to your request.

The facts and representations submitted are summarized as follows:

On Date 1, Taxpayer established Trust, an irrevocable trust, for the benefit of Taxpayer's children and the lineal descendants of those children. The co-trustees of Trust are Taxpayer's spouse (Spouse) and another individual.

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Article I of Trust provides that the original trust property shall be divided into separate, equal shares, one such share for each child of Taxpayer living at the time the property is contributed to the Trust. Each separate share will be held as a separate trust in accordance with Article II.

Article II of Trust provides that, during the life of each child, the independent trustee has the discretion to pay income and principal to or for the benefit of that child. Upon attaining age 21, each child has the power, exercisable at any time, to appoint part or all of the income and principal to any one or more of Taxpayer's lineal descendants other than himself/herself, his/her estate, his/her creditors, or the creditors of his/her estate. In addition, each child has a special testamentary power to appoint all or any part of the principal and income of his/her trust remaining at his/her death to any one or more of the Taxpayer's lineal descendants in such manner as that child designates other than that child's estate, his/her creditors, or the creditors of his/her estate. Upon the death of each child, to the extent that the testamentary power is not exercised, the property will continue in further trust, as described under Article III of Trust, for the benefit of the then living descendants of that child. If there are no living descendants of that child, the property will be divided among the Taxpayer's then living lineal descendants in accordance with Article II(5) of Trust.

At the time that Trust was established, Taxpayer was the majority shareholder in Company, the sole asset of which was one parcel of commercial property. On Date 2, Taxpayer entered into two transactions with Trust. The first transaction (transaction #1) is described by Taxpayer as a gift to Trust of x shares of nonvoting common stock of Company, valued by Taxpayer for gift tax purposes at m dollars. The second transaction (transaction #2) is described by Taxpayer as a sale of y shares of nonvoting common stock of Company to Trust in exchange for a promissory note. For years prior to and including Years 1 and 2, Taxpayer and Spouse had engaged an individual to provide accounting and tax services, including the preparation of all tax returns. That individual was a tax professional who was a partner in an accounting firm with experience in filing federal gift tax returns and who was aware of the generation-skipping transfer tax and the benefits of "gift-splitting" by spouses. Taxpayer and Spouse had discussed the preparation of the Year 1 and Year 2 tax returns, including transactions #1 and #2, with the individual and all the parties agreed that the individual's firm would be responsible for preparing all tax filings associated with Trust and the transactions.

You represent that Taxpayer was aware of the generation-skipping nature of the transfer and believed that the Trust would not be subject to GST tax if the appropriate returns were filed with the Internal Revenue Service. The firm prepared Taxpayer's personal and corporate income tax returns for Year 2, but, because records were misplaced, no tax returns relating to the Trust or the transfers were prepared. Upon reviewing the records for the Trust, Taxpayer and members of the firm discovered that no income tax return for the Trust had been filed and took the necessary corrective

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action. However, you represent that Taxpayer had no knowledge of the necessity for filing gift tax returns and did not discover that the gift tax return for Year 2 had not been filed.

Taxpayers subsequently hired new estate planning counsel, who attempted to obtain copies of all gift tax returns filed for previous years. The new counsel then discovered that no gift tax returns were filed reporting the transfer in Year 2. While in the process of gathering the necessary information for filing a late gift tax return for Year 2, Taxpayer and Taxpayer's counsel made the decision to seek the requested relief prior to filing a late gift tax return.

You contend that transaction #2 (the sale of  $y$  shares of Company stock to Trust in exchange for a promissory note) was a transfer for full and adequate consideration and therefore is not subject to the gift tax.

You have requested the following rulings: (1) that the Service grant an extension of time under § 2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 to make an allocation of Taxpayer's and Spouse's GST exemption with respect to transaction #1; and (2) that the allocations shall be made based on the value of the property transferred to the Trust as of Date 2, the date of the original transfer.

Section 2501(a) of the Internal Revenue Code imposes a tax on the transfer of property by gift during each calendar year by any individual.

Section 2513(a)(1) provides that a gift made by one spouse to any person other than the donor's spouse shall, for purposes of chapter 12, be considered 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 2513(a)(2) provides that "split gift" treatment under § 2513(a)(1) shall apply only if both spouses have signified their consent to the application of § 2513(a)(1) in the case of all such gifts during the calendar year by either spouse.

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 of April following the close of such year, unless before such 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 (GST). A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

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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.

Under § 2642(a)(1), the inclusion ratio with any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the “applicable fraction.” The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the 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, 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 26.2632-1(b)(2) of the Generation-skipping Transfer Tax Regulations 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 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 individual’s spouse, then such gift shall be so treated for GST tax purposes.

Section 2642(b)(1) 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 estate tax inclusion period, its value at the time of the close of the estate tax inclusion period. 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 estate tax inclusion period, on and after the close of such estate tax inclusion period.

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

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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, 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 section 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. Notice 2001-50, 2001-34 I.R.B.189, 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.

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.

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 and Spouse are granted an extension of time of 60 days from the date of this letter to make an allocation of Taxpayer's and Spouse's available GST exemption, with respect to transaction #1, that is, Taxpayer's transfer on Date 2 to the Trust of x shares of Company stock. The allocation will be effective as of Date 2, the date of the transfer to

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the Trust, and the value of the transfer to the Trust for gift tax purposes will be used in determining the amount of GST exemption to be allocated to the Trust.

The ruling contained in this letter is 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 any aspect of any transaction or item discussed or referenced in this letter under the cited provisions or under any other provisions of the Code. We specifically do not express or imply any opinion concerning either the value of the stock of Company that was the subject of transactions #1 and #2 or whether transaction #2 (the sale of y shares of Company stock to Trust in exchange for a promissory note) was a transfer that is subject to the gift tax.

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. This election should be made on a supplemental Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Sincerely,  
Heather Maloy  
Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes  
Copy of this letter

CC: