

Internal Revenue Service

Department of the Treasury

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Washington, DC 20044

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B04-PLR-118510-01
Date: March 29, 2002

Re:

Legend:

- Husband =
- Wife =
- Son =
- Daughter =
- Trust =
- Date 1 =
- Date 2 =
- Year 1 =
- Year 2 =
- Year 3 =
- Trustee =
- \$r =
- \$s =
- \$t =
- \$x =
- \$y =
- \$z =

Dear _____ :

We received your authorized representative's submission, dated September 19, 2001, and previous correspondence requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make an allocation of Generation-Skipping Transfer (GST) exemption. This letter responds to that request.

The facts and representations submitted are summarized as follows: On Date 1, Husband and Wife established Trust, an irrevocable trust, for the benefit of Husband and Wife's son (Son), daughter (Daughter) and their descendants.

Under Article III, § 3.1(a) and (b) of Trust, Trustee, during Husband and Wife's lifetimes, may distribute to Husband and Wife's children, grandchildren, and great grandchildren so much of the net income and principal of Trust as Trustee determines to be necessary for the children's and grandchildren's health, education, support and maintenance. In no event, however, shall any payment be made in satisfaction of any legal support obligation of the Trustee as described in § 678(c) of the Internal Revenue Code. Any net income that is not distributed is to be added to corpus.

Article III, § 3.2(a) provides that during any calendar year in which property is transferred to the Trust, a beneficiary may withdraw a portion of the transferred property. A beneficiary may request within thirty days after the beneficiary receives notice of the transfer, the immediate distribution of his or her pro rata share of the property transferred to Trust, to the extent of an amount equal to the annual exclusion from gift tax allowable under § 2503(b) of the Internal Revenue Code in effect at the time of the gift.

Under Article III, § 3.2(e), Trustee may at any time amend the provisions of Trust governing powers of withdrawal in any way that Trustee determines will help achieve Husband and Wife's goal of obtaining the gift tax annual exclusion for transfers to Trust, while avoiding other adverse tax consequences to the parties. Under this provision Trustee may eliminate powers of withdrawal altogether, or deny powers of withdrawal to the beneficiaries.

Article III, § 3.3 provides that upon the death of the survivor of Husband and Wife, Trustee is to divide Trust into equal shares with one share for each of Husband and Wife's surviving children and one share for each deceased child of Husband and Wife that is survived by descendants. One hundred and eighty days after the death of Husband and Wife, Trustee is to distribute one-half of the income and principal of each respective beneficiary's share to the beneficiary. Six years after the death of Husband and Wife, Trustee is to distribute the remaining accumulated income and remaining principal of each respective beneficiary's share to the beneficiary. If any beneficiary dies prior to distribution of their full share, the corpus and accumulated income remaining is to be distributed to the deceased beneficiary's surviving children. If none of Husband and Wife's children survive Husband and Wife, then to the couple's grandchildren, per stirpes.

In Year 1, Husband and Wife each transferred \$x to Trust. No gift tax return was required to be filed with respect to these transfers which were excluded from gift tax under § 2503(b). See I.R.C. § 6019(a). However, in Year 3, the accountant for Husband and Wife filed a Form 709-A (United States Short Form Gift Tax Return) reporting Husband's and Wife's respective transfers to Trust in Year 1. No Notice of Allocation of GST exemption was filed with either of the gift tax returns. The accountant did not allocate any GST exemption to the transfers to Trust because he mistakenly believed that because the transfers were excluded for gift tax purposes under § 2503(b), the gifts to Trust would have a zero inclusion ratio under § 2642(c) for GST purposes.

In Year 2, Husband and Wife each transferred \$y to Trust. These transfers were reported on timely filed Forms 709 (United States Gift (and Generation-Skipping Transfer) Tax Return). The accountant mistakenly believed that Husband and Wife would not need to allocate any of their GST exemption to the transfers to the extent the gifts were for the benefit of their two children. The accountant also mistakenly believed that a portion of the gifts to Trust benefitting the grandchildren would have a zero inclusion ratio and, accordingly, Husband and Wife would only have to allocate their GST exemption to these gifts to the extent the gifts exceeded that amount. As a result,

on each gift tax return for the Husband and Wife, the accountant allocated only \$s (less than \$y) of Husband and Wife's GST exemption to the transfers to Trust. No Notice of Allocation was filed with the Year 2 gift tax returns.

In Year 3, each of Husband and Wife transferred \$z to Trust. The accountant allocated \$z of each of Husband and Wife's GST exemption to these transfers.

Wife died on Date 2. On the Form 706 (United States Estate and Generation-Skipping Transfer Tax Return), Wife's executor allocated \$t of Wife's GST exemption to certain testamentary transfers. With respect to Wife's GST exemption, after the allocation of \$t to certain testamentary transfers and \$z to transfers to Trust in Year 3, Wife has sufficient unused GST exemption to allocate to the transfers in Years 1 and 2, if relief is granted in this case. With respect to Husband's GST exemption, after the allocation of \$z to transfers to Trust in Year 3, Husband has sufficient unused GST exemption to allocate to the transfers to Trust in Years 1 and 2, if relief is granted in this case.

You have requested the following rulings: (1) an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an allocation of each of Husband's and Wife's GST exemption to the Year 1 and Year 2 transfers to Trust and (2) that such allocation shall be made based on the value of the property transferred to the Trust as of respective dates of each of the spouses respective transfers to Trust.

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 2503(a) provides that the term "taxable gifts" means the total amount of gifts made during the calendar year, less the deductions provided in subchapter C.

Section 25.2503-3(a) of the Gift Tax Regulations provides that the term "future interest" includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. Conversely, an unrestricted right to immediate use, possession, or enjoyment of property or the income from property (such as a life estate or a term certain) is a present interest in property.

Section 2503(b) provides, generally, that in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first \$10,000 of such gifts to such person shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year.

Generally, when a trust instrument gives a beneficiary the unrestricted right to demand immediate possession and enjoyment of trust corpus or income, the beneficiary has received a present interest in property. Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968); Rev. Rul. 73-405, 1973-2 C.B. 321.

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

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, 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 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 § 2631(c)) 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(a) provides that any allocation by an individual of his or her GST exemption under § 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) 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.

Section 2642(b)(1) 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)).

Section 2642(c) provides generally, that in the case of a direct skip which is a nontaxable gift, the inclusion ratio shall be zero. However, the preceding rule does not apply to any transfer in trust for the benefit of an individual unless (A) during the life of such individual, no portion of the corpus or income of the trust may be distributed to (or for the benefit of) any person other than such individual, and (B) if the trust does not terminate before the individual dies, the assets of such trust will be includible in the gross estate of such individual.

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). 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.

Section 564(b)(1) of the Economic Growth and Tax Relief Reconciliation Act of 2001 provides that § 2642(g)(1) applies to requests for relief pending on, or filed after, December 31, 2000.

Under § 301.9100-1(c) of the Procedure and Administration Regulations, 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 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

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). In accordance with § 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. Accordingly, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3. See Notice 2001-50, 2001-34 I.R.B.189.

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. Therefore, Husband and Wife's executor are granted an extension of time of 60 days from the date of this letter to allocate \$x to the Year 1 transfers to Trust and \$r to the Year 2 transfers to Trust. The allocations will be effective as of the various dates of the transfers to Trust that occurred in Year 1 and Year 2 and the value of the property for purposes of determining the amount of GST exemption to be allocated to Trust, shall be its value as finally determined for purposes of chapter 12.

The allocations of GST exemption for Husband and Wife should be made on separate supplemental Forms 709 and filed with the Cincinnati Service Center. A copy of this letter should be attached to the form. A copy is enclosed for this purpose.

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.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,
Paul F. Kugler
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: