

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:9-PLR-112334-02
Date:
August 1, 2002

In Re:

LEGEND

Decedent =
Spouse =
Son =
Daughter =
Date 1 =
Date 2 =
Bank =

\$x =

Dear _____ :

This is in response to your letter dated February 25, 2002, and subsequent correspondence, requesting, on behalf of Decedent's estate and Spouse, an extension of time under section 301.9100-3 of the Procedure and Administration Regulations and section 2642(g) of the Internal Revenue Code to make allocations of Decedent and Spouse's generation-skipping transfer (GST) exemptions to transfers to two irrevocable trusts.

A summary of the facts and representations submitted are as follows. Decedent died on Date 1, survived by Spouse, Son, and Daughter. Prior to her death, on Date 2, Decedent created two irrevocable trusts (Trusts), one for the benefit of Son, and one for the benefit of Daughter. Son, Daughter, and Bank are the co-trustees of the Trusts. The terms of the Trusts are identical except as to each Trust's beneficiary. The pertinent terms of the Trusts are as follows.

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Article Second, Section (A) of each Trust provides that the trustees shall distribute the entire income of each trust to the beneficiary, at least quarterly, for the beneficiary's lifetime and shall, from time to time or at any time, distribute to the beneficiary so much of the principal as the trustees (other than the beneficiary) shall, in their sole discretion, deem proper for the beneficiary's health, support, or education.

Article Second, Section (B) of each Trust provides the beneficiary with a testamentary limited power to appoint the accrued and undistributed income and principal of his or her trust among Decedent's descendants (other than the beneficiary, the beneficiary's estate, the beneficiary's creditors, or the creditors of the beneficiary's estate).

Article Second, Section (C) provides that any unappointed accrued and undistributed income and principal shall be distributed in equal shares to the beneficiary's then living descendants, per stirpes, if any, or, if none, then in equal shares to Decedent's then living descendants, per stirpes.

Decedent funded each trust with marketable securities valued at \$x. Decedent and Spouse each consented to split the gifts under section 2513 for gift tax purposes and to be treated as the transferor of one-half of the gifts for GST tax purposes under section 2652. Decedent requested Bank to prepare a United States Gift (and Generation-Skipping Transfer) Tax Return, Form 709, for Decedent and Spouse reporting the gifts to the Trusts. Bank prepared the returns, which were then reviewed by Decedent's attorneys and executed by Decedent and Spouse. Bank inadvertently failed to make an allocation of GST exemption on either return, and the attorney who reviewed the returns failed to notice the error. The returns were timely filed, but no allocation of GST exemption was made on either return.

You have requested a ruling that Spouse, individually, and as the personal representative of Decedent's estate, be granted an extension of time under section 2642(g) and section 301.9100-3 to make allocations of Decedent and Spouse's GST exemptions to the split gifts to the Trusts in an amount that would cause each Trust to have an inclusion ratio of zero for GST tax purposes.

LAW and ANALYSIS:

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under section 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.

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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 section 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 section 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under section 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.

As applicable during the year at issue, section 2642(b)(1) provided that, except as provided in section 2642(f), if the allocation of the GST exemption to any property is made on a gift tax return filed on or before the date prescribed by section 6075(b) for such transfer or is deemed to be made under section 2632(b)(1) [deemed allocations to certain lifetime direct skips] – (A) the value of such property for purposes of determining the inclusion ratio shall be its value for purposes of chapter 12, and (B) such allocation shall be effective on and after the date of such transfer.

Section 2642(g)(1)(A) provides 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 section 2642(b)(1). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of section 2642(g)(1), which was enacted 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. Section 2642(g)(1)(B) further provides that 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; 2001-34 I.R.B. 189, provides that under section 2624(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 section 2642(b)(1) or (b)(2) or an election described in section 2632(b)(3) or (c)(5) under the provisions of section 301.9100-3.

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Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in sections 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 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 section 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 section 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in section 2642(b)(1) under the provisions of section 301.9100-3.

Requests for relief under section 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 section 301.9100-3 have been satisfied. Therefore, Spouse, individually and as the personal representative of Decedent's estate, is granted an extension of time of sixty (60) days from the date of this letter to make a retroactive allocation of Decedent and Spouse's GST exemptions in any amount that would cause Decedent and Spouse's split gifts to the Trusts to have an inclusion ratio of zero for GST tax purposes. The allocations, once made, will be effective as of the date of the transfers to the Trusts, and the gift tax value of the transfers to the Trusts will be used in determining the amount of Decedent and Spouse's GST exemption to be allocated to the Trusts. The allocations should be made on separate supplemental Form 709s filed for Spouse and Decedent's estate with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Copies are enclosed for this purpose.

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.

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

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to the taxpayer.

Sincerely,
William P. O'Shea
Acting Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures: Copy for section 6110 purposes
Two copies for attachment to supplemental Form 709s

cc: