Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B09 – PLR-163814-03
Date:
February 20, 2004

In Re:

Legend:

Taxpayer 1 =
Taxpayer 2 =
Date 1 =
Trust =
A =
B =
Date 2 =
C =
Year 1 =
Date 3 =
D =
Year 2 =
Date 4 =
E =
Year 3 =
Date 5 =
Year 4 =
Date 6 =
Year 5 =
Attorney =
Accountant =
Date 7 =
Date 8 =

Dear :

This is in response to your letter dated October 31, 2003, on behalf of the estate of Taxpayer 1 and the estate of Taxpayer 2, requesting an extension of time under § 2642(g) of the Internal Revenue Code and §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make allocations of Generation-Skipping Transfer (GST) exemption.

The facts and representations submitted are summarized as follows: On Date 1, Taxpayer 1 established the Trust, an irrevocable trust for the benefit of Taxpayer 2 and the children of Taxpayer 1 and their descendants.

Article First, paragraph A provides that during Taxpayer 1's lifetime, the trustee shall accumulate any trust income and add it to trust principal. Article First, paragraph B provides that within A days of each contribution to the trust, the trustee shall notify Taxpayer 2 and the children of Taxpayer 1 of the nature and amount of the contribution. Taxpayer 2, if then living, shall have the non-cumulative right within A days of such notice to withdraw from the trust all or part of the contribution, but this right of withdrawal shall not in the aggregate exceed $B in value in any calendar year. Each of Taxpayer 1's then living descendants shall have the non-cumulative right within A days of such notice to withdraw from the trust, in equal portions, all or part of the contribution, as follows: (1) if Taxpayer 2 is then living, that amount, if any, by which the aggregate contributions in that calendar year exceed $B in value; or (2) if Taxpayer 2 is not then living, the entire contribution; but the amount that may be withdrawn by any descendant shall not exceed $B in value in any calendar year.

Article Third, paragraph A provides that the trustee shall pay to Taxpayer 2, commencing with Taxpayer 1's death and continuing until Taxpayer 2's death, all of the income of the trust and so much of the principal thereof as the trustee determines to be required or advisable from time to time for her reasonable support and medical care, considering her other resources known to the trustee.

Article Third, paragraph B provides that upon the death of Taxpayer 2, or upon Taxpayer 1's death if Taxpayer 2 does not survive Taxpayer 1, the trust shall terminate and the principal and any accrued and undistributed income of the trust shall be divided in equal shares as follows: one share for each then living child of Taxpayer 1 and one share for the then living descendants per stirpes of each then deceased child of Taxpayer 1.

On Date 2, Taxpayer 1 assigned a life insurance policy to the Trust with a value of $C at the time of the transfer. Neither Taxpayer 1, nor Taxpayer 2 filed a Form 709 United States Gift (and Generation-Skipping Transfer) Tax Return (gift tax return) for Year 1.

On Date 3, Taxpayer 1 assigned additional life insurance policies to the Trust with an aggregate value of $D at the time of the transfer. Neither Taxpayer 1, nor Taxpayer 2 filed gift tax returns for Year 2.

On Date 4, Taxpayer 1 transferred $E cash to the Trust. Taxpayer 1 and Taxpayer 2 each filed a gift tax return for Year 3 and each elected under § 2513 to treat the gifts made by them to third parties during the calendar year as made one-half by each of them. No allocation of Taxpayer 1's or Taxpayer 2's GST exemption was made on the Year 3 gift tax returns.

On Date 5, Taxpayer 1 transferred $E cash to the Trust. Taxpayer 1 and Taxpayer 2 each filed a gift tax return for Year 4 and each elected under § 2513 to treat the gifts made by them to third parties during the calendar year as made one-half by each of them. No allocation of Taxpayer 1's or Taxpayer 2's GST exemption was made on the Year 4 gift tax returns.

On Date 6, Taxpayer 1 transferred $E cash to the Trust. Neither Taxpayer 1, nor Taxpayer 2 filed gift tax returns for Year 5.

Taxpayer 1 and Taxpayer 2 relied on their attorney, Attorney, and accountant, Accountant, to provide them with tax and estate planning advice. Attorney and Accountant never advised Taxpayer 1 and Taxpayer 2 of the need to allocate their GST exemption to the transfers to the Trust.

Taxpayer 1 died on Date 7. Taxpayer 2 died on Date 8.

The estate of Taxpayer 1 and the estate of Taxpayer 2 have requested the following rulings: (1) an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 to make allocations of Taxpayer 1's and Taxpayer 2's respective GST exemptions with respect to the transfers to the Trust in Years 1 through 5; (2) that the allocations will be effective as of the respective dates of the transfers to the Trust; (3) that the gift tax value of the respective transfers to the Trust will be used in determining the amount of the taxpayers' GST exemption to be allocated to the Trust; and (4) that Taxpayer 1 and Taxpayer 2 may elect split gift treatment under § 2513 for transfers made to the Trust.

Rulings 1-3 – Section 301.9100 Issue

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 tax is the taxable amount multiplied by the 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) 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 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides, in part, 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. An allocation of GST exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust.

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 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, 2001-2 C.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. 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 the Trust. The allocations will be effective as of the dates of the respective transfers to the Trust, and the gift tax values of the transfers to the Trust will be used in determining the amount of GST exemption to be allocated to the trust.

These allocations should be made on supplemental Forms 709 United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Forms 709. Copies are enclosed for this purpose.

Ruling 4 – Gift Splitting Issue

Section 2501(a)(1) imposes a tax 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 subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2513(a)(1) provides, generally, that a gift made by one spouse to any person other than his spouse shall, for the 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 § 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 25.2513-1(b)(4) of the Gift Tax Regulations provides that if one spouse transferred property in part to his or her spouse and in part to third parties, split gift treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable at the time of the gift and severable from the interest transferred to the spouse.

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 such individual's spouse, then such gift shall also be treated as if made one-half by each spouse for purposes of the GST tax.

Section 26.2652-1(a)(4) provides that in the case of a transfer with respect to which the donor's spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513. The donor is treated as the transferor of one-half of the value of the entire property.

In Rev. Rul. 56-439, 1956-2 C.B. 605, a gift is made in trust pursuant to which the trustee is to distribute any part or all of the income or principal of the trust to or among the spouse of the donor and other descendants of the donor at such times and in such proportions and amounts as the trustee determines in its sole discretion. The ruling concludes that, under the facts presented, the value of the right to receive the income or principal to be distributed to the spouse is not susceptible of determination. Therefore, the gift to the spouse is not severable from the gifts to the other beneficiaries, and the gift may not to any extent be considered as made one-half by the donor and one-half by his spouse within the meaning of § 2513.

In Wang v. Commissioner, T.C. Memo. 1972-143, the court stated that in determining whether a remainder interest is ascertainable as of the time of the gift and thus eligible for split gift treatment under § 2513, the same principles are applied as are employed in determining whether a charitable remainder interest subject to an invasion power is ascertainable and thus deductible for estate tax purposes (under rules in effect prior to the enactment of § 2055(e)(1) and (2)).

Generally, prior to the enactment of § 2055(e), the charitable remainder interest would be ascertainable if the invasion power was limited by an ascertainable standard such that the possibility of invasion could be measured or stated in definite terms of money. Rev. Rul. 70-450, 1970-2 C.B. 195. See also Wang v. Commissioner, supra. If the remainder interest was ascertainable, then a charitable deduction was allowed in an amount in excess of the potential invasions. If the probability of invasion was so remote as to be negligible, a deduction would be allowed for the entire value of the remainder interest. Rev. Rul. 54-285, 1954-2 C.B. 302.

In the present case, the Trust provides that Taxpayer 2 shall have the non-cumulative right to withdraw all or part of each contribution to the Trust. Taxpayer 2's right of withdrawal shall not in the aggregate exceed $A in any calendar year. In addition, the Trust provides that after Taxpayer 1's death, the trustee shall pay to Taxpayer 2, for her life, all of the income and so much of the principal as the trustee determines is required for her reasonable support and medical care. We conclude that this standard for invasion is ascertainable and that Taxpayer 2's right to receive income or principal is susceptible of determination. See § 2041(b) and § 20.2041-1(c)(2) of the Estate Tax Regulations, which provide what constitutes an ascertainable standard for purposes of § 2041. Therefore, the gift to Taxpayer 2 is severable from the gifts to the other beneficiaries. Accordingly, we conclude that the transfers to the Trust are eligible for gift splitting for gift tax purposes, to the extent not attributable to Taxpayer 2's ascertainable and severable interest. Further, under § 26.2652-1(a)(4), Taxpayer 2 is treated, for GST purposes, as the transferor of one-half of the entire value of the property transferred by Taxpayer 1, regardless of the interest Taxpayer 2 is actually deemed to have transferred under § 2513. Therefore, for GST purposes, Taxpayer 1

and Taxpayer 2 are each treated as the transferor of one-half the value of the entire property transferred to the Trust.

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. In addition, we express or imply no opinion regarding the value of the property transferred to the Trust.

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

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
Associate Chief Counsel
(Passthroughs & Special Industries)