

Internal Revenue Service

Number: **201811003**

Release Date: 3/16/2018

Index Number: 2504.02-00, 2513.00-00,
2632.00-00, 2642.00-00,
9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:04

PLR-117350-17

Date:

November 27, 2017

Re:

LEGEND

Husband =

Wife =

Trusts =

Attorney =

Accounting Firm =

Date 1 =

Date 2 =

Date 3 =

Year 1 =

Year 2 =

g =

r =

s =

t =

u =

Dear :

This letter responds to your personal representative's letter of May 17, 2017, and other correspondence, requesting rulings regarding the effect of gift splitting under § 2513 of the Internal Revenue Code on certain transfers and the application of the generation-skipping transfer (GST) tax allocation rules under § 2632(c) to those transfers.

The facts and representations submitted are summarized as follows.

On Date 1 in Year 1 (a date after August 5, 1997, and before January 1, 2001), Husband created four irrevocable trusts (Trusts) for his four children. Each child is the primary beneficiary of a separate trust for the benefit of herself and her children.

Under Article First, Paragraph A of each trust, the income of that trust is to be paid to the child for whom the trust was created. On the child's death, the principal is to be held in further trust and distributed outright to her children upon their attaining age 35.

On Date 1, Husband transferred \$q to each of the four Trusts. In total, Husband transferred \$r to Trusts on Date 1.

Prior to the Date 1 transfer in Year 1, Husband and Wife had retained Attorney for estate planning advice and preparation of the governing instruments of Trusts. Attorney coordinated this estate planning with Accounting Firm, which Husband and Wife retained to prepare any necessary Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns.

Accounting Firm prepared Year 1 Forms 709 for Husband and Wife. On his and her respective timely filed Form 709, Husband and Wife signified their consent to treat their gifts in Year 1 as having been made one-half by each spouse under § 2513. Nevertheless, Husband's Form 709 reported his portion of the total transfer to Trusts to be \$s, which is three-quarters (rather than one-half) of \$r. Wife's Form 709 reported her portion of the total transfer to Trusts to be \$q, which is one-quarter (rather than one-half) of \$r.

Although Trusts had GST potential, neither Attorney nor Accounting Firm advised Husband and Wife to allocate GST exemption to his and her respective portion of the transfers they are treated as having made pursuant to the election under § 2513. Accordingly, no amount of Husband's or Wife's available GST exemption was allocated to the transfers to Trusts on the Year 1 Forms 709.

Several years later, in Year 2, Husband and Wife made additional gifts (not to Trusts). Accounting Firm prepared Year 2 Forms 709, timely filed by Husband and Wife, on which Husband and Wife reported his and her respective gifts.

In preparing the Year 2 Forms 709, Accounting Firm realized that no GST exemption had been allocated to the transfers to Trusts in Year 1. Accounting Firm advised Husband of the ability to make a late allocation of GST exemption to the Date 1

transfers to Trusts. Accounting Firm prepared Husband's Year 2 Form 709 to include the late allocation of GST exemption to the Date 1 transfers to Trusts. On Husband's Year 2 Form 709, Husband made a late allocation of his available GST exemption to the Date 1 (in Year 1) transfers to Trusts. The late allocation of Husband's GST exemption erroneously allocated an amount equal to one-hundred percent of the value of the Date 1 transfers to Trusts (such value determined as of the effective date of the allocation). The notice of allocation attached to Husband's Year 2 Form 709 stated that, as a result of the late allocation, the inclusion ratio of Trusts was zero. Wife was not advised to make a late allocation of GST exemption to Wife's portion of the Date 1 transfers to Trusts.

It is represented that Wife had sufficient GST exemption to allocate to the transfers she is treated as having made to Trusts in Year 1. Wife died on Date 3. The period of limitations under § 6501 has expired with respect to Wife's Forms 709 filed for Year 1 and Year 2.

You, as executor of Wife's estate, have requested the following rulings:

- (1) As the period for assessment of gift tax under § 6501 has expired for Wife's Year 1 Form 709, Wife is treated as the transferor of \$g, the amount reported for Wife's portion of the Date 1 transfers to Trusts on Wife's Year 1 Form 709.
- (2) An extension of time be granted to Wife's estate to make a timely allocation of GST exemption to Wife's portion of the total Date 1 transfers to Trusts.

LAW AND ANALYSIS

Ruling Request 1

Section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during the calendar year by any individual, resident or nonresident. Section 2511(a) 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 2504(c) provides that if the time has expired under § 6501 within which a tax may be assessed under chapter 12 on the transfer of property by gift made during a preceding calendar period, the value thereof shall, for purposes of computing the tax under chapter 12, be the value as finally determined (within the meaning of § 2001(f)(2)) for purposes of chapter 12.

Section 25.2504-2(b) of the Gift Tax Regulations provides that if the time has expired under § 6501 within which a gift tax may be assessed under chapter 12 on the transfer of property by gift made during a preceding calendar period, and the gift was made after August 5, 1997, the amount of the taxable gift or the amount of the increase in taxable gifts, for purposes of determining the correct amount of taxable gifts for the preceding

calendar periods is the amount that is finally determined for gift tax purposes and such amount may not be thereafter adjusted. The rule in this paragraph applies to adjustments involving all issues relating to the gift including valuation issues and legal issues involving the interpretation of the gift tax law.

Section 2513(a)(1) provides, generally, that a gift made by one spouse to any person other than the donor's spouse is considered, for purposes of the gift tax, as made one-half by the donor and one-half by the donor's spouse.

Section 25.2513-1(b)(5) provides, in part, that the consent may not be applied only to a portion of the property interest constituting such gifts. If the consent is effectively signified on either the husband's return or the wife's return, all gifts made by the spouses to third parties (except as described in § 25.2513-1(b)(1) through (4)), during the calendar period will be treated as having been made one-half by each spouse.

In this case, Husband and Wife elected to treat their Year 1 gifts (including \$r, the total amount transferred to Trusts) as made one-half by each spouse. However, Husband's Form 709 incorrectly reported three-fourths of \$r (\$s) as his portion of the gift, and Wife's Form 709 incorrectly included one-fourth of \$r (\$g) as her portion of the gift.

Under § 2513, Husband's Year 1 transfers to Trusts, totaling \$r, are considered as made one-half by Husband and one-half by Wife. However, under § 2504(c) and § 25.2504-2(b), because the time has expired under § 6501 within which a gift tax may be assessed, the amount of the taxable gift is the amount that is finally determined for gift tax purposes and may not thereafter be adjusted. In this case, the disproportionate gift split reported on Husband's and Wife's respective Forms 709 represents the amounts that are finally determined for gift tax purposes.

Consequently, for gift tax purposes, Husband is treated as transferring \$s to Trusts on Date 1, and Wife is treated as transferring \$g to Trusts on Date 1.

Ruling Request 2

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 2602 provides that the amount of the tax imposed by § 2601 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 GST 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), as in effect for the tax year at issue, provided that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

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)(4)(i) of the Generation-Skipping Transfer Tax Regulations provides, in relevant part, that an allocation of GST exemption to property transferred during the transferor's lifetime 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)(A) 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 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)).

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 § 2642(g)(1)(A), 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 (or election) shall be treated as if not expressly prescribed by statute.

Section 2652(a)(1) provides, in part, that except as provided in this subsection or § 2653(a), the term "transferor" means in the case of any property subject to the tax imposed by chapter 12, the donor.

Section 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of chapter 13.

Section 26.2652-1(a)(4) provides that in the case of a transfer with respect to 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.

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 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 6 months except in the case of a taxpayer who is abroad), under all subtitles of the 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) 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. For GST tax purposes, Wife is

treated as the transferor of one-half of the total value of the property transferred to Trusts on Date 1, which is equal to \$u. Section 26.2652-1(a)(4). The executor of Wife's estate is granted an extension of time of 120 days from the date of this letter to allocate

Wife's GST exemption to that one-half portion of the transferred property. The allocation will be effective as of the date of the transfers to Trusts.

The allocation should be made on a supplemental Form 709 for Year 1 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Except as expressly provided herein, we express 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) 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 representatives.

The ruling contained in this letter is 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,

Karlene Lesho

Karlene Lesho
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures:
Copy for § 6110 purposes
A copy of this letter

cc: