

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:

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Refer Reply To:

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Date:

March 23, 2004

LEGEND

Taxpayer =

Date 1 =

Spouse =

Irrevocable Trust =

Date 2 =

\$x =

Accountant 1 =

Year 1 =

Date 3 =

Date 4 =

\$y =

Year 2 =

Date 5 =

Accountant 2 =

Year 3 =

Date 6 =

Law Firm =

Dear :

This is in response to your letter dated July 28, 2003, 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 late allocations of Taxpayer's generation-skipping transfer (GST) tax exemption.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer and Spouse created Irrevocable Trust for the benefit of their children and more remote descendants.

Section 2.1 of Irrevocable Trust provides, in part, that the trustee may distribute such amount or amounts of the net income and principal, or both, as the trustee may determine to be necessary to provide for the support, maintenance, health, and education of Taxpayer and Spouse's descendants, after taking into consideration all other funds available to those individuals.

Section 2.2 provides that the trust shall terminate upon the death of the survivor of Taxpayer and Spouse.

Section 2.3 provides that upon termination of the trust, the remaining trust estate shall be divided in a manner to create one share for each then living child, and one share for the then-living descendants of any deceased child of Taxpayer and Spouse. Each share created for a child of Taxpayer and Spouse shall be held in further trust in accordance with Article 3. Each share created for the descendants of any deceased child shall be divided into further shares by representation. Each share created for a descendant of a deceased child shall be held in further trust in accordance with Article 3.

Section 3.1 provides that whenever property becomes subject to distribution under Article 3 for a child or more remote descendant of Taxpayer and Spouse, the trustee shall hold such property as a separate trust for such descendant.

Section 3.2 provides that after the descendant reaches the age of thirty-five years, the trustee shall distribute one-third of the net income of the trust received after that date to him or her. After the descendant reaches the age of forty years, the trustee shall distribute two-thirds of the net income of the trust received after that date to him or her. After the descendant reaches the age of forty-five years, the trustee shall distribute all of the net income of the trust received after that date to him or her. Any net income that is not required to be distributed may be distributed to the descendant as the trustee may determine to be necessary to provide for the descendant's support, maintenance, health, and education.

Section 3.3 provides that the trustee may distribute such amount of principal to the descendant as the trustee may determine to be necessary to provide for the descendant's support, maintenance, health, and education.

Section 3.7 provides, in part, that the trust shall terminate upon the death of the descendant or at the end of the perpetuities period, whichever occurs first.

Section 3.8 provides, in part, that if the trust terminates upon the death of the descendant, the remaining trust estate shall be disposed of as the descendant may appoint pursuant to a special testamentary power of appointment.

Section 3.9 provides, in part, that to the extent the descendant does not exercise his or her special testamentary power of appointment over the trust property, any property not effectively disposed of by such exercise shall be divided into shares for such descendant's then-living descendants, by representation.

Section 11.3 provides that it is Taxpayer's and Spouse's intention to allocate a portion of their federal GST exemption to the property initially transferred to the trust, so that each trust share subsequently created will be exempt from the GST tax. If additional contributions are made to the trust, Taxpayer and Spouse intend that their remaining GST exemptions be allocated to such property. If for any reason the value of the property transferred to the trust exceeds Taxpayer's and Spouse's available GST exemptions or is otherwise not exempt from the GST tax, the trustee shall divide any separate trust held under the trust agreement into two separate trusts so that the GST tax inclusion ratio for each such trust will be either zero or one. The first such trust shall be designated as GST exempt and the second as GST nonexempt. Any GST nonexempt trust shall have terms identical to those of the GST exempt trust from which it was divided, except the beneficiary of the nonexempt trust shall have a testamentary

general power of appointment over the trust assets remaining at the time of the beneficiary's death.

On Date 2, Taxpayer and Spouse funded Irrevocable Trust with cash in the amount of \$x. They retained Accountant 1 to prepare their Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns for Year 1. The returns reflected Taxpayer's and Spouse's intention to treat the Date 2 transfer as being made one-half by each pursuant to § 2513. Although Accountant 1 reported the transfer to Irrevocable Trust on each return, he inadvertently failed to allocate any of Taxpayer's or Spouse's GST exemption to that transfer.

On Date 3, Taxpayer and Spouse transferred cash in the amount of \$x to Irrevocable Trust. On Date 4, Taxpayer transferred an additional \$y to Irrevocable Trust. Accountant 1 subsequently prepared Taxpayer's and Spouse's gift tax returns for Year 2. Both returns reflected Taxpayer's and Spouse's intention to treat the Date 3 and the Date 4 transfers to Irrevocable Trust as being made one-half by each pursuant to § 2513. Although Accountant 1 reported the Date 3 and Date 4 transfers to Irrevocable Trust on the returns, he inadvertently failed to allocate any of Taxpayer's GST exemption to those transfers.

On Date 5, Taxpayer and Spouse transferred cash in the amount of \$x to Irrevocable Trust. Taxpayer and Spouse engaged Accountant 2 to prepare their Forms 709 for Year 3. The returns reflected Taxpayer's and Spouse's intention to treat the Date 5 transfer as being made one-half by each pursuant to § 2513. However, Accountant 2 inadvertently failed to allocate any of Taxpayer's or Spouse's GST exemption to that transfer.

Taxpayer died on Date 6 survived by Spouse and their three children. Spouse, in her capacity as personal representative of Taxpayer's estate, engaged Law Firm to assist her with estate administration matters. The attorneys at Law Firm later discovered that none of Taxpayer's GST exemption had been allocated to the Year 1, Year 2, or Year 3 transfers to Irrevocable Trust. Accordingly, Taxpayer's estate now requests an extension of time under § 2642(g) and § 301.9100-3 to make allocations of Taxpayer's GST exemption to the Year 1, Year 2, and Year 3 transfers to Irrevocable Trust, effective as of the dates of the original transfers.

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 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)) that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

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 26.2632-1(b)(2)(i) 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, United States Gift (and Generation-Skipping Transfer) Tax Return. An allocation of GST exemption to a trust is void to the extent the amount of the allocation exceeds the amount necessary to obtain a zero inclusion ratio with respect to the trust.

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 determining the inclusion ratio shall be its value for purposes of chapter 12 (within the meaning of § 2001(f)(2)), and such allocation shall be effective on and after the date of such transfer.

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). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1), 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. 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 § 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 generation-skipping 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 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) 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 with respect to the transfers made by Taxpayer and Spouse to Irrevocable Trust in Year 1, Year 2, and Year 3, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, we grant an extension of time of 60 days from the date of this letter for Spouse, in her capacity as the personal representative of Taxpayer's estate, to make allocations of Taxpayer's GST exemption to the Year 1, Year 2, and Year 3 transfers to Irrevocable Trust. The allocations will be effective as of the dates of the transfers to Irrevocable Trust, and the gift tax values of the transfers will be used in determining the amount of GST exemption to be allocated to each transfer.

All allocations of Taxpayer's GST exemptions should be made on supplemental Forms 709 and filed with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to each supplemental Form 709. Copies are enclosed for this purpose.

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 the value of the property transferred to Irrevocable Trust.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to the taxpayers.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) 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.

Sincerely,

Heather C. Maloy

Heather C. Maloy
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copies of Letter

Copy for 6110 purposes