Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-100698-16

Date:
July 22, 2016

Legend

Husband
Wife
Date 1
Date 2
Date 3
Date 4
Year 1
Year 2
Year 3
Year 4
Year 5
Year 6
Year 7
Trust 1

Trust 2
Trust 3
Accountant

Dear :

This letter responds to your authorized representative's letter dated December 28, 2015, requesting an extension of time under § 2642(g) of the Internal Revenue Code (Code) and § 301.9100-3 of the Procedure and Administration Regulations to elect out of the generation-skipping transfer (GST) exemption automatic allocation rules with respect to certain transfers to trusts.

The facts and representations submitted are summarized as follows:

On Date 1, during Year 1, a date before January 1, 2001, Husband executed Trust 1 for the benefit of his spouse, Wife, and their children. Wife is the trustee of Trust 1.

Article 2.1 of Trust 1 provides, in relevant part, that the trustee may accumulate any part or all of the net income received in each year and add it to principal, and/or allot net income among Wife and Husband's living descendants as the trustee determines in her discretion.

Article 4 of Trust 1 provides, in relevant part, that upon the death of the survivor of Husband and Wife, the trustees are to pay the then principal of the trust, together with all the net income thereof accrued, *per stirpes*, to Husband's living descendants. If any descendant who receives property of the trust is under the age of 40, that descendant's property will be held in trust until the descendant reaches the age of 40.

Article 9 of Trust 1 provides, in relevant part, that any person, including Husband, (a donor) may make a transfer to the trust by any method. Upon receiving such transfer, the trustee will provide prompt notice to all permissible beneficiaries of the trust. During the withdrawal period, each permissible beneficiary shall have the power to withdraw by written instrument delivered to the trustee, an "Applicable Fraction" of the value of any transfer to the trust; provided, however, that with respect to property so transferred by any donor in any calendar year, each permissible beneficiary is entitled to withdraw in the aggregate, no more than the maximum amount excluded from gift tax under § 2503(b) of the Internal Revenue Code (after taking into account the effects of § 2513). The withdrawal period is a period of 45 days from the date of the transfer. The term "Applicable Fraction" is defined in the case of a permissible beneficiary, who is not the spouse of the donor of the gift, as a fraction the numerator of which is one and the denominator of which is the sum of the number of permissible beneficiaries with respect to such transfer other than the donor's spouse plus one-half if the donor's spouse is a permissible beneficiary with respect to such transfer. In the case of a permissible beneficiary who is the spouse of the donor of the transfer, "Applicable Fraction" is defined as one-half of the previously defined fraction.

On Date 2, during Year 3, a date after December 31, 2000, Husband executed Trust 2 for the benefit of Wife, Husband's issue, and other relatives. Article First of Trust 2 provides, in relevant part, that the trustees may pay to or apply for the benefit of a beneficiary so much of the income and principal of the trust, as the trustees in their absolute discretion determine, accumulating any undistributed income and adding the same to principal. At such times or times during each calendar year as any person (a donor) transfers any property as an addition to the trust, the addition will be subject to withdrawal rights of the beneficiaries. Wife will have the first right and power to withdraw from the principal an amount equal to the lesser of (i) the addition, and (ii) the amount of the annual exclusion under § 2503(b), as reduced by the value of any prior gifts made by the donor during the calendar year to or for the benefit of Wife.

Husband's living children will each have the right and power to withdraw from the principal an amount equal to the lesser of (i) the addition, reduced by any amount withdrawn by Spouse (whether or not such withdrawal is actually made), and (ii) the amount of the annual exclusion under § 2503(b) (taking into account § 2513), as reduced by the value of any prior gifts made by the donor during the calendar year to or for the benefit of the child.

Article Second of Trust 2 provides, in relevant part, that upon the death of the survivor of Husband and Wife, the property of Trust 2 is to be divided, without adjustment for any prior distributions of income and principal, into separate shares *per stirpes* for Husband's then living issue.

On Date 3, during Year 4, Wife executed Trust 3 for the benefit of Husband and Wife's issue. Article First of Trust 3 provides, in relevant part, that the trustees may pay to or apply for the benefit of a beneficiary so much of the income and principal of the trust, as the trustees in their absolute discretion determine, accumulating any undistributed income and adding the same to principal. At such times or times during each calendar year as any person (a donor) transfers any property as an addition to the trust, the addition will be subject to withdrawal rights of the beneficiaries. Husband will have the first right and power to withdraw from the principal an amount equal to the lesser of (i) the addition, and (ii) the amount of the annual exclusion under § 2503(b), as reduced by the value of any prior gifts made by the donor during the calendar year to or for the benefit of Husband. Wife's living children will each have the right and power to withdraw from the principal an amount equal to the lesser of (i) the addition, reduced by any amount withdrawn by Husband (whether or not such withdrawal is actually made), and (ii) the amount of the annual exclusion under § 2503(b) (taking into account § 2513), as reduced by the value of any prior gifts made by the donor during the calendar year to or for the benefit of the child.

Article Second of Trust 3 provides, in relevant part, that upon the death of the survivor of Husband and Wife, the property of Trust 3 is to be divided, without adjustment for any prior distributions of income and principal, into separate shares *per stirpes* for Wife's then living issue.

From Year 1 through Year 2 (a year after 2001), Husband annually made transfers of cash to Trust 1. No Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return) was filed for any of the above transfers.

In Year 3, Year 4, Year 5, and Year 6, Husband made transfers of cash to Trust 1 and Trust 2. In Year 4, Year 5, and Year 6, Wife made transfers of cash to Trust 3. Husband and Wife hired Accountant to prepare their income tax returns and Forms 709 for each of the above years. Accountant failed to timely prepare the Forms 709 for Year 3, Year 4, and Year 5. After discovering his error, Accountant prepared Forms 709 for Year 3, Year 4, and Year 5 for both Husband and Wife. On each form, Husband and Wife signified their consent to treat the transfers as having

been made one-half by each spouse under § 2513. The returns for Year 3, Year 4, and Year 5 were filed late on Date 4, during Year 7. Accountant timely prepared the Forms 709 for Year 6. The returns for Year 6 were timely filed on Date 4.

Wife requests an extension of time under § 301.9100-3 to elect under § 2632(c)(5) not to have the automatic allocation rules contained in § 2632(c)(1) apply to (i) Wife's transfers to Trust 1 in Year 3 (by application of § 2513) for Year 3 and all subsequent years, (ii) Wife's transfers to Trust 2 in Year 3 (by application of § 2513) for Year 3 and all subsequent years, and (iii) Wife's transfers to Trust 3 in Year 4 for Year 4 and all subsequent years.

LAW & ANALYSIS

Section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during the 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 2503(b)(1) provides that in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first $10,000 of such gifts to the donee (adjusted for inflation as provided in § 2503(b)(2)) is excluded from the total amount of taxable gifts made by the donor. This annual exclusion is only available for gifts of present interests in property.

Section 25.2503-3(b) of the Gift Tax Regulations provides that a present interest in property is an unrestricted right to the immediate use, possession or enjoyment of property or the income from property (such as a life estate or term certain). An exclusion is allowable with respect to a gift of such an interest (but not in excess of the value of the interest).

Section 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall, for 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 2513(b)(2)(A) provides that the consent under section 2513(a)(2) may be signified at any time after the close of the calendar year in which the gift was made. The consent may not be signified after the 15th of April following the close of such year, unless before the 15th day no return has been filed for such year by either spouse, in

which case the consent may not be signified after a return for such year is filed by either spouse. Thus, if a late return is filed, the consent must be made on the first return filed for such year.

Section 25.2513-1(b)(4) provides that the consent is effective only if both spouses signify their consent to treat all gifts made to third parties during that calendar period by both spouses while married to each other as having been made one-half by each spouse. Such consent, if signified with respect to any calendar period, is effective with respect to all gifts made to third parties during such calendar period except, in part, if one spouse transferred property in part to his or her spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and severable from the interest transferred to his spouse.

Section 25.2513-1(b)(5) provides that the consent applies alike to gifts made by one spouse alone and to gifts made partly by each spouse, provided such gifts were to third parties and do not fall within any of the exceptions set forth in § 25.2513-1(b)(1) through (b)(4). The consent may not be applied only to a portion of the property interest constituting such gifts. If the consent is effectively signified on either the husband's return or the wife's return, all gifts made by the spouses to third parties (except as described in subparagraphs (1) through (4) of this paragraph), during the calendar period will be treated as having been made one-half by each spouse.

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.

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 Wang v. Commissioner, T.C. Memo. 1972-143. 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.

Section 2652(a)(2) and § 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations provide that, if, under § 2513, one-half of a gift is treated as made by an individual and one-half is treated as made by the spouse of the individual, then for

purposes of the GST tax, each spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor spouse, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513.

In the present case, when Husband makes a contribution to Trust 1 or to Trust 2, each beneficiary (other than Wife) has the right to withdraw for their own benefit an amount from the trust equal to the lesser of the annual exclusion amount under § 2503(b) or a fractional share of the contribution. Each of the beneficiaries, but for his withdrawal right under the governing instrument, would not have an enforceable present interest in the trust property of either trust income or principal. Here, by virtue of his demand right, the beneficiary will have the unrestricted right to the immediate enjoyment of any future annual addition in any subsequent year. Therefore, under the authorities cited above, these future additions will constitute presently ascertainable, present interests in property for the year in which they are made, up to the amount of the annual exclusion under § 2503. Therefore, we conclude that, in each of Year 3, Year 4, Year 5, and Year 6, to the extent Husband makes a transfer to Trust 1 or Trust 2 that is subject to the withdrawal rights of a child and does not exceed the amount of the annual exclusion under § 2503(b), that transfer will be treated as made one-half by Husband and one-half by Wife. Thus, Wife is a transferor of Trust 1 and Trust 2 for purposes of the Generation-Skipping Transfer Tax.

Section 2601 provides that a tax is imposed on every generation-skipping transfer (GST). Section 2611(a) provides that the term “generation-skipping transfer” means: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of GST tax is the taxable amount multiplied by the applicable rate.

Section 2641(a) defines the applicable rate as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2641(b) provides that the term “maximum Federal estate tax rate” means the maximum rate imposed by § 2001 on the estate of decedents dying at the time of the taxable distribution, taxable termination, or direct skip, as the case may be.

Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is the excess (if any) 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 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 allowed 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 amount 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 2631(c) provides that, for purposes of § 2631(a), the GST exemption amount for any calendar year shall be equal to the applicable exclusion amount under § 2010(c) for such calendar year.

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(c)(1) provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such unused portion, the entire unused portion shall be allocated to the property transferred.

Section 2632(c)(3)(A) provides that for purposes of this subsection, the term "indirect skip" means any transfer of property (other than a direct skip) subject to the tax imposed by chapter 12 made to a GST trust. Section 2632(c)(3)(B) provides, in part, that the term "GST trust" means a trust that could have a generation-skipping transfer with respect to the transferor unless the exceptions enumerated in (i) through (vi) apply.

Section 2632(c)(5)(A)(i)(I) provides that an individual may elect to have § 2632(c) not apply to an indirect skip. Section 2632(c)(5)(B)(i) provides that an election under § 2632(c)(5)(A)(i)(I) shall be deemed to be timely if filed on a timely filed gift tax return for the calendar year in which the transfer was made.

Section 26.2632-1(b)(2)(iii)(A) of the Generation-Skipping Transfer Tax Regulations provides that a transferor may prevent the automatic allocation of GST exemption (elect out) with respect to: (1) one or more prior-year transfers subject to § 2642(f) (regarding ETIPs) made by the transferor to a specified trust or trusts; (2) one or more (or all) current-year transfers made by the transferor to a specified trust or trusts; (3) one or more (or all) future transfers made by the transferor to a specified trust or trusts; (4) all future transfers made by the transferor to all trusts (whether or not in existence at the time of the election out); or (5) any combination of paragraphs (b)(2)(ii)(A)(1) through (4) of this section.

Section 26.2632-1(b)(2)(iii)(B) provides that to elect out, the transferor must attach an election out statement to a Form 709 filed within the time period provided in § 26.2632-1(b)(2)(iii)(C). In general, the election out statement must identify the trust,

and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Prior-year transfers that are subject to § 2642(f), and to which the election out is to apply, must be specifically described or otherwise identified in the election out statement. Under § 26.2632-1(b)(2)(iii)(C), to elect out, the Form 709 with the attached election out statement must be filed on or before the due date for timely filing the Form 709 for the calendar year in which: (1) for a transfer subject to § 2642(f), the ETIP closes; or (2) for all other elections out, the first transfer to be covered by the election out was made.

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 § 2642(g)(1), 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.

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 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.

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 301.9100-1(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 six 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.

Section 301.9100-3(a) provides, in part, that requests for relief subject to § 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 the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, except as provided in § 301.9100-3(b)(3)(i) through (iii), 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 upon the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore:

(i) Wife is granted an extension of time of 120 days from the date of this letter to elect out of the automatic allocation rules under § 2632(c)(5) with respect to Trust 1 for Year 3 and all subsequent years. This election should be made on a supplemental Form 709 for Year 3.

(ii) Wife is granted an extension of time of 120 days from the date of this letter to elect out of the automatic allocation rules under § 2632(c)(5) with respect to Trust 2 for Year 3 and all subsequent years. This election should be made on a supplemental Form 709 for Year 3.

(iii) Wife is granted an extension of time of 120 days from the date of this letter to elect out of the automatic allocation rules under § 2632(c)(5) with respect to Trust 3 for Year 4 and all subsequent years. This election should be made on a supplemental Form 709 for Year 4.

The supplemental Forms 709 should be filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center - Stop 82, Cincinnati, OH 45999. You should attach a copy of this letter to the Forms 709. We have enclosed a copy for this purpose.

In accordance with the Power of Attorney on file with this office, we have sent a copy of this letter to your authorized representatives.

Except as expressly provided herein, we neither express nor imply any opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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.

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,

Associate Chief Counsel
(Passthroughs and Special Industries)

Leslie H. Finlow

By: Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
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cc: