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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
February 5, 2002

Legend

Husband

Wife

Trust 1

Trust 2

Trust Company

Date 1

Year 1

a

b

Dear

This is in response to your letter requesting on behalf of Husband and Wife 1) an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make an allocation of generation-skipping transfer (GST) exemption described under §§ 2642(b)(1) and 2642(g)(1) of the Internal Revenue Code and 2) a ruling under § 25.2513-1(b)(4) of the Gift Tax Regulations.

The facts and representations submitted are summarized as follows. On Date 1, pursuant to Husband's instructions, Trust Company transferred $ a to Trust 1 and $ b to Trust 2 from Husband's personal assets. Trust 1 is to benefit Wife, daughter, descendants of daughter, and the surviving spouses of descendants of daughter. Trust 2 is to benefit Wife, son, descendants of son, the surviving spouse of son, and the surviving spouses of descendants of son.

Due to secretarial mistakes at Trust Company, Husband's gift was erroneously reflected in Trust Company's gift database as a gift not subject to the GST tax and as a gift made one-half by Husband and one-half by Wife. This error in Trust Company's

computer database was automatically incorporated into Husband's and Wife's Year 1 gift tax returns. Accordingly, the Year 1 gift tax returns did not include a Notice of Allocation and line 5 of Part 2 of Schedule C was left blank. Further, the Year 1 returns reported the transfer to each trust as made one-half by Husband and one-half by Wife. The entire amount of the transfer to each trust, however, should have been reported on Husband's return as a gift by Husband. Husband and Wife signed each other's Year 1 gift tax return signifying his or her consent to treat the other's eligible gifts to third parties as if made one-half by him or her.

Husband and Wife timely filed their Year 1 gift tax returns. Husband and Wife did not create any other trusts to which GST exemption could be allocated since funding Trust 1 and Trust 2, no distributions have ever been made from Trust 1 or Trust 2, and at no time since the inception of the GST tax have Husband and Wife created any other nonskip person trust to which it may have been desirable to allocate GST exemption.

Sections 1.1A of Trust 1 and Trust 2 are identical except the identities of the respective beneficiaries. Section 1.1A of Trust 1 provides as follows:

> My trustees may pay any part or all of the income and principal of the Family Trust to any one or more members of a class consisting of my wife, my daughter, my daughter's descendants, and the surviving spouses of my daughter's descendants for health, support, maintenance or education. Payments may be made in such amounts and proportions as shall be determined from time to time in the discretion of my Independent Trustee. Before making any such determination, I request that my Independent Trustee consult with my Family Trustees; or if there is none, with the competent adult beneficiaries of the Family Trust. I recommend to my Independent Trustee that if payments are made to beneficiaries other than my wife, such payments be equal as to each beneficiary hereunder; provided that my Independent Trustee may consider the income or capital resources of a beneficiary and also make allowances for emergency or chronic adverse circumstances facing any beneficiary. Any income not paid shall be accumulated and added at least annually to principal.

Section 1.1B of Trust 1 provides as follows:

> Upon the death of the last to die of my daughter and her descendants, [Trust 1] shall terminate and the remaining principal and any accumulated income shall be distributed to the trustees of [Trust 2], under the irrevocable trust agreement of even date made by me as Grantor, to be held in accordance with the provisions of said agreement; or if said trust is not then in existence, the remaining principal and any accumulated income shall be distributed in equal shares to the then surviving descendants of [son].

Section 1.1B and C of Trust 2 provide as follows:

> B. Upon and after the death of [son], payments to my descendants and the surviving spouses of my descendants shall be made in such proportions as my son shall appoint. To the extent not appointed to the contrary, the income and principal of [Trust 2] shall continue to be held or distributed pursuant to Section 1.1A.
>
> C. Upon the death of the last to die of my son, his surviving spouse and his descendants, [Trust 2] shall terminate and the remaining principal and any accumulated income shall be distributed to the trustees of [Trust 1], under the irrevocable trust agreement of even date made by me as Grantor, to be held in accordance with the provisions of the agreement; or if said trust is not then in existence, the remaining principal and any accumulated income shall be distributed in equal shares to [daughter] and her descendants, or to such of them as shall then be surviving.

Taxpayers request an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make an allocation of GST exemption described under § 2642(b)(1), pursuant to § 2642(g)(1). Taxpayers also request a ruling that for GST tax purposes, Husband and Wife are each the transferor of one-half of the Year 1 transfers to Trust 1 and Trust 2.

Ruling 1

Section 2601 imposes a tax on every 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)) 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 2642(b)(1) provides that except as provided in subsection (f), if the allocation of the GST exemption to any transfer 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 subsection (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 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 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 of the Procedure and Administration Regulations.

Under § 301.9100-1(c), the Commissioner of Internal Revenue may grant a reasonable extension of the time 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, if the taxpayer demonstrates to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith, and granting the relief will not prejudice the interests of the government.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-1(a).

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), the time for allocating the GST exemption to lifetime transfers is to be treated as if not expressly prescribed by statute. Accordingly, a taxpayer may seek an extension of time to make an allocation described in § 2642(b)(1) under the provisions of § 301.9100-3. See Notice 2001-50, 2001-34 I.R.B. 189.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and 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 representations made in this case, we conclude that the standards of §§ 301.9100-1 and 301.9100-3 have been satisfied. Therefore, Husband and Wife are granted an extension of time of 60 days from the date of this letter to make an allocation of their available GST exemption, with respect to the transfers to Trust 1 and 2. The allocation will be effective as of the date of the transfers to Trust 1 and 2, and the value of the transfers for gift tax purposes will be used to determine the allocation of the GST exemption.

The allocation should be made on a supplemental Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Cincinnati Service Center. A copy of this letter should be attached to the supplemental Form 709. A copy is enclosed for this purpose.

Ruling 2

Section 2501 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 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 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 25.2513-1(b)(4) provides that if one spouse transfers 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 and severable from the interest transferred to the spouse.

Section 25.2513-2(a)(1) provides that if both spouses file gift tax returns within

the time for signifying consent, it is 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.

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.

Section 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations provides that in the case of a transfer with respect of 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 (e)(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; Wang v. Commissioner. 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, Trust 1 and Trust 2 each provides that income and principal may only be paid for Wife's "health, support, maintenance or education." We conclude that this standard for invasion is ascertainable, and the spouse'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 that this standard constitutes an ascertainable standard for purposes of § 2041. Therefore, the gift to Wife is severable from the gifts to the other beneficiaries. Accordingly, we conclude that the Year 1 transfers to Trust 1 and Trust 2 were eligible for gift-splitting for gift tax purposes, to the extent not attributable to Wife's ascertainable and severable interest. Further, under § 26.2652-1(a)(4), Wife is treated for GST purposes as the transferor of one-half of the entire value of the property transferred by Husband, regardless of the interest Wife is actually deemed to have transferred under § 2513. Therefore, Husband and Wife are each the transferor for GST purposes of one-half of Trust 1 and one-half of Trust 2.

Based upon your representations, Trust Company mistakenly reported on Husband's and Wife's Year 1 gift tax returns that the transfers to Trust 1 and Trust 2 were made one-half from Husband and one-half from Wife, instead of reporting that Husband made all of the transfers. In order to correct this error, Husband and Wife must file amended gift tax returns for Year 1, reflecting that Husband made the transfers to Trust 1 and 2 and that Wife elected to treat one-half of the transfers, not attributable to Wife's ascertainable and severable interest, as made by her. Husband and Wife must also amend all gift tax returns filed for years subsequent to Year 1 to reflect the Year 1 transfers.

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 no opinion on the federal tax consequences of the facts described above under any other provisions of the Code.

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

Sincerely,
Paul F. Kugler
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures:
Copy of this letter
Copy for § 6110 purposes

CC: