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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04 – PLR-122753-08

Date: MAY 26, 2009

Re:

Legend:

Donor =

Spouse =

Accountant =

Trust A =

Trust B =

Trust C =

Trust D =

Trust E =

Dear :

This responds to the letter dated March 31, 2008, and subsequent correspondence submitted by your authorized representatives, requesting an extension of time under § 2642(g) and § 301.9100-3 of the Procedure and Administration Regulations to make an election under § 2632(c)(5) of the Internal Revenue Code to have the automatic allocation rules contained in § 2632(c)(1) not apply to transfers to trusts for generation-skipping transfer (GST) tax purposes.

Facts

Prior to December 31, 2000, Spouse created Trust A, Trust B, and Trust C and Donor and Spouse created Trust D. After December 31, 2000, Donor created Trust E.

Trust B was created as a Grantor Retained Annuity Trust (GRAT) with a 5-year term. Pursuant to the terms of Trust B, at the expiration of the 5-year term, which occurred in 2002, Trust B is to continue in trust until the death of the survivor of Donor and Spouse.

The beneficiaries of each trust are certain members of Donor's and/or Spouse's family, including the issue of Donor and Spouse's children. For each year in which gifts were made to one or more of the trusts, Donor and Spouse each timely filed a Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, and elected under § 2513 to treat the gifts as made one-half by each spouse. Donor and Spouse have filed Forms 709 with respect to transfers to one or more of the trusts from 1996 through 2006. The tax returns were prepared by certified public accountants at Accounting Firm.

Donor did not intend to allocate her GST exemption to the transfers to the trusts, and no allocation was made on the Forms 709 filed for 1996 through 2000 with respect to the transfers to Trust A, Trust C, and Trust D.

However, Accounting Firm failed to advise Donor of changes made to the GST tax, effective for gifts made after December 31, 2000, by the Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16). As described below, these changes automatically allocate a taxpayer's unused GST exemption to transfers that are "indirect skips" to "GST trusts" unless the taxpayer makes an affirmative election to have the automatic allocation rules not apply. Donor made additional gifts to one or more of the trusts in calendar years 2001 through 2006. Due to Accounting Firm's failure to advise her of the automatic allocation rules, Donor's unused GST exemption was automatically allocated to the transfers to the trusts in these years. In addition, the estate tax exclusion period (ETIP) described in § 2642(f) with respect to Trust B closed in 2002.

It is represented that to date, no taxable distributions, taxable terminations, or any other events have occurred with respect to any of the trusts that would result in a GST tax liability on the part of any of the trusts or their beneficiaries.

Donor requests an extension of time under § 2642(g) and § 301.9100-3 to elect out of the automatic allocation rules under § 2632(c)(5) for all transfers made to Trust A, the continuing trust under Trust B, Trust C, Trust D, and Trust E after December 31, 2000.

Law and Analysis

Section 2513(a) provides generally that, for gift tax purposes, if the parties consent, a gift made by one spouse to any person other than his or her spouse shall, for gift tax purposes, be considered as made one-half by the donor spouse and one-half by

his or her spouse.

Section 2601 imposes a tax on every generation-skipping transfer (GST) (within the meaning of subchapter B). 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 GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means with respect to any GST transfer, 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 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.

Section 2631(a), as in effect for generation-skipping transfers made before January 1, 2004, 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. In the case of transfers after December 31, 2003, the GST exemption is equal to the applicable exclusion amount under § 2010(c). Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 26.2632-1(b)(4) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of GST exemption to property transferred during the transferor's lifetime is made on Form 709.

Under § 2632(c)(1), effective for transfers made after December 31, 2000, if any individual makes an indirect skip transfer (a transfer to a GST trust as defined in § 2632(c)(3)(A)), 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. Section 2632(c)(4) provides that for purposes of the automatic allocation rule contained in § 2632(c)(1), an indirect skip to which § 2642(f) applies (describing transfers subject to an estate tax inclusion period) shall be deemed made only at the close of the estate tax inclusion period.

Section 2632(c)(5) provides, in part, that an individual may elect to have the automatic allocation rule in § 2632(c) not apply to (1) an indirect skip (that is, a transfer to a GST trust), or (2) any or all transfers made by such individual to a particular trust. An election 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 or deemed to have been made pursuant to § 2632(c)(4) or on such later date or dates as may be prescribed by the Secretary.

Section 26.2632-1(b)(2)(iii)(A) 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).

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, a 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 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. Accordingly, 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. See Notice 2001-50, 2001-2 C.B. 189.

Section 2652(a)(2) and § 26.2652-1(a)(4) provide 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 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.

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 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). 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.

Under § 301.9100-3(b)(iv), 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, we conclude that the requirements of § 301.9100-3 are satisfied. Therefore, Donor is granted an extension of time of 60 days from the date of this letter to elect pursuant to section 2632(c)(5) to have the automatic allocation rules contained in section 2632(c)(1) not apply to all transfers made by the Donor to Trust A, continuing Trust B, Trust C, Trust D, and Trust E that were made after December 31, 2000.

The elections should be made on Supplemental Forms 709 for the appropriate calendar years prescribed under § 26.2632-1(b)(2)(iii)(C) and filed with the Internal Revenue Service, Cincinnati Service Center—Stop 82, Cincinnati, Ohio 45999. A statement must be attached to each Form 709 identifying the trust(s), and specifically providing that the Donor is electing, pursuant to section 2632(c)(5)(A), to have the automatic allocation rules contained in section 2632(c)(1) not apply to any transfers Donor has made or will make to the identified trust(s) after December 31, 2000. See § 26.2632-1(b)(2)(iii) and (iv). A copy of this letter should be attached to each Supplemental Form 709.

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.

Except as specifically ruled herein, we express 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 taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

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

Enclosure

Copy for section 6110 purposes
Copy of this letter