

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

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Date: May 21, 2004

LEGEND:

Taxpayer 1 =

Taxpayer 2 =

Trust =

Date 1 =

Child A =

Year 2 =

X =

Year 3 =

Y =

Dear :

This is in response to a letter dated January 26, 2004, sent by your representative 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 your generation-skipping transfer (GST) tax exemption.

The facts and representations submitted are summarized as follows: Taxpayer 1 and Taxpayer 2, husband and wife (hereinafter "Trustors"), created Trust on Date 1. Trust is an irrevocable trust for the primary benefit of their descendants.

Part Two of the trust agreement provides that the trustee may make discretionary distributions of income and principal to Trustors' issue as is necessary for the health, education, support and maintenance of such issue as a group.

Article I of Part Three of the trust agreement provides that the trust initially created in Part Two of the trust agreement shall terminate on the first to occur of the following events: (1) Child A attaining the age of twenty-one, or (2) Trustors' oldest living child attaining the age of thirty-five.

Article II(A)(1) of Part Three provides that upon the termination referred to in Article I of Part Three, the trust is to be divided into as many equal shares as there are then living children of Trustors and then deceased children of Trustors leaving issue then living, with each share being administered in a separate trust.

Article II(B)(1)(a) of Part Three provides that until the beneficiary of each separate trust attains the age of thirty-five, the trustee may make discretionary distributions of income and principal to the beneficiary as is necessary for his or her health, education, support and maintenance. Article II(B)(1)(b) of Part Three provides that after the beneficiary of each separate trust attains the age of thirty-five, the trustee shall pay to the beneficiary the entire net income of the trust quarter-annually or at more frequent intervals, and so much of the principal as is necessary for the beneficiary's health, support, maintenance, and education.

Article II(B)(2) of Part Three provides that until the beneficiary of each separate trust attains the age of thirty-five, such beneficiary will have a special power of appointment to appoint the undistributed balance of his or her trust upon his or her death to one or more of the group consisting of such beneficiary's issue and the spouses of such beneficiary's issue. It further provides that after the beneficiary of each separate trust attains the age of thirty-five, such beneficiary will have a special power of appointment to appoint the undistributed balance of his or her trust to any person except such beneficiary or his or her estate or the creditors of such beneficiary or his or her estate.

Article II(B)(3) of Part Three provides that upon the death of a beneficiary, any part of such beneficiary's trust that is not effectively appointed pursuant to Article II(B)(2) of Part Three, shall be divided into shares and allocated to such beneficiary's then living issue, by right of representation, or, if there are none, to Trustors' then living issue, by right of representation.

Article II(B)(4) of Part Three provides that upon the death of a beneficiary who had attained the age of thirty-five, if any portion of the distribution under Article II(B)(3) of Part Three would involve a payment of GST tax if the beneficiary did not possess a general power of appointment, then such beneficiary shall have a general power to appoint at death the portion of the distribution that otherwise would involve a payment of GST tax to one or more persons or entities, including such beneficiary's estate, as the beneficiary shall appoint. It further provides that if a beneficiary's trust has a federal

GST tax inclusion ratio of greater than zero, then the trustee shall pay to the beneficiary during the beneficiary's lifetime such amounts as the beneficiary may from time to time request in writing up to the whole of the trust.

Article II(B)(6) of Part Three provides that if some or all of an individual's GST tax exemption is allocated to property distributed to a trust hereunder and such trust would otherwise have an inclusion ratio of greater than zero, then the Trustee is directed to create, prior to the distribution of such property, one such trust having an inclusion ratio of zero and one having an inclusion ratio of one.

Potential beneficiaries include individuals who are two or more generations below Trustors' generation, therefore, distributions from Trust may be subject to the GST tax.

In Year 2, Trustors transferred to Trust shares of stock valued at \$x. In Year 3, Trustors transferred to Trust shares of stock valued at \$y. Trustors reported the transfers to Trust on timely filed Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return, for Year 2 and Year 3. Each Trustor consented on his or her Form 709 for Year 2 and Year 3 to treat the gifts made in Year 2 and Year 3 as being made one-half by each pursuant to § 2513. The gift tax returns were prepared by a certified public accountant on whose expertise Trustors relied. The accountant, however, inadvertently failed to allocate Trustors' available GST tax exemptions to the transfers.

Taxpayers request an extension of time to make allocations of their GST tax exemptions under § 2642(g) with respect to the assets transferred to Trust in Year 2 and Year 3. In addition, Taxpayers request that the allocation be based on the value of the assets transferred to the trust as of the date of the transfers so that each trust has an inclusion ratio of zero.

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.

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 2642(b)(1) 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 that, in general, requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3.

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. 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 and Year 3 transfers to Trust. The Forms 709 should include a Notice of Allocation properly allocating each taxpayer's GST tax exemption to the transfers in Year 2 and Year 3. The allocations will be effective as of the date of the transfers, and the gift tax value of the transfers to Trust will be used in determining the amount of GST tax exemption to be allocated to the trusts. A copy of this letter should be attached to each supplemental Form 709 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. Four copies are included for this purpose.

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. We are specifically not ruling on the gift tax value of the transfers to Trust.

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.

Pursuant to the Power of Attorney on file with this office, this letter is being sent to the taxpayers' 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

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

Enclosures (4)

cc: