

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

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Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-168486-03

Date: OCTOBER 5, 2004

Re:

Legend:

Date 1	=
Date 2	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=
Year 7	=
Year 8	=
Year 9	=
Year 10	=
Year 11	=
Year 12	=
Grantor	=
Spouse	=
<u>A</u>	=
<u>B</u>	=
Bank	=
Trust 1	=
Trust 2	=
Partnership I	=
Partnership II	=
Son	=

Dear _____ :

This is in response to your letter dated June 9, 2004 and prior correspondence requesting an extension of time under § 2642(g) of the Internal Revenue Code and § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of the Generation-Skipping Transfer (GST) exemption to two trusts. This letter responds to your request.

The facts and representations submitted are summarized as follows: On Date 1, Grantor and Spouse established Trust 1, an irrevocable trust for the benefit of Grantor and Spouse's children and descendants. Bank is the trustee of Trust 1. Trust 1 owns a second-to-die life insurance policy insuring the lives of Taxpayer and Spouse.

Article IV, paragraph E provides, generally, that prior to the death of an insured by a policy owned by Trust 1, the children and grandchildren have the power to require the Trustee to pay to such child or grandchild in any calendar year the lesser of \$5,000 or the value of money or property added to the trust as a gift in the calendar year divided by the number of children or grandchildren alive at the time of the exercise of the power. The power lapses at the end of the calendar year if not exercised.

Article V provides, generally, that the proceeds of the insurance policies along with any other property will be held by the trustee. Article V, paragraph A provides, generally, that for an 18-month period following the execution of Trust 1, A may appoint in and by his last will and testament or other instrument in writing to a class limited to descendants of Grantor's and Spouse's who are surviving at the death of the survivor of Grantor and Spouse, or to a trust established for these descendants in such proportions as A may appoint. If A is unwilling or unable to act in this fiduciary capacity, then B will have the authority granted to A pursuant to Article V.

Article V, paragraph B, provides, generally, that in default of the exercise by A of the limited power of appointment, the trustee will divide the trust into equal shares so as to provide one share for each then living child of Grantor's and Spouse's and one share for the then living descendants, collectively, of each deceased child of Grantor's and Spouse's. The income from each share will be paid in convenient installments to such child until complete distribution of such share or his prior death. The trustee may apply such sums from principal as it deems necessary for health, education, support and maintenance. In the event of the death of a child the remainder of the trust is to be distributed per stirpes to his or her then living descendants, if any, if none then per stirpes to Grantor's and Spouse's living descendants. If any descendant is under the age of 25, their share is to be held in further trust.

Grantor and Spouse intended that Trust 1 be a long-term generation-skipping trust fully exempt from GST tax. Grantor and Spouse had agreed that they would allocate their GST exemptions to Trust 1, so that Trust 1 would have an inclusion ratio of zero. Grantor and Spouse consented to split the gifts and so signified on their Year 1

through Year 12 Forms 709 United States Gift (and Generation-Skipping Transfer) Tax Return.

Information regarding Trust 1, including information on all transfers to Trust 1 and statements that Trust 1 was to be a GST exempt trust, was provided to Grantor's and Spouse's accountants. Beginning in Year 3, accountants prepared the Forms 709 which contained Notices of Allocation allocating Grantor's and Spouse's GST exemptions to Trust 1. The Year 3 returns contained late allocations of Grantor's and Spouse's GST exemption for Years 1 and 2.

On Date 2, Grantor and Spouse created Trust 2, an irrevocable trust for the benefit of Grantor's and Spouse's descendants. Son is trustee of Trust 2. Trust was funded with Partnership I Interest and Partnership II Interest in Year 3. In addition in Year 4, there was an additional transfer of farmland to Trust 2. Grantor and Spouse consented to split their gifts and so signified on their Forms 709 for Year 3 and Year 4. No further transfers were made after Year 4.

Article II, paragraph 1, provides that the trustee may in its discretion pay to, or use for the benefit of Grantor's and Spouse's descendants so much or all of the income or principal of Trust 2, as the trustee determines for their health, education, support and maintenance.

Article II, paragraph 2, provides that upon the death of the survivor of Grantor's and Spouse's children and Grantor and Spouse, the trustee shall distribute the trust to their living descendants, per stirpes.

It is represented that Grantor and Spouse intended that their GST exemption be allocated to the transfers to Trust 2. Grantor and Spouse provided information on all the transfers to Trust 2, as well as the Trust Agreement to their accountants. However, accountants failed to include the transfers to Trust 2 in the Notices of Allocation attached to Grantor's and Spouse's Year 3 and Year 4 Forms 709.

In connection with additional estate planning with Grantor's and Spouse's attorneys in Year 12, attorneys undertook a complete review of Grantor's and Spouse's gift tax returns and discovered significant errors in the preparation of several of the returns. Some years were properly prepared. However, accountants made numerous errors due to their misunderstanding of the GST allocation rules. Consequently, Trust 1 and Trust 2 have inclusion ratios greater than zero.

Grantor and Spouse have requested an extension of time under § 2642(g)(1) and § 301.9100-3 to allocate Grantor's and Spouse's GST exemption to Trust 1 for Years 5-12 and with respect to Trust 2, Grantor's and Spouse's transfers for Years 3 and 4. Grantor further requests a ruling that each of the allocations will be effective as of the date of the transfers to Trust 1 and Trust 2, respectively, and that the gift tax value of

the transfers to the trusts will be used in determining the amount of the Grantor's and Spouse's GST exemptions to be allocated to each trust.

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.

Section 2602 provides that the amount of the GST 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 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 the GST exemption allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust (or involved in the direct skip).

Section 2631(a), in effect at the time of the transfers for Years 1 through 8, provided 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(a), in effect at the time of the transfers for Years 9 through 12, provided 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 2513(a)(1) provides, generally, that a gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, 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 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 2652(a)(2) provides that, if under § 2513, one-half of a gift is treated as made by the individual, and one-half of such gift is treated as made by the individual's spouse, then such gift shall be so treated for purposes of chapter 13.

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)(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.

Section 26.2632-1(b)(2)(ii) provides that, except as otherwise provided, an allocation of GST exemption is effective as of the date of any transfer as to which the Form 709 on which it is made is a timely filed return (a timely allocation). An allocation to a trust made on a Form 709 filed after the due date for reporting a transfer to the trust (a late allocation) is effective on the date the Form 709 is filed. See Example 3 of § 26.2632-1(b)(2)(iii).

Section 2642(b)(1) provides, in part, 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, 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)).

Section 2642(b)(3) provides, in part, that if any allocation of the GST exemption to any property not transferred as a result of the death of the transferor is not made on a gift tax return filed on or before the date prescribed by § 6075(b), the value of such property for purposes of § 2642(a) shall be determined as of the time such allocation is filed with the Secretary, and such allocation shall be effective on and after the date on which such allocation is filed with the Secretary.

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.

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. 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 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, Grantor and Spouse are granted an extension of time of 60 days from the date of this letter to allocate Grantor's and Spouse's GST exemption to the Year 5 through Year 12 transfers for which they were the transferors to Trust 1, and for the Year 3 and Year 4 transfers for which they were the transferors to Trust 2. The allocations will be effective as of the date of the transfers to the trusts, and the gift tax value of the transfers to the trusts will be used in determining the amount of GST exemption to be allocated to the trusts.

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.

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.

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 allocation of Grantor and Spouse's GST exemption should be made on a supplemental Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Internal Revenue Service, 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 C. Maloy
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: