

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-168276-02
Date:
March 17, 2003

Re:

LEGEND:

- Taxpayer 1 =
- Taxpayer 2 =
- Date 1 =
- Trust =
- x =
- Company =
- Attorney =
- Accountant =
- Date 2 =
- Year 1 =
- Year 2 =
- Son =

Dear :

This is in response to your letter dated December 3, 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 an allocation of Taxpayer 1's and Taxpayer 2's generation-skipping transfer (GST) tax exemptions.

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The facts and representations submitted are summarized as follows:

On Date 1, Taxpayer created Trust and gifted x shares of Company stock to Trust. Trust was drafted by Attorney. Accountant participated with Taxpayer and Attorney in the planning and was assigned the task of preparing the required gift tax returns.

Article One, Section 1.1 of Trust provides that, while the trustee holds corporate stock in a corporation that is qualified for Sub Chapter S of the Internal Revenue Code, the trustee shall distribute all of the net income of Trust to Son at least as often as every three months. Any time that the trustee does not hold corporate stock in a corporation that is qualified under Sub Chapter S of the Internal Revenue Code, the independent trustee may from time to time, in the independent trustee's absolute discretion, pay or distribute such part or all of the net income of Trust as may be deemed appropriate to any one or more of the persons then living of the group consisting of Son, Son's wife, and the issue of Son, in such amounts and proportions as the independent trustee shall determine.

Article One, Section 1.2 of Trust provides that, while the trustee holds corporate stock in a corporation that is qualified for Sub Chapter S of the Internal Revenue Code, the trustee, in the sole discretion of the trustee, may distribute such principal of Trust to or for the benefit of Son, as the trustee deems necessary or advisable for the health care, maintenance, support or education of Son. Any time that the trustee does not hold corporate stock in a corporation that is qualified under Sub Chapter S of the Internal Revenue Code, the independent trustee may from time to time, in trustee's absolute discretion, pay or distribute to any beneficiary then eligible to receive income from Trust such part of the principal of Trust as the independent trustee may deem appropriate.

Article One, Section 1.4 of Trust provides that, upon the death of Son, if he is survived by his wife, the entire principal of Trust shall be distributed to the trustee of the trust of Son's wife. Upon the death of Son, if he is not survived by his wife, the entire principal of Trust shall be divided into as many equal shares as there shall be children of Son then surviving and deceased children of Son leaving issue then surviving. One such share shall be allocated to and designated with the name of each of Son's then surviving children, and one such share shall be allocated to and designated with the name of each then deceased child of Son leaving issue then surviving. Each share designated with the name of a deceased child of Son leaving issue then surviving shall be further divided, per stirpes, into separate shares designated with the names of the then surviving issue of Son. Each share or partial share designated with the name of a then surviving child or remote issue of Son shall be held as a separate and distinct trust.

Article Two, Section 2.4 provides that, upon the death of Son's widow, the entire principal of Trust shall be divided into as many equal shares as there shall be children of Son then surviving and deceased children of Son leaving issue then surviving. One

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such share shall be allocated to and designated with the name of each of Son's then surviving children, and one such share shall be allocated to and designated with the name of each then deceased child of Son leaving issue then surviving. Each share designated with the name of a deceased child of Son leaving issue then surviving shall be further divided, per stirpes, into separate shares designated with the names of the then surviving issue of Son. Each share or partial share designated with the name of a then surviving child or remote issue of Son shall be held as a separate and distinct trust.

Article Three, Section 3.1 provides that, until the death of the beneficiary with whose name a trust is designated, the trustee shall distribute all of the net income of the trust to such beneficiary at least as often as every three months. Any time that the trustee does not hold corporate stock in a corporation that is qualified under Sub Chapter S of the Internal Revenue Code, the independent trustee may from time to time, in the independent trustee's absolute discretion, pay or distribute such part or all of the net income of Trust as may be deemed appropriate to any one or more of the persons then living of the group consisting of the beneficiary with whose name such trust is designated and the issue of the beneficiary, in such amounts and proportions as the independent trustee shall determine.

Article Three, Section 3.2 provides that the trustee, in the sole discretion of the trustee, may distribute such principal of the trust to or for the benefit of the beneficiary, as the trustee deems necessary or advisable for the health care, maintenance, support or education of the beneficiary. Any time that the trustee does not hold corporate stock in a corporation that is qualified under Sub Chapter S of the Internal Revenue Code, the independent trustee may from time to time, in trustee's absolute discretion, pay or distribute to any beneficiary then eligible to receive income from Trust such part of the principal of the trust as the independent trustee may deem appropriate.

Article Three, Section 3.4 provides that, upon the death of any beneficiary with whose name a trust is designated, the entire principal of that trust shall be divided, per stirpes, into separate shares designated with the names of the then surviving issue of that deceased beneficiary and each of such shares shall continue to be held as a separate and distinct trust and trust fund.

Article Three, Section 3.7 provides that upon the sale of a majority of the voting shares of Company or upon the sale of substantially all of the assets of Company, each trust created shall terminate at the following time: upon the death of each person for whom the name of a trust is designated at the time of the sale, and after the assets of that trust have been divided into separate trusts, each such separate trust shall terminate when the beneficiary of that trust shall reach 35 years of age or upon his prior death.

Article Four, Section 4.7 provides that Trust shall be irrevocable.

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On Date 2, Taxpayer 1 and Taxpayer 2 each filed a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, reporting the Year 1 gifts and electing to treat all gifts made by Taxpayer 1 and Taxpayer 2 to third parties as made one-half by each of them. The Year 1 gift tax returns were prepared by Accountant. Although Attorney, Accountant, Taxpayer 1 and Taxpayer 2 had all agreed that generation skipping tax exemption would be allocated to the transfer of stock made to Trust, Accountant inadvertently failed to allocate Taxpayer 1's and Taxpayer 2's GST exemptions to the Year 1 transfer of stock to Trust.

In the process of preparing gift tax returns for Year 2, Accountant discovered that GST allocations had not been made on the Year 1 gift tax returns.

Taxpayer 1 and Taxpayer 2 have requested the following ruling: (1) an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 to make an allocation of Taxpayer 1's and Taxpayer 2's GST exemptions for the transfer 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 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)) that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2632(a)(1) 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 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

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requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1), which was enacted into law on June 7, 2001.

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.

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 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. Taxpayer 1 and Taxpayer 2 acted reasonably and in good faith, and the interests of the government will not be

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prejudiced by the granting of this relief. Therefore, Taxpayer 1 and Taxpayer 2 are granted an extension of time of 60 days from the date of this letter to make allocations of Taxpayer 1's and Taxpayer 2's available GST exemptions, with respect to the transfers to Trust in Year 1. The allocations will be effective as of the date of the transfer to Trust, and the allocations will be made based on the value of property transferred to Trust as of the date of transfer.

The allocations should be made on supplemental Forms 709 and filed with the 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 rulings contained in this letter are based upon information and representations submitted by the taxpayers 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 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 the trusts.

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.

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,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter