

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

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Date:

July 20, 2004

LEGEND

Taxpayer 1 =

Taxpayer 2 =

Date 1 =

Trust 1 =

Year 1 =

a =

Date 2 =

Year 2 =

b =

Company =

c =

d =

e =

Date 3 =

f =

Accounting Firm =

Year 3 =

Year 4 =

Trust 1-A =

Trust 1-B =

Dear ,

This is in response to your representative's letter, dated February 18, 2004, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make allocations of Taxpayer 1's and Taxpayer 2's Generation-Skipping Transfer (GST) exemption.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer 1 established Trust 1. Trust 1 is an irrevocable trust for the benefit of the descendants of Taxpayer 1 (husband) and Taxpayer 2 (wife).

Trust 1 provides in part as follows: Until the death of the survivor of Taxpayer 1 and Taxpayer 2, the trustees, other than Taxpayer 1, Taxpayer 2, and any issue who is acting as a trustee, may pay to any one or more or all of Taxpayer 1's issue, part or all of the principal as such trustees deem advisable.

Upon the last to die of Taxpayer 1 and Taxpayer 2, or in the absolute discretion of the trustees, other than Taxpayer 1, Taxpayer 2, and any issue acting as a trustee, at any time prior to the death of the survivor of Taxpayer 1 and Taxpayer 2, the trust principal shall be divided and set aside into equal shares, per stirpes, for Taxpayer 1's issue then living. The net income shall be paid to the beneficiary of such separate share at least annually until his death. The trustees, however, other than Taxpayer 1, Taxpayer 2, or any issue acting as trustee, may in their discretion, pay any part or all of such income to the beneficiary's issue, or accumulate and add part, or all of the income to principal.

The trustees, other than Taxpayer 1, Taxpayer 2, and any issue who may be acting as a trustee, have the discretion to pay principal from a separate share, for the benefit of any one or more or all of the beneficiary and the beneficiary's issue, as such trustees shall deem advisable. Upon the death of the beneficiary, the principal of the

separate share shall be distributed to or among such one or more of the beneficiary's issue, outright or in further trust, as such beneficiary shall appoint by will.

In Year 1, Taxpayer made a taxable gift of \$a in cash to Trust 1. Taxpayer 1 and Taxpayer 2 elected to split gifts for Year 1 under Internal Revenue Code § 2513. Accordingly, the Year 1 transfer to Trust 1 is treated as if made one-half by each of them. On their Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return for Year 1, Taxpayer 1 and Taxpayer 2 each allocated sufficient GST exemption to this transfer so that the inclusion ratio of Trust 1 was zero.

On Date 2 in Year 2, Taxpayer 1 transferred b Company shares to Trust 1. You represent that the value of these shares as of that date was \$c. On that date, Taxpayer 1 also transferred d Company warrants to Trust 1. You represent that the total value of these warrants on Date 2 was \$e. On Date 3 in Year 2, Taxpayer 1 transferred \$f in cash to Trust 1.

Taxpayer 1 and Taxpayer 2 engaged Accounting Firm to prepare their Year 2 Forms 709. Accounting Firm prepared and filed the Taxpayers' Year 1 Forms 709. Accounting Firm was instructed to apply Taxpayers' GST exemptions to the Year 2 gifts to Trust 1. Accounting Firm obtained an extension of time to file Taxpayers' Year 2 Forms 709, however, Accounting Firm did not prepare and file the Forms 709 until Year 4, a date that was after the expiration of the extension period.

In Year 4, Accounting Firm informed Taxpayer 1 that because the Year 2 Forms 709 were filed late, in order to get an inclusion ratio of zero, Taxpayers would have to allocate GST exemption in the amount of the Year 4 value of the Year 2 gifts to Trust 1. Because of the substantial increase in the value of Company assets, the GST exemption required to be allocated in order to bring the inclusion ratio of Trust 1 to zero was much greater than it would have been if there was a timely allocation. In an attempt to mitigate further damage, in Year 4 the trustees of Trust 1 split Trust 1 into two identical trusts, Trust 1-A and Trust 1-B, so that each taxpayer could allocate a sufficient amount of their GST exemption to fully exempt one of the divided trusts from the GST tax. Trust 1-B held the Company stock and warrants, and Trust 1-A held the remaining assets. On their Year 3 Forms 709, Taxpayer 1 and Taxpayer 2 made late allocations of GST exemptions to the assets transferred in Year 2 that were retained in Trust 1-A.

Taxpayer 1 and Taxpayer 2 have requested an extension of time to make allocations of their respective GST tax exemption with respect to the assets transferred to Trust 1 in Year 2.

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 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 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, in part, 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.

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 § 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, its value at the time of the close of the estate tax inclusion period, and such allocation shall be effective on and after the date of such transfer, 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 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 § 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 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 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, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Taxpayer 1 and Taxpayer 2 are granted an extension of time of 60 days from the date of this letter to file supplemental Forms 709 for the Year 2 transfers to Trust 1. Each Form 709 should include a Notice of Allocation properly allocating each Taxpayer's GST exemption to the Year 2 transfers. The allocations will be effective as of the dates of the Year 2 transfers to Trust 1, and the gift tax values of the Year 2 transfers to Trust 1 will be used in determining the amount of GST exemption to be allocated.

These allocations 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.

The late allocations of Taxpayer 1's and Taxpayer 2's respective GST exemptions to the Year 2 transfers retained in Trust 1-A after the split are void because if Taxpayer 1 and Taxpayer 2 make allocations of GST exemption pursuant to the relief granted above, the allocations will be deemed timely and result in Trust 1 having a zero inclusion ratio prior to the division. Similarly, immediately after the division of Trust 1, Trust 1-A and Trust 1-B will have zero inclusion ratios for GST tax purposes.

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. In addition, we express or imply no opinion regarding the value of the property transferred to Trust 1.

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

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copies of this letter (2)