

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:9-PLR-154749-02

Date:

February 3, 2003

In Re:

LEGEND:

Trust	=
Taxpayer 1	=
Taxpayer 2	=
Date 1	=
Date 2	=
Year 1	=
<u>a</u>	=
<u>b</u>	=

Dear :

This is in response to your letter dated September 16, 2002, on behalf of Taxpayer 1 and Taxpayer 2, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations and § 2642(g) of the Internal Revenue Code to make allocations of Taxpayer 1's and Taxpayer 2's generation-skipping transfer (GST) tax exemptions to certain transfers to an irrevocable trust.

A summary of the facts and representations submitted is as follows. On Date 1, Taxpayer 1 and Taxpayer 2 formed the Trust, for the benefit of their four children and their descendants. On Date 1, Taxpayer 1 and Taxpayer 2 each transferred \$a to the Trust.

Article Fourth, Section 2 of the Trust provides that the Trust's assets will be held in a single trust for twenty years. During this period, the trustee has the discretion to authorize distribution of income and principal to Taxpayer 1 and Taxpayer 2's lineal descendants subject to an ascertainable standard. Income not distributed is to be added to principal. Pursuant to Article Fourth, Section 5, each child who dies prior to the end of the initial twenty-year period has a testamentary limited power of

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appointment exercisable in his will over his share of the trust estate. This power of appointment becomes effective, if exercised, at the end of the twenty-year period.

At the end of the twenty-year period the trust estate is to be divided into equal shares, one share for each then living child of Taxpayer 1 and Taxpayer 2 and one share for each then deceased child of Taxpayer 1 and Taxpayer 2 who had not exercised his power of appointment over his share of the trust estate.

Article Fourth, Section 4 provides that each share for a living child is to be held as a separate trust to benefit the child and his descendants. During the child's lifetime the trustee has discretion to authorize the distribution of income and principal to the child and his descendants. Income not distributed is to be added to principal. Upon the child's death, the child has a testamentary limited power of appointment exercisable in his will over his trust. Any assets not so appointed are to be retained in trust for the child's descendants. Section 4 further provides that any trust for a living child shall terminate on the day preceding the 21<sup>st</sup> anniversary of the death of the survivor of such child and all the descendants of Taxpayer 1 and Taxpayer 2 in being on Date 1. At that time, the trust estate shall be distributed per stirpes to the then living descendants of such child, if any or, if none, distributed per stirpes to Taxpayer 1 and Taxpayer 2's then living descendants.

For shares of trust property held for the benefit of a deceased child's issue who were alive on Date 1, Article Fourth, Section 6 provides that the share is to be divided into as many shares as there are then living issue of the deceased child and held in further trust until the day preceding the 21<sup>st</sup> anniversary of the death of the survivor of the descendants of Taxpayer 1 and Taxpayer 2. During this period, the trustee has the discretion to authorize the distribution of income and principal to the issue. Income not distributed shall be added to principal. Upon termination, the trust estate is to be distributed per stirpes to the then living issue of such deceased child, and if none, to Taxpayer 1 and Taxpayer 2's then living descendants, per stirpes.

A share of trust property held for the benefit of a deceased child's issue who were not alive on Date 1 is to be distributed free of trust to the issue, per stirpes, pursuant to Article Fourth, Section 7. Article Fourth, Section 9 provides special provisions for administration of a share for each descendant under 40 years of age.

Taxpayer 1 and Taxpayer 2 retained an accountant to prepare their Year 1 Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns. The accountant mistakenly reported on the Year 1 Forms 709 that Taxpayer 1 and Taxpayer 2 each made gifts of \$b, rather than \$a, to the Trust. Further, the accountant inadvertently failed to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to their gifts to the Trust.

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In the course of reviewing Taxpayer 1's and Taxpayer 2's gift tax returns, Taxpayer 1 and Taxpayer 2's new attorney discovered the accountant's errors with respect to the amount reported as being transferred on Date 1 by Taxpayer 1 and Taxpayer 2, as well as the accountant's failure to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to the Date 1 transfers to the Trust. The attorney also discovered that although Taxpayer 1's Form 709 was received by the Service on Date 2, the Service had no record that Taxpayer 2's Year 1 Form 709 had been filed. On Taxpayer 1's Year 1 Form 709, Taxpayer 1 and Taxpayer 2 consented to have the gifts made by each to third parties during Year 1 as made one-half by each.

You have represented that Taxpayer 1 and Taxpayer 2 have made no additional transfers to the Trust and that Taxpayer 1 and Taxpayer 2 each have sufficient remaining GST exemption available to apply to the Date 1 transfers to the Trust.

The following rulings have been requested: (1) Taxpayer 1 and Taxpayer 2 are granted an extension of time under §§ 2642(g)(1) and 301.9100-3 to make an allocation of Taxpayer 1's and Taxpayer 2's GST exemptions to the Date 1 transfers to the Trust, and (2) for GST tax purposes, Taxpayer 1 and Taxpayer 2 each is the transferor of \$a to the Trust.

#### LAW and ANALYSIS:

Section 2501(a)(1) provides that a tax, computed as provided in § 2502, is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident, or nonresident.

Section 2511(a) provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2513(a)(1) provides, in part, 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 2513(a)(2) provides that § 2513(a)(1) shall apply only if both spouses have signified (under the regulations provided for in § 2513(b)) their consent to the application of § 2513(a)(1) in the case of all such gifts made during the calendar year by either while married to the other.

Section 25.2513-2(a)(1) of the Gift Tax Regulations provides, in part, that consent to the application of the provisions of § 2513 with respect to a "calendar period" (as defined in § 25.2502-1(c)(1)) shall, in order to be effective, be signified by both spouses. If both spouses file gift tax returns within the time for signifying consent, it is

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sufficient if--(i) the consent of the husband is signified on the wife's return, and the consent of the wife is signified on the husband's return; (ii) the consent of each spouse is signified on his own return; or (iii) the consent of both spouses is signified on one of the returns. If only one spouse files a gift tax return within the time provided for signifying consent, the consent of both spouses shall be signified on that return.

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), as in effect for Year 1, 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.

As applicable during the years at issue, § 2642(b)(1) provided 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) – (A) 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 (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, 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 § 2642(g)(1).

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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. 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 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of this chapter.

Notice 2001-50, 2001-34 I.R.B. 189 provides that under § 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 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 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 § 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) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) 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.

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Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Taxpayer 1 and Taxpayer 2 are granted an extension of time of sixty (60) days from the date of this letter to make allocations of their available GST exemptions to the transfers to the Trust on Date 1. The allocations will be effective as of Date 1, 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 Trust will have an inclusion ratio of zero, provided the amount of GST exemption allocated to the Trust is equal to the amount transferred to the Trust for federal gift tax purposes.

In addition, based on the facts submitted and the representations made, we conclude that Taxpayer 1 and Taxpayer 2 each is the transferor for GST purposes of \$a to the Trust. The accountant who prepared Taxpayer 1's Form 709 mistakenly reported on the Form 709 that Taxpayer 1 transferred \$b, rather than \$a, to the Trust on Date 1. In order to correct this error, Taxpayer 1 must file a supplemental gift tax return for Year 1, reflecting Taxpayer 1's transfer of \$a to the Trust. This return should also reflect the allocation of Taxpayer 1's GST exemption to the Date 1 transfer to the Trust. The supplemental return should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Because the Service's records do not reflect that a Year 1 Form 709 was filed for Taxpayer 2, Taxpayer 2 should file an original Form 709, reflecting that Taxpayer 2 transferred \$a to the Trust, as well as Taxpayer 1's and Taxpayer 2's consent to have the gifts made by each of them to third parties during Year 1 as made one-half by each. This original Form 709 should also reflect the allocation of Taxpayer 2's GST exemption to the Date 1 transfer to the Trust. The original return should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the original Form 709. A copy is enclosed for this purpose.

The rulings contained in this letter are based upon information and representations submitted by Taxpayer 1 and Taxpayer 2 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. Specifically, no opinion is expressed or implied regarding the value of the property transferred to the Trust for federal transfer tax purposes.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to Taxpayer 1 and Taxpayer 2.

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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,

Heather C. Maloy

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

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