

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:4 - PLR-168982-02

Date:

MARCH 03, 2003

Re:

LEGEND:

H -
W -
Trust -

Trustee -
Company -
Date 1 -
Date 2 -
Date 3 -
Date 4 -
Year 1 -
Year 2 -
m -
x shares -
Law Firm -
Accounting Firm -
Lawyer -

Dear :

This is in response to your letter dated December 13, 2002, and other correspondence, 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 generation-skipping transfer (GST) tax exemptions to transfers to a trust.

The facts and representations submitted are summarized as follows:

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On Date 1, H and W established Trust, an irrevocable trust, for the benefit of their children and their lineal descendants. The trustee of Trust is Trustee.

Article III, Paragraph 3.1 of Trust provides that the trustee may, in his absolute discretion, accumulate the net income, or any portion thereof, of the Trust and add it to the Trust principal or may pay it, or any portion of it, to or use it for the benefit of any one or more of a class of beneficiaries comprised of the grantors' issue from time to time living during the existence of the Trust. The trustee shall be under no duty to equalize payments of income among said beneficiaries.

Article III, Paragraph 3.2 provides that the trustee may pay to or use for the benefit of any one or more of the grantors' issue from time to time living during the existence of the Trust so much of the principal of the Trust as the trustee, in his absolute discretion, may deem necessary or advisable for their health, support, maintenance and education after taking into consideration the income and other resources known to the trustee to be available to them. The trustee shall be under no duty to equalize payments of principal among said beneficiaries.

Article III, Paragraph 3.3 provides that after the death of the last to die of the grantors, or at such earlier time as the trustee, in his absolute discretion, determines, the trustee shall divide the then remaining balance of the Trust into equal trust shares, one trust share for each then living child of the grantors and one trust share for each deceased child of the grantors with then living issue. A trust share created for a deceased child of the grantors with then living issue shall be further divided into separate trust shares, by right of representation, for said deceased child's then living issue. Each trust share so created for a child or more remote issue of the grantors (such child or more remote issue hereinafter referred to as the "beneficiary") shall be designated with the name of such beneficiary and shall be held, administered and distributed as a separate trust as provided in Paragraphs 3.3.1 through 3.3.3.

Paragraph 3.3.1. provides that the trustees may, in their absolute discretion, accumulate the net income or any portion thereof, of such trust share and add it to principal or may pay it, or any portion of it, to any one or more of a class of beneficiaries comprised of said beneficiary and his issue who are from time to time living. The trustees shall be under no duty to equalize payments of income among said beneficiary and his issue and the trustees shall give paramount consideration to said beneficiary in making such payments.

Paragraph 3.3.2. provides that whenever the trustees determine that the income and other resources known to the trustees to be available to said beneficiary and his issue are not sufficient for their reasonable health, support, maintenance and

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education, including, but not limited to, the purchase or improvement of a home for said beneficiary commensurate with said beneficiary's income and standard of living, the trustees may pay to any one or more of them, or use for their benefit, so much of the principal of such trust share as the trustees, in their absolute discretion, may determine to be required for those purposes. The trustees shall be under no obligation to equalize the payments of principal among said beneficiary and his issue in making such payments.

Paragraph 3.3.3. provides that after the death of said beneficiary, the trustees shall distribute the remaining balance of his trust share to such person or persons among the grantors' then and thereafter living issue, upon such conditions and estates, in trust or otherwise, in such manner and at such time or times said beneficiary appoints or directs in his will specifically referring to this power of appointment. In default of such appointment or to the extent it is not effectively exercised, the trustees shall divide the remaining balance of such trust share into separate trust shares, by right of representation, for said deceased beneficiary's then living issue or, if said beneficiary has no then living issue, the trustees shall divide said remaining balance into separate trust shares, by right of representation, for the then living issue of said deceased beneficiary's parent who was issue of the grantors. If the parent of said deceased beneficiary who was issue of the grantors has no then living issue, said remaining balance shall be divided into separate trust shares, by right of representation, for the then living issue of said deceased beneficiary's nearest ascendant who was issue of the grantors and who has issue then living or, if there is no such ascendant with issue then living, said remaining balance shall be divided into separate trust shares, by right of representation, for the then living issue of the grantors. Each trust share so created shall be added to the corresponding trust share then existing for the individual who is issue of the grantors for whom said trust share was created or, if such a corresponding trust share is not then existing, said trust share shall be held and administered as a separate trust share designated with the name of such individual under this Article.

Article VI, Paragraph 6.4 provides, in part, that the grantors' purpose in creating Trust is to conserve the principal of Trust, except as otherwise expressly provided herein, and to achieve savings in income taxes, generation-skipping transfer taxes and death taxes.

On Date 2, H and W transferred to Trust x shares of stock of Company valued at \$m.

H and W retained Accounting Firm to prepare their tax returns for Year 2. Accounting Firm filed a protective extension of time for filing a gift tax return on Date 3 for H and W. In a correspondence dated Date 4, Accounting Firm requested Trustee to notify Accounting Firm if there were any reportable gifts for Year 2, and that barring any reply from Trustee, a second extension would not be filed. Trustee mistakenly believed that the transfers to Trust on Date 2 would not have gift tax implications. Accordingly,

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Trustee did not respond to the Date 4 correspondence and, therefore, Accounting Firm did not to file H's and W's respective gift tax returns reporting the Year 2 transfers or allocating a portion of H's and W's GST exemption to their respective transfers.

Law Firm drafted Trust in Year 1. Recently, H and W engaged Lawyer for estate planning services. Lawyer requested copies of H's and W's prior gift tax returns and learned that no gift tax returns were prepared or filed to report the Date 2 gifts that H and W made to Trust.

You have requested that the Service grant an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 to allocate H's and W's GST exemption under § 2642(b)(1) to the transfers to Trust in Year 1.

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 2602 provides that the amount of the GST tax is the taxable amount multiplied by the applicable rate. § 2641(a) defines applicable rate as 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 the GST exemption 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 (United States Gift (and Generation-Skipping Transfer) Tax Return).

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

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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. 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 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, 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.

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.

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) 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

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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, H and W are granted an extension of time of 60 days from the date of this letter to make allocations of H's and W's available GST exemption, with respect to the transfers on Date 2 to Trust. Each allocation will be effective as of Date 2, the date of their respective transfers to Trust, and the value of the transfers to Trust 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 should be made on Forms 709 and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Forms 709. A copy is enclosed for this purpose.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer(s) 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 any aspect of any transaction or item discussed or referenced in this letter under the cited provisions or under any other provisions of the Code.

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

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

Enclosures

Copy for § 6110 purposes
Copy of this letter