

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:

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CC:PSI:04

PLR-147538-04

Date: NOVEMBER 17, 2004

Letter Ruling Request

| | |
|------------|---|
| H | = |
| W | = |
| Trust | = |
| Child 1 | = |
| Child 2 | = |
| Child 3 | = |
| Year | = |
| Date 1 | = |
| Date 2 | = |
| Date 3 | = |
| Accountant | = |
| Attorney | = |
| X | = |

Dear :

This is in response to a letter by your authorized representative, submitted on your behalf, dated September 1, 2004, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations and section 2642(g) to make an election out of the automatic allocation of generation-skipping transfer (GST) tax under section 2632(c)(5)(A)(i)(II).

The facts and representations submitted are summarized as follows:

On Date 1, H and W established Trust, an irrevocable trust, for the benefit of their children, Child 1, Child 2, and Child 3 (Primary Beneficiaries). The trustees of Trust are H and W.

Pursuant to Article Three of Trust, each Primary Beneficiary shall have the right to make a written demand for distribution, with respect to each gift by each donor, of the lesser of: (1) the maximum federal gift tax present interest annual exclusion for that calendar year, reduced by previous transfers qualifying under that section in the same calendar year; (2) the cumulative amount of all gifts made by a donor during the calendar year divided by the lesser of the number of Primary Beneficiaries or the number of Primary Beneficiaries specified by the donor as being able to withdraw; or (3) the amount specified by the donor as withdrawable by the Primary Beneficiary; plus the Primary Beneficiary's carryover amount from the immediately preceding calendar year.

Article Three, Paragraph 2(a) provides that until a Primary Beneficiary reaches the age of thirty-five, the net income of each share of the trust estate which is set aside for the benefit of a Primary Beneficiary may be paid to or used for her benefit in convenient installments, or added to principal, in the sole and absolute discretion of the trustee.

Article Three, Paragraph 2(b) provides, in part, that when a Primary Beneficiary reaches the age of thirty-five, the entire net income of the share then being held for her shall be distributed to her on at least an annual basis. The trustee then acting shall have the right to distribute to said Beneficiary so much of the principal, including the whole thereof, as they may deem appropriate. In all events, the share then being held for each Primary Beneficiary shall be distributed to her no later than her fiftieth birthday. If any of the Primary Beneficiaries should die before she has received the entire share of the trust estate which has been set aside for her, said share, or the remainder thereof, as the case may be, shall be divided into as many equal shares as she leaves children surviving her and one such share shall be set aside and held for each such grandchild of H and W. If said deceased Primary Beneficiary leaves no children then living, said share or the remainder thereof shall be added to the share then being held for or previously distributed to the other Primary Beneficiaries.

On Date 2, H and W each made gifts of partial interests in property located at X to Trust. H and W reported their respective gift on Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return, dated Date 3. Forms 709 were prepared by Accountant and subsequently reviewed by Attorney.

H and W represent that their intention, based on the advice from Accountant, was to make the election out of automatic allocations pursuant to section 2632(c)(5)(A)(i)(II). H and W wished to make an election not to treat Trust as a GST trust within the meaning of section 2632(c).

However, in preparing Forms 709, Accountant inadvertently failed to realize that a written election out of the automatic allocation of the GST exemption under section 2632(c)(5)(A)(i)(II) on H's and W's respective Forms 709 was required. Accordingly, the result of the Forms 709 as filed, treat Trust as a GST trust as defined within the meaning of section 2632(c).

H's and W's Forms 709 were also reviewed by Attorney prior to filing. However, Attorney also failed to realize that a written election out of the automatic allocation of the GST exemption under section 2632(c)(5)(A)(i)(II) on H's and W's respective Forms 709 was required.

H and W, respectively, request that H and W each be granted an extension of time under section 301.9100 with respect to transfers to Trust in Year 1 to make the election out of automatic allocation pursuant to section 2632(c)(5)(A)(i)(II) so that Trust is not treated as a GST trust within the meaning of section 2632(c).

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under section 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 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 section 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is defined as the excess of 1 over the "applicable fraction." The applicable fraction, as defined in section 2642(a)(2), is a fraction, the numerator of which is the amount of 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), reduced by the sum of certain federal estate tax or state death tax and charitable deductions.

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 section 2631(c)) that 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 section 2631(a), once made, shall be irrevocable.

Section 2632(c) provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be 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.

Section 2632(c)(3)(A) provides that for purposes of this subsection, 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. Section 2632(c)(3)(B) provides, in part, that the term "GST trust" means a trust that could have a generation-skipping transfer with respect to the transferor unless the trust instrument provides that more than 25 percent of the trust corpus must be distributed to or may be withdrawn by one or more

individuals who are non-skip persons (I) before the date that the individual attains age 46, (II) on or before on or more dates specified in the trust instrument that will occur before the date that such individual attains age 46, or (III) upon the occurrence of an event that, in accordance with regulations prescribed by the Secretary, may reasonably be expected to occur before the date that such individual attains age 46.

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

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 section 2642(b)(1) or (2), and an election under section 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 section 2642(g)(1), which was enacted into law on June 7, 2001.

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, 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 section 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 sections 2642(b)(1) or (b)(2) or an election described in section 2632(b)(3) or (c)(5) under the provisions of section 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 sections 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 section 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 section 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in section 2642(b)(1) or (b)(2) or an election described in section 2632(b)(3) or (c)(5) under the provisions of section 301.9100-3.

Requests for relief under section 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.

A GST trust is defined in section 2632(c)(3)(B), in general, as any trust that could have a generation-skipping transfer. A trust is a GST Trust unless it meets one of the exceptions described in section 2632(c)(3)(B)(i) through (vi) where a sufficient possibility exists (based on the statutory criteria) that the trust corpus will not be distributed to lower generations. Based upon the facts submitted and the representations made, none of the exceptions in section 2632(c)(3)(B) apply to Trust and, accordingly, Trust is a GST Trust for purposes of section 2632(c).

Further, we conclude that the requirements of section 301.9100-3 have been satisfied. Therefore, H and W are granted an extension of time of 60 days from the date of this letter to make the election out of the automatic allocation of GST under section 2632(c)(5)(A)(i)(II) for the transfers to Trust in Year. Accordingly, Trust will not be treated as a GST trust within the meaning of section 2632(c).

The elections should be made on Supplemental Forms 709 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Forms 709. A copy is enclosed for this purpose.

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) 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 representative.

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.

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc:

cc: