

Internal Revenue Service

Department of the Treasury
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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

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Date:

November 10, 2003

In Re:

Legend:

Date 1 =
Husband =

Spouse =

Trust Agreement =
Law Firm =

Child 1 =
Child 2 =
Child 3 =
Grandchild 1 =
Grandchild 2 =
Grandchild 3 =
State =

X =

Y =

Accountant =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Z =

Dear : :

This is in response to your letter dated March 20, 2003, and subsequent submissions, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to allocate Taxpayers' generation-skipping transfer (GST) exemption to certain trusts.

The facts and representations submitted are summarized as follows: The Taxpayers are Husband and Spouse's estate. On Date 1, Husband executed an irrevocable trust agreement (Trust Agreement) for the benefit of the descendants of Husband and Spouse. Trust Agreement was prepared by an attorney in Law Firm.

Under the terms of Trust Agreement, six initial separate trusts were created, one for the benefit, respectively, of each of Husband and Spouse's then living children, Child 1, Child 2, and Child 3, and one for the benefit, respectively, of each of Grandchild 1, Grandchild 2, and Grandchild 3, children of Husband and Spouse's deceased child (collectively, the "Trusts"). Husband and Spouse's three children were each named trustee of their own trusts. Child 1 was named as trustee of each of the grandchildren's trusts. The initial trustee of a trust may designate a successor.

From every contribution to a trust, the trustee must set aside as a separate "GST Share" property with an aggregate value equal to the lesser of (a) the value of the contribution or (b) a fraction of the contribution having a numerator equal to the donor's available GST exemption amount under § 2631 of the Internal Revenue Code and a denominator equal to the value of the contribution. Any part of a contribution not allocated to the GST share will constitute the "Residuary Share."

For purposes of allocating the GST and Residuary Shares, unless the donor indicates otherwise in a written statement delivered to the trustee when a contribution is made, the donor will be deemed to intend to allocate to the contribution to the fullest extent possible the donor's available GST exemption. Further, if any contribution can be made as a split gift with the donor's spouse under § 2513, the donor and the donor's spouse will be deemed to intend to make a split gift and to each allocate their available GST exemptions to that gift.

The terms of the GST and Residuary Shares are identical. The descendant for whom the share is held is the primary beneficiary. The trustee may pay the primary

beneficiary any amount of the net income and principal of the share as the trustee from time to time determines to be necessary for that beneficiary's health, support, and education. On the primary beneficiary's death, the trustee will distribute any part of the net income and principal of the share as the primary beneficiary appoints to any one or more individuals or organizations, excluding the primary beneficiary, the primary beneficiary's creditors, the primary beneficiary's estate, and the creditors of the primary beneficiary's estate. The trustee will divide and allocate any part of the GST and Residuary Shares, respectively, not so appointed among the primary beneficiary's then living descendants, per stirpes, or, if none, per stirpes, among the then living descendants of the primary beneficiary's nearest lineal ancestor who was a descendant of Husband, or if none, per stirpes, among Husband's then living descendants. The trusts created under Trust Agreement are intended to be Qualified Perpetual Trusts under State law.

On Date 1, Husband transferred \$x to each of the trusts for Child 1, Child 2, and Child 3 and \$y to each of the trusts for Grandchild 1, Grandchild 2, and Grandchild 3. Husband and Spouse circulated a memorandum dated Date 1 to the trustees of the Trusts stating their intention to allocate their GST exemptions to the Trusts to produce a zero inclusion ratio for each trust.

Husband's accountant, Accountant, agreed to prepare and file Husband and Spouse's Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return, to report the Date 1 transfers to the Trusts. Spouse intended to consent to split the total gift to the Trusts on the Forms 709.

On Date 2, Child 2 died. Under Trust Agreement, Child 2's trust was required to be divided into separate trusts, one for each of his surviving children. However, to date, his trust has not been divided. No distributions have been made from this trust or any of the Trusts since their creation.

Subsequently, Spouse died on Date 3. Husband, as executor of Spouse's estate, hired Law Firm to assist with the estate administration. In preparing the federal estate tax return for the estate, Law Firm requested the Forms 709 reporting the Date 1 transfers to Trusts. Neither Husband nor Accountant were able to locate copies of the Forms 709. On Date 4, Husband requested copies of the Forms 709 from the Service. The Service found no record of the returns having been filed.

The Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for Spouse's estate was filed on Date 5. On Line 2, Part 1 of the Schedule R, the estate listed \$z, one-half of the value of the Date 1 transfers to Trusts, as the amount of Spouse's GST exemption allocated against Spouse's lifetime transfers. The balance of Spouse's total \$1.1 million GST exemption was allocated to testamentary trusts provided under a revocable trust agreement executed by Spouse.

Taxpayers have requested an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 to make allocations of Taxpayers' GST exemptions to the Trusts; and a ruling that such allocations are to be made based on the value of the assets transferred to the Trusts as of Date 1, the date of the transfer to the Trusts.

Section 2513(a) provides that a gift made by one spouse to any person other than his spouse shall, for purposes of chapter 12, 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 paragraph (1) shall apply only if both spouses have signified their consent to the application of § 2513(a)(1) in the case of all such gifts during the calendar year by either while married to the other.

Under § 25.2513-2(b)(1) of the Gift Tax Regulations, with respect to gifts made after December 31, 1981, the consent may be signified at any time following the close of the calendar year, subject to specified limitations. Section § 25.2513-2(b)(1)(i) provides that the consent may not be signified after the 15th day of April following the close of the calendar year, unless before such 15th day, no return has been filed for the year by either spouse, in which case the consent may not be signified after a return for the year is filed by either spouse. Section § 25.2513-2(c) provides that the executor or administrator of a deceased spouse may signify the consent.

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 2612(a)(1) provides that the term "taxable termination" means the termination (by death, lapse of time, release of power, or otherwise) of an interest in property held in a trust unless, immediately after such termination, a non-skip person has an interest in such property, or at no time after such termination may a distribution (including distributions on termination) be made from such trust to a skip person. Section 2612(c)(1) provides that the term "direct skip" means a transfer subject to a tax imposed by chapter 11 or 12 of an interest in property to a skip person.

Section 2613(a)(2) provides that, for purposes of chapter 13, the term "skip person" means a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor or a trust if all interests in such trust are held by skip persons.

Section 2652(c) provides that a person has an interest in property held in trust if (at the time such determination is made) such person has a right (other than a future right) to receive income or corpus from the trust.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means, with respect to any GST transfer, 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 any property transferred in a generation-skipping transfer is 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

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) reduced by the sum of any federal estate tax or state death tax actually recovered from the trust attributable to such property and any charitable deduction allowable under § 2055 or § 2522 with respect to such property.

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 2632(b)(1) provides that if any individual makes a direct skip during his lifetime, any unused portion of such individual's GST exemption is allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero.

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.

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 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.

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.

On Date 1, the date of the original transfers to the Trusts, Husband's GST exemption was automatically allocated under § 2632(b)(1) to the trusts for Grandchild 1, Grandchild 2, and Grandchild 3. Husband's GST exemption was not automatically allocated or allocated on a Form 709 to the trusts for Child 1, Child 2, or Child 3. It is represented that Husband, in his capacity as the executor of Spouse's estate, and as an individual, will elect to treat the Date 1 transfers as made one-half by Husband and one-half by Spouse. Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, Taxpayers are granted an extension of time of 60 days from the date of this letter to allocate Husband's and Spouse's available GST exemption, with respect to the Date 1 transfers to the Trusts. The allocations will be effective as of Date 1, the date of the transfers to the Trusts, and the gift tax value of the Date 1 transfer to the Trusts will be used in determining the amount of GST exemption to be allocated to the Trusts. If the Date 1 transfers are treated as made one-half by Husband and one-half by Spouse, Husband and Spouse will each be treated as the transferor with respect to one-half of the transfers to the Trusts for purposes of chapter 13, including the trusts for Grandchild 1, Grandchild 2, and Grandchild 3.

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 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.

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. The election to treat the gifts as made one-half by Husband and one-half by Spouse under section 2513 and the allocations of GST exemption should be made on Forms 709 and filed with the Cincinnati Service Center -- Stop 82, Internal Revenue Service, Cincinnati, OH 45999. A copy of this letter should be attached to the Forms 709. A copy is enclosed for this purpose.

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Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: