

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

Telephone Number:

In Re:

Refer Reply To:

CC:PSI:B04 – PLR-160175-03

Date:

July 29, 2004

LEGEND:

Decedent =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Year 1 =
Child 1 =
Child 2 =
Child 3 =
Trust 1 =
Trust 2 =
Trust 3 =
Trust A-1 =

Mineral Trust =
Trust A-2 =

Trust A-3 =

a =
Attorney =

Dear :

This is in response to your letter dated September 3, 2003, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations and section 2642(g) of the Internal Revenue Code to make an allocation of the generation-skipping transfer (GST) exemption to transfers to certain trusts.

The facts and representations submitted are summarized as follows:

Trust 1

On Date 1, Decedent executed Trust 1. Section 2.1(a) of Trust 1 provides for the creation of "Trust A" (Trust A-1). The trustee is to allocate to Trust A-1 the following fractional undivided interest in property listed in Exhibit A, the numerator of the fraction is the lesser of \$a or 1/3 of Decedent's available GST exemption amount which has not been allocated to transfers made by Decedent prior to Date 1 and the denominator is the value of property listed in Exhibit A as finally determined for gift tax purposes.

Section 2.1(b) provides for the creation of a "Trust B" (Trust B-1). The trustee is to allocate the balance of the assets listed in Exhibit A to Trust B-1.

Section 2.1(c) provides that the trustee is to allocate any mineral interests or other property transferred by Decedent to Trust 1, other than the property listed in Exhibit A of Trust 1, to the Mineral Trust.

Section 2.1(d) provides that the trustee is to hold the corpus of Trust A-1, Trust B-1, and the Mineral Trust as separate and distinct trusts. Child 1 is to be the initial income beneficiary of each such trust created under Trust 1.

Section 2.3(a) provides, in part, that, while the income beneficiary is living, the trustee is to pay such part or all of the income or corpus, or both, of the trust as the trustee shall deem proper for the support, benefit, and happiness of the income beneficiary.

Section 2.3(b) provides the income beneficiary with a lifetime power of appointment, subject to the provisions of section 2.8.

Section 2.3(c) provides that on the death of the income beneficiary, the trustee is to pay over the corpus of the trust as the income beneficiary shall appoint by will. In default of appointment, the trustee is to continue to hold, or pay over and deliver, the corpus of the trust to the then living descendants of the income beneficiary, per stirpes, and if there are none, to the then living descendants of the income beneficiary's nearest lineal ancestor who is Decedent or a descendant of Decedent and has descendants then living, and if there are none, to the executors or administrators of the estate of the income beneficiary.

Section 2.8 provides, in relevant part, that the objects of the power of appointment granted in section 2.3(b) and 2.3(c), is to be any one or more persons or organizations that the income beneficiary will choose, provided that in no event may the power be exercised in favor of the income beneficiary, the income beneficiary's estate,

the income beneficiary's creditors, or the creditors of the income beneficiary's estate, and provided that the power given by section 2.3(b) is not to be exercised in favor of any person who is a beneficiary of, and who possesses at the time a power of appointment over a trust created by Trust 1, Trust 2, or Trust 3.

Trusts 2 and 3

On Date 1, Decedent executed Trust 2. Section 2.1(a) of Trust 2 provides for the creation of a "Trust A" (Trust A-2). Section 2.1(a) of Trust 3 provides for the creation of a "Trust A" (Trust A-3). The trustee is to allocate to each Trust A the following fractional undivided interest in property listed in Exhibit A, the numerator of the fraction is the lesser of \$a or 1/2 of Decedent's remaining GST exemption amount which has not been allocated to transfers made by Decedent prior to Date 2 and the denominator is the value of property listed in Exhibit A as finally determined for gift tax purposes.

Section 2.1(b) of Trust 2 provides for the creation of a "Trust B" (Trust B-2). Section 2.1(b) of Trust 3 provides for the creation of a "Trust B" (Trust B-3). The trustee is to allocate the balance of the assets listed in Exhibit A for each trust to Trust B.

Section 2.1(c) of both trusts provides that the trustee is to hold the corpus of each Trust A and each Trust B as separate and distinct trusts. Child 2 is to be the initial income beneficiary of each such trust created under Trust 2. Child 3 is to be the initial income beneficiary of each such trust created under Trust 3.

Section 2.3(a) of Trust 2 provides that, while the income beneficiary is living, the trustee is to pay such part or all of the income or corpus, or both, of the trust as the trustee shall deem proper for the support of the income beneficiary.

Section 2.3(a) of Trust 3 provides, in part, that, while the income beneficiary is living, the trustee is to pay such part or all of the income or corpus, or both, of the trust as the trustee shall deem proper for the support, benefit, and happiness of the income beneficiary.

Section 2.3(b)(i) of both trusts provides that the trustee is to deliver the assets of each Trust A as the income beneficiary is to appoint by deed, in accordance with the provisions of section 2.8.

Section 2.3(b)(ii) of both trusts provides that the trustee is to deliver such amounts of the income or corpus, or both, of each Trust B, even to the exhaustion of each Trust B, as the initial income beneficiary is to appoint by deed, in accordance with the provisions of section 2.8.

Section 2.3(c)(i) of both trusts provides that on the death of the income beneficiary, the trustee is to continue to hold, or pay over and deliver, the corpus of

each Trust A as the income beneficiary shall appoint by will, in accordance with the provisions of section 2.8.

Section 2.3(c)(ii) of both trusts provides that on the death of the initial income beneficiary, the trustee is to continue to hold, or pay over and deliver, the corpus of Trust B then on hand as the initial income beneficiary is to appoint by will, in accordance with the provisions of section 2.8.

Section 2.3(c)(iii) of both trusts provides that in default of appointment, the trustee is to continue to hold, or pay over and deliver, the corpus of the trust to the then living descendants of the income beneficiary, per stirpes, and if there are none, to the then living descendants of the income beneficiary's nearest lineal ancestor who is Decedent or a descendant of Decedent and has descendants then living, and if there are none, to the executors or administrators of the estate of the income beneficiary.

Section 2.8 of both trusts provides, in relevant part, that the objects of the power of appointment granted in section 2.3(b)(i) and 2.3(c)(i), is to be any one or more persons or organizations that the income beneficiary will choose, provided that in no event may the power be exercised in favor of the income beneficiary, the income beneficiary's estate, the income beneficiary's creditors, or the creditors of the income beneficiary's estate, and provided that the power given by section 2.3(b)(i) is not to be exercised in favor of any person who is a beneficiary of, and who possesses at the time a power of appointment over a trust created by Trust 1, Trust 2, or Trust 3.

All three trusts

Decedent filed the Form 709, United States Gift (and Generation-Skipping Tax) Return for Year 1 on Date 3. Attorney represented Decedent with respect to estate planning manners, including assistance in the filing of the Form 709. The return indicated that gifts were made to Decedent's children, rather than to the trusts involved. A "Notice of Allocation" was not filed with the Form 709.

Decedent died on Date 4. During a review of Decedent's gift tax return, Attorney discovered that the "Notice of Allocation" was not filed with the Form 709. On Date 5, Decedent filed an amended Form 709 with a "Notice of Allocation" that attempted to allocate Decedent's GST exemption to the gifts to Trusts A-1, A-2, A-3, and Mineral Trust as of Date 1.

You have requested an extension of time under section 2642(g) and sections 301.9100-1 and 301.9100-3 to allocate Decedent's GST exemption as of Date 1 to Trusts A-1, A-2, and A-3 and then to allocate the remaining GST exemption as of Date 1 to the Mineral Trust.

LAW AND ANALYSIS

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 generally defined as the excess (if any) 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 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) 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 2632(a)(1) provides that any allocation by an individual of his or her GST exemption under section 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)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides, in part, 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.

Section 26.2632-1(b)(2)(ii) provides that, except as otherwise provided, an allocation of GST exemption is effective as of the date of any transfer as to which the Form 709 on which it is made is a timely filed return (a timely allocation). An allocation to a trust made on a Form 709 filed after the due date for reporting a transfer to the trust (a late allocation) is effective on the date the Form 709 is filed. See Example 3 of section 26.2632-1(b)(2)(iii).

Section 2642(b)(1) provides, in part, that except as provided in section 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 section 6075(b) for such transfer, the

value of such property for purposes of section 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of section 2001(f)(2)).

Section 2642(b)(3) provides, in part, that if any allocation of the GST exemption to any property not transferred as a result of the death of the transferor is not made on a gift tax return filed on or before the date prescribed by section 6075(b), the value of such property for purposes of section 2642(a) shall be determined as of the time such allocation is filed with the Secretary, and such allocation shall be effective on and after the date on which such allocation is filed with the Secretary.

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 under this paragraph, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-34 I.R.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 generation-skipping 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 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.

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.

Based on the facts submitted and the representations made, we conclude that the requirements of section 301.9100-3 have been satisfied. Therefore, Decedent's estate is granted an extension of time of 60 days from the date of this letter to make allocations of Decedent's available GST exemption to Trusts A-1, A-2, and A-3 and the Mineral Trust. The allocations will be effective as of Date 1, the date of the transfers to the trusts, and the gift tax values of the transfers to the trusts will be used in determining the amount of GST exemption to be allocated to the trusts.

These allocations should be made on supplemental Forms 709 United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 709. Copies are enclosed for this purpose.

When Decedent's estate makes an allocation pursuant to the relief granted above, the late allocation made on Date 5 with respect to the Year 1 transfers to Trust is not necessary to obtain a zero inclusion ratio with respect to Trust. The late allocation made on Date 5, therefore, is void in accordance with section 26.2632-1(b)(2).

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer and taxpayer's other authorized representative.

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.

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.

This ruling is directed only to the taxpayer(s) 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
Copy of this letter