

## Internal Revenue Service

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Department of the Treasury  
Washington, DC 20224

Person To Contact:

, ID #

Telephone Number:

Refer Reply To:

CC:PSI:B9 – PLR-144356-03

Date:

November 20, 2003

### LEGEND

Date 1 =

Taxpayer =

Irrevocable Trust =

State =

Year 1 =

Spouse =

\$x =

Accounting Firm =

Date 2 =

\$y =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

Year 7 =

\$z =

Dear . :

This is in response to your authorized representative's letter dated July 22, 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 allocations of your generation-skipping transfer (GST) tax exemptions.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer created Irrevocable Trust for the benefit of Taxpayer's present and future descendants.

Section 5.1 of Irrevocable Trust provides, in part, that Taxpayer's descendants, whether now living or later born, shall have the unrestricted right in each calendar year to demand and immediately receive a share of the property placed in the trust estate as a gift. This power of withdrawal is non-cumulative and must be exercised separately for each calendar year in which any such gift is made to the trust estate. Each beneficiary shall exercise the power of withdrawal by written notice to the trustee within the time limits set forth in Section 5.2.

Section 5.2 provides, in part, that the trustee shall, within a reasonable period after receipt of any property placed in the trust as a gift, give written notice to the beneficiaries of the nature and amount of the property received and that the beneficiaries have a withdrawal right with respect to the gift. If a beneficiary wishes to exercise his or her withdrawal right, the beneficiary must notify the trustee in writing within a period of thirty (30) days from the date the beneficiary received written notice from the trustee of the gift to the trust estate.

Section 6.1 provides, in part, that the trustee is to pay to or apply for the benefit of any one or more of Taxpayer's children and their issue, so much of the net income and principal of the trust estate as the trustee, in the exercise of discretion, determines to be necessary or appropriate for their health, education, comfortable support, and maintenance, taking into consideration the beneficiaries' other assets and reasonable ability to provide for their own support and welfare.

Section 6.2 provides that Irrevocable Trust shall terminate at the end of the longest period of time in which a nonvested property interest in real or personal property must vest under the State Uniform Rule Against Perpetuities. Upon termination, the undistributed income of the trust estate shall be distributed outright, in equal shares, to Taxpayer's then living issue, per stirpes, subject to the provisions set forth in Section 6.3.

Section 6.3 provides that in the event a portion of the trust estate is set apart for a surviving issue of Taxpayer pursuant to Section 6.2, and the issue is under the age of thirty-five (35) years at the time the trust portion is required to be distributed to the issue, the trustee, in the exercise of discretion, may retain the share for the issue as a separate trust until the issue attains the age of thirty-five (35) years. In that event and during that time, the trustee shall pay to or apply to for the benefit of the issue so much of the income and/or principal of the issue's separate trust as the trustee, in the exercise of the trustee's discretion, shall deem necessary or appropriate to provide for the health, education, comfortable support, and maintenance of the issue. Any income from a separate trust not distributed shall be added to the principal of that trust at the end of each fiscal year. At the time the issue attains the age of twenty-five (25) years, the trustee shall distribute outright to the issue one-third (1/3) of the remaining balance of the principal and undistributed income of the issue's separate trust. At the time the issue attains the age of thirty (30) years, the trustee shall distribute outright to the issue one-half (1/2) of the remaining balance of principal and undistributed income of the issue's separate trust. At the time the issue attains the age of thirty-five (35) years, the trustee shall distribute outright to the issue all of the remaining balance of principal and undistributed income of the issue's separate trust. If the issue dies prior to receiving a complete distribution of his or her separate trust, then the issue's separate trust shall terminate and the remaining principal and any undistributed income shall be distributed to the issue's estate.

Section 10.8 provides, in part, that if the trust would, in the determination of the trustee, be partially exempt from generation-skipping tax, the trustee, in the trustee's discretion, may divide the trust into separate trusts of equal or unequal value, to permit allocation of any available GST exemption solely to one trust which would be entirely exempt from generation-skipping tax. If a trust is entirely exempt or non-exempt from generation-skipping tax, the trustee, in the trustee's discretion, may hold that property as a separate trust in lieu of making the addition.

In Year 1, Taxpayer and Spouse transferred to Irrevocable Trust property with a reported value of \$x as of the date of the transfer. Taxpayer and Spouse retained Accounting Firm to prepare their Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns for Year 1. Both returns reflected Taxpayer's and Spouse's intention to treat the transfer made to Irrevocable Trust on Date 1 as being

made one-half by each pursuant to § 2513. Although the gift tax returns reported the Date 1 transfer to Irrevocable Trust, the returns failed to allocate any of Taxpayer's or Spouse's GST exemption to that transfer.

On Date 2, Taxpayer and Spouse transferred an additional \$y of assets to Irrevocable Trust. Taxpayer and Spouse again retained Accounting Firm to prepare their Forms 709 for Year 2. Both returns reflected Taxpayer's and Spouse's intention to treat the transfer made to Irrevocable Trust on Date 2 as being made one-half by each pursuant to § 2513. Although the gift tax returns reported the Date 2 transfer to Irrevocable Trust, the returns failed to allocate any of Taxpayer's or Spouse's GST exemption to that transfer.

In Year 3, Taxpayer and Spouse discovered that no GST exemption had been allocated to Irrevocable Trust. Accordingly, Taxpayer and Spouse allocated their available GST exemptions to Irrevocable Trust on their gift tax returns using the fair market value of the trust assets on the date of allocation. At that time, the fair market value of the trust assets was in excess of the amount of Taxpayer's and Spouse's combined available GST exemptions. Consequently, pursuant to Section 10.8 of Irrevocable Trust, the trust was severed into two parts. Taxpayer and Spouse then allocated their combined \$2,000,000 exemption fully to one part (the "Exempt Trust"). The remaining assets were held in a second part (the "Non-Exempt Trust").

In Year 4, Year 5, Year 6, and Year 7, Taxpayer and Spouse each contributed assets valued at \$z to the Non-Exempt Trust. Taxpayer and Spouse each filed gift tax returns for Year 4, Year 5, Year 6, and Year 7 reporting the transfers of assets to Irrevocable Trust. However, the returns did not allocate any of Taxpayer's or Spouse's GST exemption to the transfers because no portion of Taxpayer's or Spouse's GST exemptions remained after their Year 3 GST allocations to Irrevocable Trust.

Taxpayer and Spouse now request that: (1) an extension of time be granted under § 2642(g) and § 301.9100-3 to make allocations of their respective GST exemptions with respect to the Date 1 and Date 2 transfers to Irrevocable Trust, effective as of the date of the original transfers; (2) the late allocations made by Taxpayer and Spouse on their Year 3 gift tax returns be deemed invalid; and (3) an extension of time be granted under § 2642(g) and § 301.9100-3 to make allocations of their respective GST exemptions with respect to the Year 4, Year 5, Year 6, and Year 7 transfers to the Non-Exempt 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 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) 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 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, 2001-34 I.R.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 on Date 1 and Date 2, 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 Taxpayer and Spouse to make allocations of their respective GST exemptions to the transfers to Irrevocable Trust in Year 1 and Year 2. 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.

The severance of Irrevocable Trust into the Exempt Trust and the Non-Exempt Trust in Year 3 that was made pursuant to Section 10.8 of the trust instrument complies with State law. Assuming that Taxpayer and Spouse allocate a portion of their GST exemptions to their Date 1 and Date 2 transfers to Irrevocable Trust pursuant to the relief granted herein, those allocations will be deemed timely and will result in Irrevocable Trust having a zero inclusion ratio immediately prior to the severance. Similarly, because the Exempt Trust and Non-Exempt Trust will each have a zero inclusion ratio immediately after the severance, under § 2632-1(b)(2)(i), the late allocations of Taxpayer's and Spouse's GST exemptions made on their respective Year 3 gift tax returns are invalid.

With respect to the transfers made by Taxpayer and Spouse in Year 4, Year 5, Year 6, and Year 7 to the Non-Exempt Trust, we conclude that the requirements of § 301.9100-3 have been satisfied. We therefore grant an extension of time of 60 days from the date of this letter for Taxpayer and Spouse to make allocations of their respective GST exemptions to their Year 4, Year 5, Year 6, and Year 7 transfers to Non-Exempt Trust. The allocations will be effective as of the dates of the transfers, 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 and Spouse'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 your authorized representative.

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