

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:9-PLR-111150-02
Date:
March 24, 2002

In Re:

LEGEND:

- Date 1 =
- Date 2 =
- Decedent =
- Son =
- Daughter-in-law =
- Granddaughter =
- Grandson =
- Trust =
- Year 1 =
- Year 2 =
- Year 3 =
- Year 4 =
- W =
- X =
- Y =
- Z =

Dear

This is in response to your letter dated February 8, 2002, requesting, on behalf of Decedent's estate, 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 allocations of Decedent's generation-skipping transfer (GST) tax exemption to Decedent's lifetime transfers to a trust.

A summary of the facts and representations submitted are as follows. Decedent died on Date 1, survived by Son and Daughter-in-law and their two children, Grandson and Granddaughter.

Prior to her death, on Date 2, Decedent created an irrevocable trust (Trust) with the

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intent that the trustees purchase a second-to-die life insurance policy on the lives of Son and Daughter-in-law. Grandchildren are the co-trustees of Trust.

Article I of the Trust provides that net income (after payment of insurance premiums) is to be paid by the trustees to either or both Son and Daughter-in-law during their lifetimes, as the trustees, in their discretion, consider advisable. Trustees may also distribute principal to either or both Son and Daughter-in-law for their maintenance in health and reasonable comfort, or support in their accustomed manner of living, as the trustees, in their discretion, consider advisable.

Upon the death of the survivor of Son and Daughter-in-law, the Trust is to be divided into two equal shares, one for Grandson and one for Granddaughter, and each share is to be administered under the provisions of Article II of the Trust. If either Grandchild is not then living, his or her share is to be distributed to his or her living descendants, per stirpes. If any descendant of a deceased Grandchild is then under 30 years of age, his or her share is to be held in further trust and administered under the provisions of Article III of the Trust.

Article II of the Trust provides that the share of each Grandchild is to be held as a separate trust. During the lives of the Grandchildren, the income from their respective trusts may be distributed to the Grandchild and that Grandchild's descendants in the discretion of the trustees, and principal may be distributed to that Grandchild and that Grandchild's descendants for their maintenance in health and reasonable comfort, complete education, or support in their accustomed manner of living, as the trustees, in their discretion, consider advisable. Upon the death of a Grandchild, his or her trust is to be distributed to his or her living descendants, per stirpes.

Article III of the Trust provides that a share of a Grandchild's trust that is distributed to a descendant of a deceased Grandchild upon the death of the survivor of Son and Daughter-in-law is to be held in further trust if the descendant is under 30 years of age at the time of distribution. The net income of the trust is to be paid, or applied to or for the benefit of, such descendant, together with all or any part of the principal that the trustees, in their discretion, consider advisable for such descendant's maintenance in health and reasonable comfort, complete education, or support in such descendant's accustomed manner of living. After reaching age 30, such descendant may withdraw all or any part of the trust principal. Any principal remaining at such descendant's death shall be distributed to such descendant's living descendants, per stirpes.

Article IV of the Trust provides that the trustees may, in their discretion, terminate the Trust for any reason. Under Article VII, paragraph J, no trustee may participate in any decision regarding any discretionary payment, application or allocation of principal or income to or for the benefit of such trustee or any beneficiary whom he or she is legally obligated to support, nor may any trustee participate in any discretionary termination of a trust of which he or she is a beneficiary or an eligible beneficiary.

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Article V also provides that the trustee may divide any trust into two separate trusts so that the inclusion ratio for each trust shall be either zero or one for generation-skipping transfer tax purposes.

In Year 1, Decedent funded the Trust with cash and securities in the sum of \$W. As authorized by the terms of the Trust, toward the end of Year 1, Grandchildren, as co-trustees, purchased an insurance policy with a face value of \$X on the lives of Son and Daughter-in-law.

Decedent retained the services of an accounting firm to prepare a federal gift tax return for her Year 1 transfers to the Trust. In preparing the gift tax return, the tax professional failed to effectively allocate Decedent's GST exemption to the Trust.

In Year 2, Decedent transferred an additional \$Y to the Trust. Decedent again relied upon the same tax professional to file a gift tax return reporting the transfer. The tax professional failed to file a gift tax return reporting the transfer and allocating a portion of Decedent's GST exemption to the transfer.

Decedent transferred \$Z to the Trust in Year 3 and \$Z to the Trust in Year 4. By that time, the tax professional whom Decedent had previously retained for purposes of preparing her Year 1 and Year 2 gift tax returns had died. Decedent asked Son to prepare gift tax returns for her Year 3 and Year 4 transfers to the Trust, using the Year 1 gift tax return prepared by the deceased tax professional as a model. Son prepared gift tax returns for both Year 3 and Year 4 and, relying on the Year 1 return as a model, failed to allocate any of Decedent's GST exemption to the transfers.

It has been represented that Decedent did not retain any incidents of ownership over any assets transferred to or owned by the Trust.

You have requested the following rulings: (1) that Decedent's estate be allowed an extension of time under sections 2642(g) and 301.9100-3 to allocate Decedent's GST exemption to Decedent's transfers to the Trust in Years 1, 2, 3, and 4; and (2) that such allocations shall be made based on the value of the property transferred to the Trust as of the date of the original transfers.

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.

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Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST tax exemption of \$1,000,000 (adjusted for inflation under section 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 section 2631(a), once made, shall be irrevocable.

Section 2632(a) 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) 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.

As applicable during the years at issue, section 2642(b)(1) provided that, except as provided in section 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 section 6075(b) for such transfer or is deemed to be made under section 2632(b)(1) [deemed allocations to certain 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.

As amended by section 536(a) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. 107-16, and applicable to transfers subject to the estate or gift tax made after December 31, 2000, section 2642(b)(1) provides 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 or is deemed to be made under section 2632(b)(1) [deemed allocation to certain lifetime direct skips] or section 2632(c)(1) [deemed allocation to certain lifetime transfers to GST trusts] –

- (A) the value of such property for purposes of determining the inclusion ratio shall be its value as finally determined for purposes of chapter 12 (within the meaning of section 2001(f)(2)), or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, its value at the time of the close of the estate tax inclusion period, and
- (B) such allocation shall be effective on and after the date of such transfer, or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, on and after the close of such estate tax inclusion period.

Section 2642(g)(1)(A) provides that the Secretary shall by regulation prescribe such

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circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in section 2642(b)(1). 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 on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief, 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. Section 2642(g)(1)(B) further provides that for purposes of determining whether to grant relief, the time for making the allocation shall be treated as if not expressly prescribed by statute.

Section 301.9100-1(c) of the Procedure and Administration Regulations 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 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), the time for allocating the GST exemption to lifetime transfers is to be treated as if not expressly prescribed by statute. Accordingly, taxpayers may seek an extension of time to make an allocation described in section 2642(b)(1) under the provisions of section 301.9100-3. See Notice 2001-50, 2001-34 I.R.B. 189.

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.

Section 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) competent to render advice on the regulatory election, or (ii) aware of all relevant facts.

Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate

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for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

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 sixty (60) days from the date of this letter to make allocations of Decedent's available GST exemption to Decedent's transfers to the Trust in Year 1, Year 2, Year 3, and Year 4. The allocations, once made, will be effective as of the date of the transfers to the Trust, and the gift tax value of the transfers to the Trust will be used in determining the amount of GST exemption to be allocated to the Trust. The allocation for each year at issue should be made on a separate supplemental Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Copies are enclosed for this purpose.

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.

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 the taxpayer.

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

Enclosures: Copy for section 6110 purposes
4 copies of this letter