

Internal Revenue Service

Number: **200407003**

Release Date: 2/13/04

Index Number: 2642.00-00, 9100.00-00

Department of the Treasury
Washington, DC 20224

Person To Contact:

, ID No.

Telephone Number:

In Re:

Refer Reply To:

CC:PSI:04 – PLR-147586-03

Date:

November 06, 2003

Legend:

Trust =

Son's Trust =

Daughter's Trust =

Y Trust =

Settlor =

Husband =

State =

Daughter =

Son =

Attorney 1 =

Attorney 2 =

B =

C =

D =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

w =

y =

\$u =

\$x =

\$z =
State Statute =

Dear ,

This is in response to your authorized representative's July 31, 2003, submission requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations and § 2642(g) of the Internal Revenue Code to allocate Settlor's GST exemption to Trust, and a determination that a previous allocation to Trust is deemed void or ineffective.

According to the facts submitted, on Date 2, Settlor established Trust, an irrevocable trust, for the benefit of Settlor's descendants.

Article III(A) of Trust provides that the Trustee of Trust is to divide Trust into two equal shares, one equal share for the benefit of Daughter and her issue (Daughter's Trust), and one equal share for the benefit of Son and his issue (Son's Trust). If either Daughter or Son is not then living, and has no then living issue, the entire balance of the trust is to be held by the trustee for the surviving child of Settlor and her issue.

Under Article III(A)(1)(a), any share set aside for the benefit of either Daughter or Son, is to be held for the benefit of any one or more of the class of persons consisting of the child of Settlor for whom the separate share is established and the issue of such child. The trustee will pay to such child and their issue, in equal or unequal amounts, including all to any one thereof and none to all thereof, such amounts of net income and accumulated income as the trustee may deem advisable for the care, support, education, maintenance or general welfare of any or all of such persons. Any net income not so paid or applied is to be added to principal at the end of each trust year.

Article III(A)(1)(b) provides that the Trustee has the power at any time, in the Trustee's absolute discretion to pay so much or all of the principal of either trust to either the child of Settlor for whom the separate share is being held or any issue of such child for the care, support, education, maintenance or general welfare of the child or issue.

Under Article III(A)(1)(c), upon the death of either Daughter or Son, that child's trust is to be held in further trust for any living issue as provided in Article III(A)(2). If no such descendant is then living, the trust corpus is to be added to the trust for Settlor's other child or his or her descendants.

Article III(A)(2)(a) provides that any share set aside for the issue of any child of Settlor is to be held in further trust for the benefit of any one or more of the class consisting of the then living issue of said child. The Trustee will pay to such one or

more of such child's descendants, in equal or unequal amounts, so much of the net income and accumulated income as the Trustee may deem advisable for the care, support, education, maintenance or general welfare of any or all of such persons. Any net income not so paid or applied is to be added to principal at the end of each trust year.

Under Article III(A)(2)(c), the Trustee has the power at any time, in the Trustee's absolute discretion to pay so much or all of the principal of either trust to any income beneficiary of the trust for the care, support, education, maintenance or general welfare of such beneficiary.

Article III(A)(2)(b) provides that twenty-one years after the death of the survivor of Settlor, Daughter, Son, and each descendant of Daughter or Son who is alive at Settlor's death, the Trustee is to pay any principal of the further trust held for the descendants of Daughter to Daughter's then living descendants, by right of representation, and to pay any principal of the further trust held for Son's then living descendants, by right of representation. If either Daughter or Son does not have then living descendants, such trust will be paid to the descendants of the remaining child of Settlor, by right of representation.

Article III(A)(2)(d) provides that the Trustee may at any time, in their discretion, terminate any trust and transfer, pay over, deliver all of the then principal and income of such trust to the person or persons then entitled to the income from such trust, free of trust, if in their sole judgment it is in the best interest of all concerned or if the principal of any such trust is so small that it would be impractical or inadvisable to continue to hold it in trust.

Article VI(C) provides that in no event may any income beneficiary serving as trustee have the right to invade the principal from any trust for his or her own benefit. Such right of invasion shall only be exercised by the co-trustees other than the income beneficiary. In addition, Article IV(L) provides that the Trustee is not authorized to make any distribution to any beneficiary which would satisfy an existing parental obligation of support. In addition, under State Statute, if a trust beneficiary is also a trustee and the trust authorizes the beneficiary, as trustee to make discretionary distributions of income or corpus to himself or herself, then the beneficiary can exercise that power for his or her own benefit only to provide for health, education, maintenance within the meaning of §§ 2041 and 2514 of the Internal Revenue Code.

By instrument dated Date 2, Husband transferred to his wife, Settlor, one-half of Husband's vested remainder interest in Y Trust created by Husband's father under an agreement dated Date 1, for the lifetime benefit of Husband's sister. Also on Date 2, Settlor assigned the interest in Y Trust she received from Husband to Trust. On the

same day, Husband assigned the balance of his remainder interest in Y Trust to a separate irrevocable trust, with respect to which Settlor was a discretionary beneficiary.

On Date 3, Attorney 1 prepared and filed a federal gift tax return (Form 709) on behalf of Settlor to report her gift of the remainder interest in Y Trust. Attorney 1 used a 1982 version of Form 709 that did not contain a schedule by which a transferor could allocate GST exemption. Attorney 1 did not attach a Notice of Allocation of Exemption to the Form 709 to allocate any of Settlor's GST exemption to Trust.

Subsequently, Settlor's federal gift tax return was audited by the Internal Revenue Service (IRS). The audit resulted in adjustments to the valuation of Settlor's Date 2 transfer to Trust, increasing the amount of Settlor's gift to Trust from \$z to \$u. Thereafter, Settlor filed a claim for refund with the IRS that reduced the value of the gift to \$x.

On Date 4, Settlor sought the advice of Attorney 2. Upon Attorney 2's advice, on Date 6, Settlor filed a Form 709 for the sole purpose of allocating her GST exemption to Son's Trust and Daughter's Trust. On the return, Settlor allocated GST exemption to each share established for the benefit of Daughter and Son. The allocation was intended to be effective as of Date 5. It is contended that the allocation resulted in an inclusion ratio of w for Son's Trust and of y for Daughter's Trust.

The current Trustees of Son's Trust are B and C. The current Trustees of Daughter's Trust are C and D.

It is represented that since its creation, no distributions have been made from either Son's Trust or Daughter's Trust.

Settlor has requested the following rulings.

1) A ruling pursuant to §§ 2642(g)(1) and 301.9100-3, granting Settlor an extension of time until sixty days after the date the private letter ruling is issued, to make an allocation of Settlor's GST exemption to Settlor's Date 2 transfer to Trust, to be effective as of Date 2.

2) A ruling that, if the relief in ruling #1 is granted and an allocation is made pursuant to that relief, then pursuant to § 26.2632-1(b)(2) the allocation of Settlor's GST exemption made on Settlor's Form 709 that was filed on Date 6, is deemed to be void or ineffective, after taking into account the allocation made pursuant to Ruling #1.

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

Section 2601 imposes a tax on every generation-skipping transfer (GST) made by a transferor to a “skip person.”

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term “applicable rate” means with respect to any GST transfer, 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 respect to 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)) that may be allocated by the individual (or his executor) to any property with respect to which the individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

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. An allocation of GST exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust.

As applicable on Date 2, § 2642(b)(1) provided that, except as provided in § 2642(f), if the allocation of the GST exemption to any 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) [deemed allocation to lifetime direct skips] –

(A) the value of such property for purposes of determining the inclusion ratio shall be its value for purposes of chapter 12, and

(B) such allocation shall be effective on and after the date of such transfer.

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) 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.

Under § 301.9100-1(c), 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. Notice 2001-50, 2001-2 C.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 the grant of 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. Accordingly, Settlor is granted an extension of time until 60 days after the date of this letter to make allocations of Settlor's GST exemption with respect to Settlor's Date 2 transfer to Son's Trust and Daughter's Trust. The allocations, once made, will be effective as of Date 2. Accordingly, the inclusion ratio with respect to Son's Trust and Daughter's Trust will be determined based on the value as of Date 2, of Settlor's transfer to the trusts, as finally determined for gift tax purposes. The allocations should be made on a supplemental Form 709. The supplemental Form 709 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Two copies are enclosed for this purpose.

Because the allocations will be effective as of the date of the transfer, the allocations will be deemed to precede in time the allocations made by Settlor on the gift tax return filed on Date 6. It is represented that the total allocation of \$x with respect to both trusts, effective as of Date 2, will be sufficient in amount to cause Son's Trust and Daughter's Trust to have an inclusion ratio of zero as of Date 2. Accordingly, under § 26.2632-1(b)(2)(i), the allocations of GST exemption made on Date 6 with respect to the Date 2 transfer will become void upon the filing of the supplemental gift tax return authorized by this letter.

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 the transaction under the cited provisions or under any other provisions of the Code.

In accordance with the power of attorney on file with this office, we are sending copies of this letter to your authorized representative.

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,

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

Enclosures

Copy for section 6110 purposes
Copies of this letter

cc:

cc: