

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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, ID No.

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PLR-113738-04

Date:

September 13, 2004

Taxpayer 1

Taxpayer 2

Trust

Date 1

Year 1

Year 2

Year 3

Year 4

Year 5

Year 6

Year 7

Year 8

Year 9

Year 10

Year 11

Year 12

Year 13

Year 14

\$a

\$b

\$c

\$d

\$e

\$f

\$g  
\$h  
\$i  
\$i  
\$k  
\$l

Attorney 1

Attorney 2

Dear :

This is in response to your letter dated February 4, 2004, 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 allocations of generation-skipping transfer (GST) tax exemption.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer 1 created an irrevocable trust ("Trust") for the benefit of his spouse ("Taxpayer 2"), children, and more remote descendants. Taxpayer 2 was designated in the trust instrument as the trustee of Trust.

Section 1 of Article 1 provides, in part, that during the life of Taxpayer 1, Taxpayer 1 or any other person may make contributions to Trust.

Section 2 of Article 1 provides, in part, that, during the life of Taxpayer 1, the trustee may pay from income and principal any premiums or assessments on any policy of life insurance owned by the trustee. The trustee may also pay so much or all of the income and principal of the trust estate to any one or more of Taxpayer 1's children, Taxpayer 1's children's spouses, and Taxpayer 1's grandchildren from time to time living, in equal or unequal proportions, and at such times as the trustee deems advisable for their support, health and maintenance in reasonable comfort, except that no payment shall be made to satisfy any legal obligation of any person to a beneficiary. Any income not so paid shall be added to principal.

Section 2 of Article II provides, in part, that, if Taxpayer 1's wife survives Taxpayer 1, then the trustee shall pay the income from the trust estate in convenient installments, at least quarterly, to her during her lifetime. The trustee may also pay to Taxpayer 1's wife such sums from principal as the trustee deems necessary or advisable from time to time for her health and maintenance in reasonable comfort, considering the income and other sources of funds known to the trustee to be available to her.

Section 3 of Article II provides, in part, that, upon the death of Taxpayer 1's wife, or upon the death of Taxpayer 1 if his wife does not survive him, the trustee shall divide

the trust estate into equal shares to create one share for each then living child of the settlor and one share for the then living descendants, collectively, of each deceased child of the settlor.

Section 4 of Article II provides, in part, that the income from a child's share shall be paid at least quarterly to the child until complete distribution of the share or his or her prior death. The trustee may also distribute principal of his or her share as the trustee deems necessary or advisable for his or her health, maintenance in reasonable comfort, education (including postgraduate education) and best interests, considering the income of the child from all sources known to the trustee.

Section 5 of Article II provides that, if a child dies before receiving his or her share in full, then upon the death of the child his or her share shall be held in trust or distributed to or in trust for the benefit of any one or more of the child's descendants and settlor's descendants other than the child and the creditors of the estate of such child, in such manner as the child may appoint by his or her will making specific reference to the power of appointment.

Section 6 of Article II provides that, upon the death of a child, any part of his or her share not effectively appointed shall be distributed per stirpes to his or her living descendants, or if none, then per stirpes to Taxpayer 1's then living descendants.

Taxpayer 1 transferred two life insurance policies to the trust in Year 3. Taxpayer 1 also made contributions to Trust in Years 3 through Year 14 in the amount of the insurance premiums that were paid in each of those years, as follows:

Year 3	\$ <u>a</u>
Year 4	\$ <u>b</u>
Year 5	\$ <u>c</u>
Year 6	\$ <u>d</u>
Year 7	\$ <u>e</u>
Year 8	\$ <u>f</u>
Year 9	\$ <u>g</u>
Year 10	\$ <u>h</u>
Year 11	\$ <u>i</u>
Year 12	\$ <u>j</u>
Year 13	\$ <u>k</u>
Year 14	\$ <u>l</u>

Since potential beneficiaries include individuals who are two or more generations below the Taxpayer 1's generation, distributions from Trust may be subject to the GST tax.

Taxpayer 1 and Taxpayer 2 relied on Attorney 1 to draft the trust instrument, assist with the funding, and provide advice on the proper administration of Trust.

Taxpayer 1 and Taxpayer 2 maintain that Attorney 1 did not advise Taxpayer 1 and Taxpayer 2 of the need to file United States Gift (and Generation-Skipping Transfer) Tax Returns (Forms 709) for each transfer to Trust in order to (1) report the amounts of the transfers to Trust, (2) signify the consent of Taxpayer 2 to treat each transfer as made one-half by Taxpayer 1 and one-half by Taxpayer 2 pursuant to § 2513, and (3) make allocations of Taxpayer 1's and Taxpayer 2's GST exemption to the transfers.

Late in Year 14, Taxpayer 1 and Taxpayer 2 hired Attorney 2 to review their estate plan, including Trust. Attorney 2 discovered that Taxpayer 1 and Taxpayer 2 did not file Forms 709 in any of Years 3 through 13.

Pursuant to § 2513 and the regulations thereunder, Taxpayer 1 and Taxpayer 2 intend to treat the transfers to Trust made in Years 3 through 14 for gift tax purposes as made one-half by Taxpayer 1 and one-half by Taxpayer 2, but only to the extent the value of the transfers exceeded the value of Taxpayer 2's ascertainable and severable interest in the trust property. Section 25.2513-1(b)(4) of the Gift Tax Regulations. Accordingly, Taxpayer 1 and Taxpayer 2 now request an extension of time under § 2642(g) and § 301.9100-3 to make allocations of Taxpayer 1's and Taxpayer 2's GST exemption to the transfers to Trust made in Years 3 through 14, effective as of the dates of the original transfers.

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident, or nonresident. Section 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall, for 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 (under the regulations provided for in § 2513(b)) 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. This paragraph shall not apply with respect to a gift by a spouse of an interest in property if he creates in his spouse a general power of appointment, as defined in § 2514(c), over such interest.

Section 25.2513-1(b)(4) provides that, if one spouse transfers property in part to his or her spouse and in part to third parties, "split gift" treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable and severable from the interest transferred to the spouse.

Section 2514(c) provides, subject to certain exceptions, that the term “general power of appointment” means a power exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate. Under § 2514(c)(1), a power that is limited by an ascertainable standard relating to health, education, support, or maintenance of the possessor is not a general power of appointment.

Section 25.2514-1(c)(2) provides, in part, that a power is limited by an ascertainable standard relating to the possessor’s health, education, support, or maintenance if the extent of the possessor’s duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). The regulation provides that a power to invade for the power holder’s “maintenance in health and reasonable comfort” meets this standard.

Section 2601 imposes a tax on every GST. A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Under § 2652(a)(1), generally, the transferor for purposes of the GST tax is, in the case of property subject to gift tax under chapter 12, the donor of the property.

Section 2652(a)(2) provides that, if, under § 2513, one-half of the gift is treated as made by an individual and one-half is treated as made by the spouse of the individual, then for purposes of the GST tax, each spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor spouse.

Section 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations provides that in the case of a transfer with respect of which the donor’s spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513. The donor is treated as the transferor of one-half of the value of the entire property.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST tax 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 2632(a)(1) provides that any allocation by an individual of his or her GST tax 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 2632(c)(1) provides, generally, that, if any individual makes an indirect skip during such individual’s lifetime, any unused portion of such individual’s GST exemption shall be allocated to the property transferred to the extent necessary to make

the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such unused portion, the entire unused portion shall be allocated to the property transferred. The deemed allocation rules in this section are applicable to transfers made after December 31, 2000.

Section 2642(b)(1)(A) provides that, except as provided in § 2642(f), if the allocation of the GST tax 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, 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 tax 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.

Notice 2001-50, 2001-2 C.B. 189, provides that, under § 2642(g)(1)(B), the time for allocating the GST tax 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 GST 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 six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except in subtitles E, G, H, and I.

Section 301.9100-3(a) 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 prescribed 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 election 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 to 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 with respect to the transfers to Trust in Years 3 through 12. If the requirements for signifying consent under § 2513(b) are satisfied in each of these years, Taxpayer 2 will be deemed the transferor for GST purposes of one-half of the value of each transfer to Trust made by Taxpayer 1, even though Taxpayer 2 may be deemed to transfer less than one-half of the value of each transfer for gift tax purposes after taking into account Taxpayer 2's ascertainable and severable interest in each transfer. Therefore, Taxpayer 1 and Taxpayer 2 are granted an extension of time of 60 days from the date of this letter to file Forms 709 for the transfers made to Trust in Years 3 through 12. The Forms 709 should include a Notice of Allocation properly allocating Taxpayer 1's and Taxpayer 2's GST tax exemption to the transfers made to Trust in Years 3 through 12. The allocations will be effective as of the dates of each transfer, and the value of the transfers for gift tax purposes will be used in determining the amount of GST tax exemption to be allocated to Trust. A copy of this letter should be attached to each Form 709 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. We conclude that the deemed allocation rules in § 2632(c) are applicable to the transfers to Trust in Years 13 and Year 14, and therefore, no extension of time under § 301.9100-3 is necessary for those years.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers 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.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

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