

**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-134892-02  
Date:  
October 24, 2002

In Re:

LEGEND:

- Trust 1 =
- Trust 2 =
- Trustors =
- Trustees =
- Independent Trustee =
- Daughter 1 =
- Daughter 2 =
- Date 1 =
- Date 2 =
- Date 3 =
- Date 4 =
- Date 5 =
- Company =
- a =
- b =
- c =
- d =

Dear :

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This is in response to your letter dated May 20, 2002, requesting, on behalf of Trustors, 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 Trustors' generation-skipping transfer (GST) tax exemptions to certain transfers to two irrevocable trusts.

A summary of the facts and representations submitted is as follows. On Date 1, Trustors formed Trust 1, for the benefit of Daughter 1 and the descendants of Daughter 1, and Trust 2, for the benefit of Daughter 2 and the descendants of Daughter 2. The terms of each Trust are identical but for the designated beneficiaries.

Article III(A)(1) of each Trust provides that, during the lifetime of the relevant Daughter, the Trustees shall pay such sums from Trust net income to or for the benefit of that Daughter or that Daughter's descendants as the Independent Trustee may authorize or direct for their health, support, care, maintenance, and/or education, provided that the well-being of the Daughter shall be the independent' Trustee's primary concern. Any net income not distributed shall be added to principal.

Article III(A)(2) of each Trust provides that, in addition to distributions of net income, the Trustees shall pay to or apply for the benefit of the relevant Daughter such sums from the principal of the Trust as the independent Trustee may authorize or direct to provide for the that Daughter's health, maintenance, care, support, and education.

Article III(B)(1) of each Trust provides the relevant Daughter with an inter vivos limited power to appoint any principal remaining at the Daughter's death to a charity or charities and/or to a member or members of the group composed of the descendants of either Trustor and such descendant's spouses. No more than 25 percent of the aggregate amount subject to the power of appointment may be appointed to or for the benefit of persons or entities who are not descendants of Trustors.

Article III(B)(2) and (C) of each Trust provides that, if the power of appointment fails or is not exercised, the unappointed trust estate shall be held for the benefit of, and divided into as many equal shares as there are children of the relevant Daughter then living, and children of the Daughter then deceased with living descendants. One equal share shall be allocated to each living child and one equal share shall be allocated among the then living descendants of each deceased child, by right of representation. Each allocated share shall be held in a separate trust for the benefit of such children or descendants. If the Daughter has no living children or descendants, the unappointed portion of the trust estate shall be distributed to the then living descendants of either Trustor, by right of representation.

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Article III(C)(1) of each Trust provides that the net income of each trust established for the benefit of a descendant of the relevant Daughter is to be distributed to that trust's beneficiary in such amounts as the Independent Trustee determines necessary or appropriate for that beneficiary's health, support, maintenance, and/or education. Any income not distributed shall be added to principal.

Article III(C)(2) of each Trust provides that, in addition to net income, the principal of each trust established for the benefit of a descendant of the relevant Daughter may be distributed to the trust's beneficiary in such amounts as the Independent Trustee in his or her discretion deems necessary or appropriate for that beneficiary's health, support, care, maintenance, and education.

Article III(C)(3) of each Trust provides that the one-third of the principal of each trust established for the benefit of a descendant of the relevant Daughter shall be distributed to the beneficiary when the beneficiary attains age 27, one third of the principal shall be distributed when the beneficiary attains age 32, and the trust shall terminate and the remaining trust balance shall be distributed to the beneficiary when the beneficiary attains age 37.

Article III(C)(4) of each Trust provides that if a descendant dies before full distribution of his or her trust, the principal and any undistributed accumulated income shall be allocated equally to one trust for each of the descendant's then living descendants, by right of representation, and administered in accordance with Articles III(C)(1), (2), and (3). If the descendant has no then living descendants, the trust estate shall be distributed in equal shares to the beneficiary's living siblings and the issue of any deceased sibling, by right of representation. If the descendant has no living siblings and no deceased siblings with then living issue, the trust estate shall be distributed to the relevant Daughter's then living descendants, or if the Daughter has no living descendants, to the then living descendants of either Trustor, by right of representation.

Article IV, Section J, of each Trust provides that, notwithstanding anything herein to the contrary, no trust created under the Trust shall continue for a period longer than 21 years after the death of the last survivor of the descendants of the Trustors alive on the date on which the agreement governing the Trust was executed. If a trust created under the Trust is then in existence, it shall immediately terminate, and the principal and any accumulated income of shall be distributed to the income beneficiary.

The initial Trustees of Trust 1 and Trust 2 are Trustors and Independent Trustee. Daughter 1 and Daughter 2 become co-trustees of their respective Trusts at such time as both Trustors become unable to serve as Trustee, the Daughter attains age 35, or at such earlier time determined by Trustors. After a Daughter serves as co-trustee for three years, the Daughter shall become the sole trustee of her Trust.

On Date 1, each Trustor transferred a shares of Company stock to Trust I and to

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Trust 2. Trustors had owned the stock as community property. Trustors retained an accountant to prepare their federal and state tax returns for the Date 1 year, mentioning verbally to the accountant the Date 1 transfers of stock to the Trusts. Although the accountant prepared a request for an extension of time to file a United States Gift (and Generation-Skipping Transfer) Tax Returns, Form 709, for one of Trustors, and prepared and presented their state and federal income tax returns for that year to Trustors for signing, the accountant inadvertently failed to prepare Forms 709 reporting Trustors' Date 1 transfers to Trust 1 and Trust 2. The value of one share of Company stock on Date 1 was \$b.

On Date 2, approximately one year and three months later, each Trustor transferred an additional c shares of Company stock to Trust 1 and Trust 2. On Date 3, Company became a publically traded company and the value of Company's stock increased to approximately \$d. Shortly thereafter, Trustors retained new counsel, who discovered that no Forms 709 reporting the Date 1 transfers of stock to the Trusts had been filed. Trustors' accountant thereafter prepared Forms 709 reporting each Trustor's Date 1 transfers of stock to Trust 1 and Trust 2. No allocations of Trustors' GST exemptions to the Date 1 transfers was made on the returns. On Date 4, Trustors filed their Date 1 year Forms 709 late.

On Date 5, each Trustor filed a Form 709 reporting their Date 2 transfers of stock to Trust 1 and Trust 2. On each Form 709, the amount of the relevant Trustor's GST exemption equal to the value of the Company stock transferred on Date 2 to Trust 1 and Trust 2 was allocated to the transfers.

It has been represented that Trustors have made no additional transfers to Trust 1 and Trust 2, and that each Trustor has sufficient remaining GST exemption available to apply to the Date 1 transfers of stock to the Trusts such that Trust 1 and Trust 2 will each have a zero inclusion ratio for GST tax purposes.

A ruling has been requested allowing Trustors an extension of time under sections 2642(g)(1) and 301.9100-3 to make a late GST exemption allocation with respect to the Date 1 transfers of a shares of Company stock to Trust 1 and Trust 2, effective as of Date 1.

#### 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

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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.

Section 2631(a) as in effect for the Date 1 year, 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)) 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 year 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.

Section 2642(g)(1)(A), enacted on June 7, 2001, provides 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). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment.

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.

Notice 2001-50; 2001-34 I.R.B. 189, provides that under section 2624(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

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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 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) 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, each Trustor is granted an extension of time of sixty (60) days from the date of this letter to allocate his or her available GST exemption to the transfers of Company stock to Trust 1 and Trust 2 on Date 1. The allocations, once made, will be effective as of Date 1, the date of the transfers to the Trusts. The value of Company stock as of Date 1 will be used in determining the amount of each Trustor's GST exemption to be allocated to the transfers to each Trust.

The allocation for each Trustor should be made on a separate supplemental Form 709 for the Date 1 year, and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Two copies are enclosed for this purpose.

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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 taxpayers.

Sincerely,

Heather C. Maloy

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

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