

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200446003**

Release Date: 11/12/04

Index Number: 2642.01-00, 9100.00-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-111176-04

Date: JULY 13, 2004

Legend:

Settlor	-
Spouse	-
Child A	-
Child B	-
Trust	-
Trustee	-
Year	-
Date 1	-
Date 2	-
Date 3	-
Date 4	-

Dear :

This is in response to your December 30, 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 Settlor's generation-skipping transfer (GST) exemption to Trust, and a determination that a previous allocation to Trust is deemed void or ineffective.

According to the facts submitted, on Date 1, Settlor established Trust, an irrevocable trust, for the benefit of Settlor's descendants. At the time Trust was executed, Settlor and Spouse had two children, Child A and Child B, both of whom were

PLR-111176-04

minors. Trust was funded with an insurance policy on Spouse's life. Trustee, the initial trustee of Trust, is related to Spouse, but is not a beneficiary of Trust.

Article FIRST(E) of Trust provides that any property acceptable to the trustee may be added to Trust at any time and become part of the trust estate.

Article THIRD(A) provides that each child of Settlor and Spouse will have the annual noncumulative right to withdraw assets transferred to Trust not to exceed \$10,000 in each year of the transfer.

Article THIRD(B) provides that, during Spouse's life, each child of Settlor has a limited testamentary power to appoint a pro rata share of the trust estate that child's descendants, descendants of Settlor and Spouse, and any corporation, person, or organization for scientific, charitable, religious, literary, or educational purposes. This power could not be exercised for the benefit of that child, that child's estate, or the creditors of either.

Article FOURTH of Trust provides that, during Spouse's life, the trustee may accumulate the net income or pay it annually to or for the direct or indirect benefit of Settlor's and Spouse's descendants. In addition, the trustee may distribute principal to or for the direct or indirect benefit of Settlor's and Spouse's descendants as the trustee deems necessary for their support and maintenance or to meet any emergency need occasioned by accident, illness, hospitalization or invalidism of the descendants. Discretionary distributions from principal are limited by the beneficiaries' withdrawal rights set forth in Article THIRD, above.

Article FIFTH provides that, upon Spouse's death, the trust estate would be divided into equal shares, one for each living child of Settlor and Spouse and one share for the descendants of any then deceased child of Settlor and Spouse. The shares for each child of Settlor and Spouse will be held in trust for the benefit of that child with the trustee having discretion to distribute income to the child and the principal to the child or the child's descendants for support and education or to meet any emergency need occasioned by accident, illness, hospitalization or invalidism of that child or that child's descendants. Upon that child reaching age 21, the trustee has the discretion to terminate the trust and distribute principal and any undistributed income to that child. If the child dies before reaching age 21, the corpus will be held for the benefit of the descendants of that child under the same dispositive provisions as described above. The shares for any grandchild of the Settlor and Spouse will be held in a separate trust for the benefit of that grandchild. The dispositive provisions for the benefit of each grandchild is the same as the dispositive provisions, described above, of the trusts created for the benefit of each child of Settlor and Spouse. Each trust will terminate no later than 21 years after the death of the last to die of Settlor, Spouse and all descendant's of Spouse's parents who were living on Date 1. Upon termination, trust

PLR-111176-04

principal and any undistributed income will be distributed to the current beneficiary of each trust.

Article SIXTH provides that no trustee, who is also an eligible beneficiary of Trust shall exercise or join in any exercise of any discretionary power to pay or expend income or principal to or for the benefit of the trustee-beneficiary; to determine the character of a trust receipt or expenditure as principal or income; to pay or expend income or principal to or for the benefit of any person whom the trustee-beneficiary is obligated to support; or any other power or act which would result in the inclusion of the trust estate in the taxable estate of the trustee-beneficiary. If the sole trustee is also a beneficiary of Trust, a special trustee will be designated to exercise the powers described above that are prohibited to the trustee-beneficiary.

The submitted information indicates that, prior to filing Settlor's United States Gift Tax (and Generation-Skipping Transfer) Tax Return (Form 709), Settlor was advised by his attorney to allocate a portion of his generation-skipping transfer tax exemption to Trust and that such allocation would be made on his gift tax return.

Settlor's attorney filed a gift tax return, Form 709, reporting Settlor's transfer to Trust. You represent that the gift tax return was timely filed. However, Settlor's attorney inadvertently failed to allocate any of Settlor's available GST exemption to Trust.

The failure to allocate Settlor's GST exemption went unnoticed until Spouse's death on Date 2. Pursuant to the advice of his attorney, Settler made a late allocation of his GST exemption to Trust and filed an amended Form 709 on Date 3 on which he included the following statement:

This return is being filed solely to give notice of late allocation of Donor's GST exemption to a trust in connection with a transfer reported on Form 709 for a prior year (Year).

The allocation was intended to be effective as of Date 4. It is contended that the allocation resulted in an inclusion ratio of zero for Trust.

Settlor has requested a ruling permitting an extension of time under § 301.9100-3 to make an allocation of Settlor's GST exemption under § 2642(g)(1) to be effective as of Date 1.

Law and Analysis:

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

PLR-111176-04

Section 2601 imposes a tax on every generation-skipping transfer. A generation-skipping transfer is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2612(a) provides that the term taxable termination means a termination (by death, lapse of time, release of a power, or otherwise) of an interest in property held in trust where the property passes to a skip person with respect to the transferor of the property. Section 2612(b) provides that the term taxable distribution means any distribution from a trust to a skip person other than a taxable termination or a direct skip. Under § 2612(c)(1), a direct skip is a transfer subject to federal estate or gift tax made by a transferor to a skip person. A skip person is defined in § 2613(a) as (1) a natural person assigned to a generation which is two or more generations below the generation assignment of the transferor, or (2) a trust if either all the interests in such trust are held by skip persons, or there is no person holding an interest in the trust, and at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a non-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 an inclusion ratio of zero with respect to the trust.

PLR-111176-04

As applicable on Date 1, § 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 timely filed gift tax return required by § 6019 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.

PLR-111176-04

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, Settlor is granted an extension of time until 60 days after the date of this letter to make allocations of Settlor's GST exemption with respect to Settlor's Date 1 transfer to Trust. The allocations, once made, will be effective as of Date 1. Accordingly, the inclusion ratio with respect to Settlor's transfer to Trust will be determined based on the value as of Date 1, of Settlor'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.

Inherent in Settlor's request for an extension of time to make an allocation of Settlor's GST exemption under § 2642(g)(1) to be effective as of Date 1, is a request that the late allocation of Settlor's GST exemption made by Settlor to Trust on Settlor's Form 709 that was filed on Date 3, is deemed to be void or ineffective, after taking into account the allocation made pursuant to this ruling request.

Because the allocation will be effective as of the date of Settlor's transfer to Trust on Date 1, that allocation will be deemed to precede in time the allocation made by Settlor on the gift tax return filed on Date 3. It is represented that the allocation by Settlor with respect to Trust, effective as of Date 1, will be sufficient in amount to cause Trust to have an inclusion ratio of zero as of Date 1. Accordingly, under § 26.2632-1(b)(2)(i), the allocation of GST exemption by Settlor made on Date 3 with respect to the Date 1 transfer will become void upon the filing of the supplemental gift tax return authorized by this letter.

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