

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

[CC:PSI:04] – PLR-147616-03

Date:

November 06, 2003

In Re:

Legend:

Trust =

Y Trust =

Wife =

Husband =

Daughter =

Son =

Attorney 1 =

Attorney 2 =

City =

B =

C =

E =

F =

\$s =

\$u =

\$z =

\$x =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

State Statute =

Dear : :

This is in response to your authorized representative's July 31, 2003, submission requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations and § 2642(g) of the Internal Revenue Code to allocate Husband's GST exemption to Trust, and a determination that a previous allocation to Trust is void or ineffective.

According to the facts submitted, on Date 2, Husband established Trust, an irrevocable trust, for the benefit of his wife, Wife, and descendants.

Article III(A) of Trust provides that during the life of Wife, the trustee is to pay to a class consisting of Wife, Husband's then-living children and Husband's grandchildren and great-grandchildren from time to time living, so much of the income of Trust and in such amounts and proportions as the trustee, in its discretion, determines. The trustee, in its discretion, may pay all of the net income to one member of the class or apportionate for the various members, to the exclusion of other members, in such manner as the trustee deems advisable, without equality of treatment, taking into consideration the best interests and welfare of all members of the class. If the trustee deems the net income to be insufficient, the trustee may also pay as much of the principal of Trust as the trustee in its discretion, deems necessary to one or more members of such class in such proportions as the trustee deems advisable, to the exclusion of other members, after taking into consideration any other income and/or resources available to various members of the class and the interests and welfare of the class.

Under Article III(B), upon the death of Wife, the trustee is to divide the remaining trust estate into two shares, one for the benefit of Husband's daughter, Daughter, and her descendants and one for the benefit of Husband's son, Son, and his descendants. If at such time either Daughter or Son is not then living, and has no then living descendants, his or her share is directed to be held in trust for the benefit of Husband's other child and his or her descendants. At the time of creation of Trust, Husband had two grandchildren children. Following Husband's death, a third grandchild was born.

Article III(B)(1)(a) provides that any shares set aside for a child of Husband will be held in trust from which the trustee will pay to such child and his or her descendants, in equal or unequal amounts, so much of the net income and accumulated income as the trustee may deem advisable for the care, support, education, maintenance or

general welfare of any or all of such persons. Any income not so paid is to be added to principal at the end of the trust year.

Article III(B)(1)(b) of Trust provides that the trustee shall have the power at any time and from time to time in the Trustee's absolute discretion to pay so much or all of the principal of the trust to such child for whom it is held or his or her descendants for the care, support, education, maintenance or general welfare of such person.

Under Article III(B)(1)(c), upon the death of either Daughter or Son, the trust for his or her benefit will be held in further trust for his or her living descendants as provided in Article III(B)(2). If no such descendant is then living, such interest is directed to be added to the trust for Husband's other child or his or her descendants.

Article III(B)(2)(a) provides that any property that is directed to be held in trust for the benefit of the descendants of a child of Husband will be held in further trust and the trustee will pay to such one or more of such child's descendants, in equal or unequal amounts, including all to any one thereof and none to all thereof, so much of the net income and accumulated income as the trustee may deem advisable for the care, support, education, maintenance or general welfare of any or all of such persons. Any net income not so paid or applied is to be added to principal at the end of each trust year.

Under Article III(B)(2)(c), the trustee has the power at any time, in the Trustee's absolute discretion to pay so much or all of the principal of either trust to any income beneficiary of the trust for the care, support, education, maintenance or general welfare of such beneficiary.

Article III(B)(2)(b) provides that twenty-one years after the death of the survivor of Husband, Daughter, Son, and each descendant of Daughter or Son who is alive at Husband's death, the Trustee is directed to pay any principal of the further trust held for the descendants of Daughter to Daughter's then living descendants, by right of representation, and to pay any principal of the further trust held for Son's then living descendants, by right of representation. If either Daughter or Son does not have then living descendants, such trust will be paid to the descendants of the remaining child of Husband, by right of representation.

Article III(B)(2)(d) provides that the Trustee may at any time, in the trustee's discretion, terminate a trust and pay all of the then principal and income of such trust to the person or persons then entitled to the income from such trust, free of trust, if in the trustee's sole judgment it is in the best interest of all concerned or if the principal of any such trust is so small that it would be impractical or inadvisable to continue to hold it in trust.

Article VI(C) provides that in no event may any income beneficiary serving as trustee have the right to invade the principal from any trust for his or her own benefit. Such right of invasion shall only be exercised by the co-trustees other than the income beneficiary. In addition, under State Statute, if a trust beneficiary is also a trustee and the trust authorizes the beneficiary, as trustee to make discretionary distributions of income or corpus to himself or herself, then the beneficiary can exercise that power for his or her own benefit only to provide for health, education, maintenance within the meaning of §§ 2041 and 2514 of the Internal Revenue Code.

Wife, Son, and B were named as the initial trustees of Trust. Wife, Son and C are the current trustees of Trust.

By instrument dated Date 2, Husband transferred to Trust, one-half of Husband's vested remainder interest in Y Trust created by Husband's father under an agreement dated Date 1, for the lifetime benefit of Husband's sister. Husband assigned the balance of his remainder interest in Y Trust to Wife. Wife assigned the interest she received from Husband in Y Trust to an irrevocable trust created by Wife on the same day.

The assets of Y Trust consisted of an undivided interest in a ground lease to certain improved real property located in City. The remainder interest in Y Trust transferred by Husband and Wife did not vest in possession until the death of Husband's sister.

On Date 3, Attorney 1 prepared and filed a federal gift tax return (Form 709) on behalf of Husband to report his gift of the remainder interest in Y Trust. Attorney 1 used a version of Form 709 that did not contain a schedule by which a transferor could allocate his or her GST exemption. Attorney 1 did not attach a Notice of Allocation of Exemption to the Form 709 to allocate any of Husband's GST exemption to Trust.

Subsequently, Husband's federal gift tax return was audited by the Internal Revenue Service (IRS). The audit resulted in adjustments to the valuation of Husband's Date 2 transfer to Trust, increasing the amount of Husband's gift to Trust from \$z to \$y. Thereafter, Husband filed a claim for refund with the IRS that reduced the value of the gift to \$x.

Husband died on Date 4. On Date 5, Attorney 1 prepared on behalf of Husband's estate, Husband's Federal estate tax return. (Form 706). On Schedule R of the estate tax return Attorney 1 allocated \$x (the Date 2 value of Husband's transfer) of Husband's GST exemption to Trust. Attorney 1 erroneously assumed that an allocation of GST exemption made on the Husband's estate tax return would be effective as of Date 2, the date of Husband's transfer to Trust.

On Date 6, \$ was distributed from Trust to each of two grandchildren of Husband, E and F. A Form 706-GS(D-1) was filed with respect to each distribution. The forms were completed on the advice of Attorney 1, that the allocation of GST exemption on Husband's estate tax return based on the initial value of Trust resulted in an inclusion ratio of zero with respect to trust. There have been no other distributions from Trust.

Wife, as executrix of Husband's estate, consulted a new attorney, Attorney 2, on Date 7. Upon the advice of Attorney 2, the executrix has requested the following rulings:

1) A ruling granting the executrix an extension of time pursuant to § 2642(g)(1) and 301.9100-3, to make an allocation of Husband's GST exemption to Husband's Date 2 transfer to Trust, to be effective as of Date 2.

2) A ruling that, if the relief under ruling #1 is granted and an allocation is made pursuant to that relief, then pursuant to § 26.2632-1(b)(2), the allocation of Husband's GST exemption made on Husband's estate tax return is deemed void or ineffective.

3. A ruling that, after taking into account the timely allocation to be made pursuant to ruling #1, Trust has an inclusion ratio of zero, such that no GST tax should be due with respect to the Date 6 distributions from Trust.

Section 2501(a) imposes a tax on the transfer of property by gift during each calendar year by any individual.

Section 2601 imposes a tax on every generation-skipping transfer (GST) made by a transferor to a "skip person."

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means with respect to any GST transfer, 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 generation-skipping transfer 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 GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the direct skip.

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 the individual (or his executor) to any property with respect to which the individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

Section 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides 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 a zero inclusion ratio with respect to the trust.

Under § 2652(a)(1) and § 26.2652-1(a)(1), generally, the transferor for purposes of the GST tax is the individual with respect to whom the property was last subject to Federal estate or gift tax.

As applicable on Date 2, § 2642(b)(1) provided that, except as provided in § 2642(f), if the allocation of the GST exemption to any 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) [deemed allocation to lifetime direct skips] -

(A) the value of such property for purposes of determining the inclusion ratio shall be its value for purposes of chapter 12, and

(B) such allocation shall be effective on and after the date of such transfer.

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 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.

Under § 301.9100-1(c), 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. Notice 2001-50, 2001-2 C.B. 189, 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.

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 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 the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, the executrix is granted an extension of time until 60 days after the date of this letter to make an allocation of Husband's GST exemption with respect to Husband's Date 2 transfer to Trust. The allocation, once made, will be effective as of Date 2, the date of Husband's transfer to Trust. Accordingly, the inclusion ratio with respect to Trust will be determined based on the value, as of Date 2, of Husband's transfer to Trust, as finally determined for gift tax purposes. The allocation should be made on a supplemental Form 709. The supplemental Form 709 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Two copies are enclosed for this purpose.

Because the allocation will be effective as of the date of the transfer, the allocation will be deemed to precede in time the allocation made by Husband's estate on Husband's estate tax return. It is represented that the allocation will be sufficient in amount to result in an inclusion ratio of zero with respect to Trust, based on the value of Husband's transfer to Trust as finally determined for federal gift tax purposes. Accordingly, under § 26.2632-1(b)(2)(i), the allocation of GST exemption made to the Date 6 transfers will become void upon the filing of the supplemental gift tax return authorized by this letter.

Finally, assuming sufficient GST exemption is allocated to Trust pursuant to the relief granted above, such that Trust will have an inclusion ratio of zero, no GST tax will be imposed with respect to the Date 6 distributions.

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.

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 accordance with the power of attorney on file with this office, we are sending copies of this letter to your authorized representative.

This ruling is directed only to the taxpayer 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 and Special Industries)

Enclosures

Copy for section 6110 purposes
Copies of this letter

cc:

cc