

## Internal Revenue Service

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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:B4

PLR-105910-21

Date:

September 09, 2021

### Legend

Settlor =

Trust =

Trust Agreement =

Family Trust =

Child 1 Trust =

Child 2 Trust =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Attorney =

Dear               :

This letter responds to your authorized representative's letter dated March 9, 2021, and subsequent correspondence, requesting an extension of time under § 2642(g) of the Internal Revenue Code (Code) and § 301.9100-3 of the Procedure and Administration Regulations to elect out of the generation-skipping transfer (GST) tax automatic allocation of exemption rules.

The facts and representations submitted are as follows:

On Date 1 (a date after December 31, 2000), Settlor established Trust, a grantor retained annuity trust. On Date 2 (a date in the same year as Date 1), Settlor transferred property to Trust (the Date 2 transfer). Settlor filed a timely Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return. Trust is governed by Trust Agreement.

Under Article First, paragraph (A)(5) of Trust Agreement, an Independent Trustee is a trustee who is not (a) related or subordinate to the person appointing him or her to serve as trustee within the meaning of § 672(c) of the Code; (b) the Settlor or a beneficiary of the trust at issue; and (c) an individual whose possession of the powers and discretion conferred under Trust Agreement upon an Independent Trustee would result in any portion of the trust fund being included (i) for federal estate tax purposes, in the gross estate of the Settlor; (ii) in the gross estate of the trustee; (iii) in the gross estate of a beneficiary; or (iv) for federal gift tax purposes, as a taxable gift of such trustee.

Under Article Third, paragraph (A), Trust and trusts created by Trust Agreement are irrevocable and may not be altered, amended, revoked, or terminated by the Settlor, in whole or in part. Paragraph (B), however, generally provides an Independent Trustee with a limited power to modify Trust Agreement. Paragraph (C) describes restrictions on the Independent Trustee's power to modify Trust Agreement. Paragraph (D) provides the procedures for modification of Trust Agreement by the Independent Trustee.

Under Article Fourth, Settlor's retained interest in Trust terminated at the end of the annuity term on Date 3.

The estate tax inclusion period (ETIP) with respect to the Date 2 transfer closed for GST tax purposes on Date 3.

Under Article Fifth, beginning on Date 3, Trust continued as a new, separate trust known as Family Trust. Family Trust has GST potential.

Under Article Fifth, Family Trust terminates when neither Taxpayer's spouse nor any child of Settlor under the age of 30 years is living.

Under Article Sixth, upon termination of Family Trust, if both of Settlor's two children are living, the trustee is to divide the trust fund balance into a share for each child and retain each share in a separate trust for the benefit of the child for whom the separate trust is created. The Independent Trustees may make discretionary distributions to the child. One half of the principal of a child's trust is to be distributed to the child outright at the later of the death of Settlor's spouse or when the child reaches age 30; the remaining principal is to be distributed outright to the child at the later of the death of the Settlor's spouse or when the child reaches age 35.

On Date 4, the Independent Trustee of Family Trust modified Trust Agreement (in accordance with Article Third) to permit an accelerated division of Family Trust. Also on Date 4, the Independent Trustee terminated Family Trust and retained the balance of Family Trust in two equal separate trusts, the Child 1 Trust and the Child 2 Trust, to be held, administered, and distributed as provided in Article Sixth.

No taxable distributions, taxable terminations or any other events have occurred with respect to any trust established under Trust Agreement that would result in a GST tax liability.

Settlor retained Attorney to draft Trust Agreement and to provide tax advice with respect to the Date 2 transfer. Attorney failed to advise Settlor of the rules under § 2632(c) regarding the automatic allocation of GST exemption and the ability to elect out of the automatic allocation of GST exemption by making an election under § 2632(c)(5). Consequently, Settlor failed to make an election under § 2632(c)(5) with respect to the Date 2 transfer.

Settlor requests an extension of time under § 2642(g) and § 301.9100-3 to elect out of automatic allocation of GST exemption for the Date 2 transfer.

### Law and Analysis

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 exemption amount 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(c)(1) provides that if any individual makes an "indirect skip" during such individual's lifetime, any unused portion of such individual's GST exemption is treated as 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.

Under § 2632(c)(3)(A), the term “indirect skip” means any transfer of property (other than a direct skip) subject to the tax imposed by chapter 12 made to a GST trust, as defined in § 2632(c)(3)(B). Under § 2632(c)(3)(B), a GST trust is a trust that could have GST potential with respect to the transferor unless the trust satisfies any of the exceptions listed in § 2632(c)(3)(B)(i)-(vi).

Section 2632(c)(4) provides that for purposes of § 2632(c), an indirect skip to which § 2642(f) applies shall be deemed to have been made only at the close of the ETIP. The fair market value of such transfer shall be the fair market value of the trust property at the close of the ETIP.

Section 2632(c)(5)(A)(i) provides, in part, that an individual may elect to have § 2632(c) not apply to an indirect skip or any or all transfers made by such individual to a particular trust. Section 2632(c)(5)(B)(ii) provides that the election may be made on a timely filed gift tax return for the calendar year for which the election is to become effective.

Section 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides that, in the case of an indirect skip made after December 31, 2000, to which § 2642(f) (relating to transfers subject to the estate tax inclusion period or ETIP) does not apply, the transferor’s unused GST exemption is automatically allocated to the property transferred (but not in excess of the fair market value of the property on the date of the transfer). This automatic allocation is effective whether or not a Form 709 is filed reporting the transfer and is effective as of the date of the transfer to which it relates. An automatic allocation is irrevocable after the due date of the Form 709 for the calendar year in which the transfer is made.

Section 26.2632-1(b)(2)(ii) provides that, except as otherwise provided, the transferor may prevent the automatic allocation of GST exemption with regard to an indirect skip by making an election as provided in § 26.2632-1(b)(2)(iii).

Section 26.2632-1(b)(2)(iii)(A) provides, in relevant part, that a transferor may prevent (1) the automatic allocation of GST exemption (elect out) with respect to one or more (or all) current-year transfers made by the transferor to a specified trust or trusts, and (2) the automatic allocation of GST exemption (elect out) with respect to all future transfers made by the transferor to a specified trust or trusts.

Section 26.2632-1(b)(2)(iii)(B) provides that to elect out, the transferor must attach an election out statement to a Form 709 filed within the time period provided in § 26.2632-1(b)(2)(iii)(C). In general, the election out statement must identify the trust, and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers.

Under § 26.2632-1(b)(2)(iii)(C), to elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing the Form 709 for the calendar year in which (1) for a transfer subject to § 2642(f), the ETIP closes or (2) for all other elections out, the first transfer to be covered by the election out was made.

Section 26.2632-1(c)(1)(i) provides that a direct skip or an indirect skip that is subject to an ETIP is deemed to have been made only at the close of the ETIP. The transferor may prevent the automatic allocation of GST exemption to a direct skip or an indirect skip by electing out of the automatic allocation rules at any time prior to the due date of the Form 709 for the calendar year in which the close of the ETIP occurs (whether or not any transfer was made in the calendar year for which the Form 709 was filed, and whether or not a Form 709 otherwise would be required to be filed for that year).

Section 2642(b)(1)(A) 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 ETIP, its value at the time of the close of the ETIP.

Section 2642(f)(1) provides that, for purposes of determining the inclusion ratio, if an individual makes an inter vivos transfer of property, and the value of such property would be includible in the gross estate of such individual under chapter 11 if such individual died immediately after making such transfer (other than by reason of § 2035), any allocation of GST exemption to such property shall not be made before the close of the ETIP (and the value of such property shall be determined under § 2642(f)(2)). If such transfer is a direct skip, such skip shall be treated as occurring as of the close of the ETIP.

Section 2642(f)(3) provides that, for purposes of § 2642(f), the term “estate tax inclusion period” means any period after the transfer described in § 2642(f)(1) during which the value of the property involved in such transfer would be includible in the gross estate of the transferor under chapter 11 if he died.

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).

Section 2642(g)(1)(B) provides that in determining whether to grant relief under § 2642(g)(1), 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.

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 transfer 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.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides an automatic extension of time for making certain elections. Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose date is prescribed by a regulation (and not expressly provided by statute). In accordance with § 2642(g)(1)(B) and Notice 2001-50, a taxpayer 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 301.9100-3(a) provides, in part, that requests for relief subject to § 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 the grant of 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 representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, Settlor is granted an extension of time of 120 days from the date of this letter to elect out of the automatic allocation rules with respect to the Date 2 transfer. The election should be made on an amended Form 709 filed with the Internal Revenue Service at the following address: Internal Revenue Service, Attn: E&G, Stop 824G, 7940 Kentucky Drive, Florence, KY 41042-2915.

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

This ruling is directed only to the taxpayer 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.

Sincerely,

Associate Chief Counsel  
Passthroughs & Special Industries

*Leslie H. Finlow*

By: \_\_\_\_\_  
Leslie H. Finlow  
Senior Technician Reviewer, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosure (1)  
Copy for § 6110 purposes

cc: