

Internal Revenue Service

Department of the Treasury
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Telephone Number:

Refer Reply To:
CC:PSI:4
PLR-144172-08
Date:
April 13, 2009

Re:

Legend

Taxpayer =
Son =
Grandson =
Trust A =

Trust B =

Date 1 =
Date 2 =
Year 1 =
Year 2 =
Year 4 =
Year 10 =
Year 12 =
x =
y =
z =
Accounting Firm =

Dear :

This letter is in response to your letter dated October 7, 2008, and subsequent correspondence, 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 your generation-skipping transfer (GST) exemption to certain transfers to trusts.

The facts submitted and representations made are as follows:

On Date 1, Taxpayer created Trust A, an irrevocable trust, for the benefit of Grandson and his descendants. Trust A provides, *inter alia*, that with respect to any contribution of property transferred by gift to the trust during a calendar year, Grandson has the right to withdraw an amount not to exceed the annual exclusion amount under § 2503(b) for that year. Trust A also provides that during Taxpayer's life, the trustee may pay so much or all of the income and principal of the trust to and among Grandson and Grandson's descendants at such times as trustee deems necessary or advisable from time to time for the health, support, maintenance and education of Grandson or any of Grandson's descendants.

On Date 2, Taxpayer created Trust B, an irrevocable trust, for the benefit of Son and his descendants. Trust B provides, *inter alia*, that with respect to any contribution of property transferred by gift to the trust during a calendar year, Son has the right to withdraw an amount not to exceed the annual exclusion amount for that year. Trust B also provides that the trustee shall pay to or for the benefit of Son or any of his descendants so much or all of the net income and/or such amounts from principal as the trustee shall determine, in his discretion, to be necessary or advisable from time to time for the health, support, maintenance and education of Son or any of his descendants. Trust B further provides Son with a testamentary limited power to appoint the trust to any appointee or appointees, except Son, Son's estate, Son's creditors, or the creditors of Son's estate.

Taxpayer made cash gifts in Years 1 through 12 to Trust A. In each year, the gifts were equal in value to the amount excludible from the gift tax under § 2503(b). In Year 2, Taxpayer made gifts to various trusts and individuals, including the gift to Trust A. In Year 4, Taxpayer made several gifts, including the cash gift to Trust A and property valued at \$x to Trust B. In Year 10, Taxpayer made the cash gift to Trust A and a gift of property valued at \$y to Trust B.

Taxpayer retained the services of Accounting Firm during Years 1 through 12 to prepare her income and gift tax returns. Accounting Firm advised Taxpayer that she did not have to file a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, reporting her gifts to Trust A during the years in which these were her only gifts, because the gifts were excluded from the gift tax under § 2503(b).

Accounting Firm prepared and Taxpayer filed Forms 709 (gift tax returns) for Years 2, 4, and 10. On her gift tax return for Year 2, Taxpayer reported her gift to Trust A. On her gift tax return for Year 4, Taxpayer reported her gifts to Trust A and Trust B. On her gift tax return for Year 10, Taxpayer reported only her gift to Trust B. On Schedule C of her gift tax return for Year 10, Taxpayer listed \$z as her available GST exemption amount, and allocated \$y, the reported value of her gift to Trust B, to the transfer to Trust B.

Accounting Firm did not advise Taxpayer to allocate her GST exemption to any of her transfers to Trust A or to her transfer to Trust B in Year 4.

It is represented that in Year 12, during a review of Taxpayer's estate plan, Taxpayer's attorney discovered the failure to file returns for Trust A and the failure to allocate Taxpayer's GST exemption to Trust A and the Year 4 transfer to Trust B. It is also represented that no distributions of cash or property have been made by Trust A or Trust B to any beneficiaries.

Taxpayer requests an extension of time under § 301.9100-3 and § 2642(g) to make allocations of her GST exemption to the transfers to Trust A in Years 1 through 12 and to her transfer to Trust B in Year 4.

Law and analysis

Section 2501(a) 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 the tax imposed by § 2501 applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2503(b) provides that the first \$10,000 (adjusted for inflation) of gifts of present interests in property made to any person by the donor during the calendar year shall not be included in the total amount of gifts made during such year by the donor. This is referred to as the annual gift tax exclusion. Section 25.2503-2(a) provides that in the case of a gift in trust, the beneficiary of the trust is the donee.

Section 25.6019-1(a) of the Procedure and Administration Regulations provides that a gift tax return does not have to be filed for a transfer that is excluded from the gift tax under § 2503(b).

Section 2601 imposes a tax on every generation-skipping transfer (GST). Section 2611(a) defines a GST 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 GST 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 under § 2631 allocated to the trust (or to the 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.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount which may be allocated by such individual to any property with respect to which such individual is the transferor. During the years at issue in this case, the GST exemption amount increased from \$1,000,000 to an amount equal to the applicable exclusion amount under § 2010(c).

Section 2632(a)(1) provides that any allocation by an individual of his or her GST exemption may be made at any time on or before the date prescribed for filing the estate tax return for such individual’s estate, regardless of whether such a return is required to be filed. Section 2632(a)(2) provides that the manner in which allocations are to be made shall be prescribed by forms or regulations issued by the Secretary.

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 shall be deemed to be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero (automatic allocation). If the amount of the direct skip exceeds such unused portion, the entire unused portion shall be allocated to the property.

Section 2612(c) defines the term “direct skip” as a transfer subject to the estate tax or gift tax of an interest in property to a skip person. Section 2613(a) includes in the definition of the term “skip person”: (1) a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor; or (2) a trust, if all interests in such trust are held by skip persons.

Section 2642(c)(1) provides the general rule that in the case of a direct skip which is a nontaxable gift (by reason of § 2503(b)), the inclusion ratio shall be zero. However, under § 2642(c)(2), the general rule of § 2642(c)(1) does not apply to any transfer to a trust for the benefit of an individual unless, (A) during the life of such individual, no portion of the corpus or income of the trust may be distributed to (or for the benefit of) any person other than such individual, and (B) if the trust does not terminate before the individual dies, the assets of such trust will be includible in the gross estate of such individual.

For transfers prior to December 31, 2000, § 26.2632-1(b)(2) 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. The allocation must clearly identify the trust to which the allocation is being made, the amount of GST exemption allocated to it, and if the allocation is late or if an inclusion ratio greater than zero is claimed, the value of the trust assets at the effective date of the allocation. The allocation should also state the inclusion ratio of the trust after the allocation.

Section 2642(b)(1) provides, in relevant part, that if the allocation of the GST exemption to any transfers of property is made on a timely filed gift tax return or is deemed to be made under § 2632(b)(1), the value of such property for purposes of determining the inclusion ratio shall be its value as finally determined for gift tax purposes (within the meaning of § 2001(f)(2)), and, such allocation shall be effective on and after the date of such transfer.

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

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 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 is 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) 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(a) 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 prescribed 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) 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 to advise the taxpayer to make, the election.

Conclusion

Trust A provides Taxpayer's Grandson with the right to withdraw, during any calendar year, from any contributions to the trust during the year, an amount equal to the annual gift tax exclusion under § 2503(b). Taxpayer transferred cash in the amount of the annual exclusion to Trust A in Years 1 through 12. Under § 25.6019-1(a), these gifts did not have to be reported on gift tax returns for those years. However, for GST tax purposes, these transfers to Trust A were direct skips under § 2612(c) and, because Trust A was created for Grandson and his descendants, Trust A does not satisfy the exceptions under § 2642(c)(2) for purposes of the inclusion ratio. Therefore, Taxpayer's unused GST exemption is deemed to have been automatically allocated to the transfers to Trust A under § 2632(b).

Taxpayer's transfers to Trust B were reported on gift tax returns filed for Year 4 and Year 10. No allocation of Taxpayer's GST exemption was made on the return for Year 4. On the return filed for Year 10, Taxpayer's unused GST exemption was reported as \$z. Although \$z was the GST exemption amount in Year 10, Accounting Firm failed to take into account the automatic allocations that were made with respect to Taxpayer's transfers to Trust A in years prior to Year 10. These allocations reduced the amount of GST exemption available to Taxpayer in Year 10.

Based on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Taxpayer is granted an extension of time of 60 days from the date of this letter to make an allocation of her available GST exemption with respect to her transfer to Trust B during Year 4. This allocation should be made on a Supplemental Form 709 filed for Year 4. In conjunction with this grant of relief, Taxpayer will also file a supplemental Form 709 for Year 10 correctly reporting the amount of her available GST exemption as of Year 10. This correction will reflect the total amount of GST exemption automatically allocated with

respect to the transfers to Trust A made in years 1-10, and the allocation with respect to the Year 4 transfer to Trust B.

The Supplemental Forms 709 for Year 4 and Year 10 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each return.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

The ruling contained in this letter is 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 ruling, it is subject to verification on examination.

Pursuant to the power of attorney on file with this office, a copy of this letter is being sent to the Taxpayer's representative.

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,

Curtis G. Wilson
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures:

Copy of letter for section 6110 purposes

cc: