

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B09-PLR-167297-01
Date:
May 31, 2002

LEGEND:

Decedent =

Date 1 =

Trust 1 =

Spouse =

A =

Year 1 =

B =

Date 2 =

Trust 2 =

C =

Year 2 =

D =

E =

Year 3 =

Year 4 =

Year 5 =

Year 6 =

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Year 7 =
 Year 8 =
 Year 9 =
 Year 10 =
 Year 11 =
 Date 12 =

Dear :

This is in response to your authorized representative's letter dated November 29, 2001, and subsequent correspondence, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make allocations of Decedent's Generation-Skipping Transfer (GST) exemption.

The facts and representations submitted are summarized as follows: On Date 1, Decedent established Trust 1, an irrevocable trust, for the benefit of his children and grandchildren.

On Date 1, Decedent and Spouse transferred to Trust 1 real estate and related leases. The real estate and related leases were valued at \$A on Decedent's Year 1 gift tax return.

Article III of Trust 1 provides that Decedent's purpose in establishing the Trust is to provide his children with income during their lives, and upon the death of each of his children to provide income to their children, Decedent's grandchildren, until the Trust terminates.

Article V.a. of Trust 1 provides, in part, that the trustee shall manage, invest and reinvest the trust property, shall collect the income thereof, and shall pay over the net income to the beneficiaries in accordance with the provisions of the trust, at regular times, in substantially equal amounts. Distributions shall be made in installments and paid to the beneficiaries not less than quarterly.

Article V.b. of Trust 1 provides that all income shall be distributed equally to Decedent's children. Upon the death of any child, his or her share of said income distribution shall be made to his or her children. If any of Decedent's children should die without being survived by any children who are named as grandchildren herein, then said child's share of said income distribution shall be divided among the other beneficiaries then entitled to income distributions.

Article VI of Trust 1 provides, in part, that the trust shall terminate, and the corpus and all remaining principal and undistributed income shall be distributed when

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both the following events have occurred: (a) all of the children have died, and (b) the youngest living grandchild has reached the age of 30 years. Upon the termination, the distribution shall be made of the assets, in kind, or by the sale of some or all of the assets and a distribution of the proceeds. The distribution shall be made per capita among all living grandchildren, or if not living, to their children per stirpes.

Decedent relied on a qualified tax professional to advise him in all tax matters for all pertinent years, including the preparation of his gift tax returns. Decedent timely reported the Year 1 transfers to Trust 1 on a Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return. On Decedent's Year 1 gift tax return, Spouse consented to have the gifts made by Decedent and herself to third parties during the calendar year as made one-half by each of them. On Schedule C, Part 2 of the return, the tax professional allocated only \$B of Decedent's GST exemption to Trust 1, an amount believed to equal one-half the actuarial value of the interests passing to his grandchildren. The tax professional mistakenly believed Decedent was only required to allocate his GST exemption in an amount equal to the actuarial value of the interests passing to his grandchildren in order to achieve an inclusion ratio of zero for the trust.

On Date 2, Decedent established Trust 2 for the benefit of Spouse, his children, and grandchildren. Decedent transferred an insurance policy on his life, with a reported cash and fair market value of \$C to Trust 2.

Article VI of Trust 2 provides that this trust shall be administered as follows: (1) Commencing as of the date of Decedent's death and during the life of Decedent's wife, Spouse, the trustee shall distribute to Spouse all of the net income of the trust, to be paid at least quarterly; and the trustee may also make distributions from the principal, if necessary, even to the extent of exhausting principal, as the trustee from time to time believes desirable, in his sole discretion, for the health, support in reasonable comfort, best interests, and welfare of Spouse; (2) Decedent's primary concern during the life of Spouse is for her health and support in reasonable comfort, and the trustee need not consider the interest of any other beneficiary in making distributions to Spouse under this paragraph; and (3) Upon the death of Spouse, this trust will terminate and the trustee is directed to distribute the remaining principal and undistributed income to the trustee acting under that certain trust agreement dated Date 1, designated Trust 1, to be added to the principal held in trust thereunder.

Decedent timely reported the Date 2 transfer to Trust 2 on a Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return for Year 2. On Decedent's Year 2 gift tax return, Spouse consented to have the gifts made by Decedent and herself to third parties during the calendar year as made one-half by each of them. On Schedule C, Part 2 of the Year 2 gift tax return, the tax professional allocated only \$D of Decedent's GST exemption to Trust 2, an amount believed to equal one-half the actuarial value of the interests passing to his grandchildren. The tax professional mistakenly believed that Decedent was only required to allocate his GST exemption in an amount equal to the actuarial value of the interests passing to his grandchildren in

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order to achieve an inclusion ratio of zero for the trust. In addition, the tax professional mistakenly believed that the transfer to Trust 2 was eligible for gift-splitting.

Decedent transferred \$E to Trust 2 in each of the following years: Year 3, Year 4, Year 5, Year 6, Year 7, Year 8, Year 9, Year 10, and Year 11. Decedent and Spouse did not file gift tax returns for Year 3, Year 4, Year 5, Year 6, Year 7, and Year 8. Decedent and Spouse filed gift tax returns for Year 9, Year 10, and Year 11, and elected gift-splitting on those returns. However, the transfers to Trust 2 were not reported. The tax professional mistakenly believed that the transfers of \$E to Trust 2 in Year 3, Year 4, Year 5, Year 6, Year 7, Year 8, Year 9, Year 10, and Year 11 did not have to be reported for GST tax purposes since the amount of the gifts, per donee, was less than \$10,000 per year and since the inclusion ratio of Trust 2 was believed to have been determined by the allocation made on the Year 2 gift tax return.

Decedent died on Date 12. Shortly after Date 12, your representative submitted a private letter ruling request. You have requested the following rulings: (1) an extension of time under § 2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 to make allocations of Decedent's GST exemption for transfers made in Year 1, Year 2, Year 3, Year 4, Year 5, Year 6, Year 7, Year 8, Year 9, Year 10, and Year 11; and (2) that such allocations shall be made based on the value of the property transferred as of the respective dates of the original transfers.

Section 2513(a) provides, generally, that a gift made by one spouse to any person other than his spouse shall, for the purposes of this chapter, be considered as made one-half by him and one-half by his spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

Section 25.2513-1(b)(4) of the Gift Tax Regulations provides that if one spouse transferred property in part to his spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and hence severable from the interest transferred to his spouse.

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

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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, 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.

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)), 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 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, 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.

Notice 2001-50, 2001-34 I.R.B. 189, provides that under § 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 § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 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 §§ 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.

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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. 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 (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

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 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 § 301.9100-3 have been satisfied. Therefore, the executor of 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, with respect to Decedent's transfer to Trust 1 on Date 1 and Decedent's transfers to Trust 2 in Year 2, Year 3, Year 4, Year 5, Year 6, Year 7, Year 8, Year 9, Year 10, and Year 11. The transfers to Trust 2 may not be split because the interest passing to third parties is not ascertainable at the time of the gift because principal may be invaded for Spouse's best interests. The allocations will be effective as of the respective dates of the transfers to the trusts, and the gift tax value 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 Cincinnati Service Center at the following address:

Internal Revenue Service Center
Cincinnati, OH 45999

A copy of this letter should be attached to the supplemental Forms 709. 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.

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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 addition, we express or imply no opinion regarding the value of the property transferred to Trust 1 and Trust 2.

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

Enclosures

Copy for section 6110 purposes
Copy of this letter