

**Internal Revenue Service**

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:4-PLR-145439-02

Date:

March 06, 2003

Re:

LEGEND:

Husband =  
Wife =  
Child A =  
Child B =  
Trust 1 =  
Trust 2 =

Real Property=

Accountant =  
Attorney =  
Date 1 =  
Date 2 =  
Date 3 =  
x =

Dear :

This is in response to your letter dated August 5, 2002, 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 trusts.

The facts and representations submitted are summarized as follows:

Husband and Wife are married. On Date 1, Husband and Wife created two trusts, Trust 1 for the benefit of Child A and her issue, and Trust 2 for the benefit of Child B and her issue. At the same time, Husband contributed an undivided 46.5% interest in Real Property to Trust 1 and another undivided 46.5% interest in Real Property to Trust 2. Each undivided interest was valued at \$x. The provisions of the two trusts are identical except for the beneficiary designations.

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Article I, § 1(a) of each trust provides that the trustee is to distribute or apply so much of the net income to or for the benefit of the respective beneficiary as the trustee, in the trustee's sole discretion, deems advisable for her health, maintenance, support, education and welfare. Any net income not so distributed or applied is to be added to principal.

Section 1(b) provides for the distribution of principal to or for the beneficiary and/or to or for the benefit of the beneficiary's living issue as the trustee may deem advisable to provide generously for the health, maintenance, support, education, and welfare of the beneficiary and/or her issue.

Section 1(c) provides that the trust is to terminate on the respective beneficiary's death, and the trustee is to distribute the remaining principal and accumulated or accrued income to such of the beneficiary's issue, in such amounts or shares, in further trust or otherwise, as the beneficiary appoints by will. To the extent the property is not effectively appointed, it is to be distributed, outright or in further trust, to or for the beneficiary's then living issue, per stirpes. Section 1(c) and § 2 provide directions for distribution of the trust property in the event the beneficiary dies without issue.

Attorney drafted the trust agreement and Accountant prepared the gift tax returns. Husband and Wife elected to treat the gifts of undivided interests in Real Property as made one-half by each under § 2513. On Date 2, the gifts were reported on timely filed gift tax returns. In the course of preparing the returns, however, Accountant inadvertently failed to allocate any of Husband's and Wife's GST exemption to the transfers. In reviewing the returns, Attorney noticed the omission and, on Date 3, submitted the request, on behalf of Husband and Wife, for an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 to allocate a portion of their unused GST exemption to those gifts. Husband and Wife have not allocated any GST exemption to gifts made after the Date 1 transfers.

Section 2513(a) provides that a gift made by one spouse to any person other than such person's spouse shall be considered as made one-half by that person and one-half by such person's spouse, but only if both spouses have signified their consent.

Section 2601 imposes a tax on every generation-skipping transfer. A generation-skipping transfer 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.

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 is the value of the property transferred to the trust (or involved in the direct skip).

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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 to any property with respect to which the 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.

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 the transfer or is deemed to be made under § 2632(b)(1) or (c)(1), the value of the 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)).

Section 2642(g)(1)(A) provides that the Secretary shall by regulation prescribe the 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).

Section 2642(g)(1)(B) provides that in determining whether to grant relief, 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.

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 the gift is treated as made by the individual's spouse, the gift shall be so treated for purposes of chapter 13.

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 transfer 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

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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 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, Husband and Wife are granted an extension of time of 60 days from the date of this letter to make an allocation of available GST tax exemption with respect to the Date 1 transfers of interests in Real Property to Trust 1 and Trust 2. The allocation will be effective as of the date of the transfers to the trusts, and the inclusion ratio with respect to each trust will be determined under § 2642(a) based on the value of the transfer to each trust, as finally determined for gift tax purposes.

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.

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 allocation should be made on supplemental Form 709 United States Gift (and Generation-Skipping Transfer) Tax Returns and filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Two copies are enclosed for this purpose.

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Sincerely,

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