

Dear _____ :

This is in response to a letter from your authorized representative dated March 17, 2004, and prior correspondence, requesting an extension of time under § 301.9100 of the Procedure and Administration Regulations to make an allocation of generation-skipping transfer (GST) tax exemption.

Facts

The facts and representations submitted are summarized as follow: Grandparent 1 created Trust on Date 1, for the benefit of Son, Daughter-in-law, and Grandson. Grandparent 1 contributed Amount 1 to Trust at that time.

Article FIRST, section 1.01 of Trust provides that the trustee has the discretion to distribute income and principal to Son, Daughter-in-law, and Grandson as the trustee, in the trustee's sole and absolute discretion, deems necessary for their health, education, support and maintenance. Section 1.02 provides that Trust shall terminate upon the death of the last to die of Son and Daughter-in-law. At termination, Trust principal and any accumulated and undistributed income is to be distributed to the then-living lineal descendants of Son and Daughter-in-law, per stirpes.

Article FIRST, section 1.07 of Trust permits the trustee to receive as part of Trust, contributions of additional property from the settlor or any other person. In Date 2, Grandparent 2 also contributed Amount 1 to Trust. Grandparent 2 is Daughter-in-law's father.

Because Trust then had multiple transferors, separate trust shares were established. The share to which Grandparent 1 is the donor is known as Sub-trust 1, and Grandparent 2's share is known as Sub-trust 2.

Neither Grandparent 1 nor Grandparent 2 filed a federal gift tax return, Form 709 (United States Gift (and Generation-Skipping Transfer) Tax Return), for Year 1. In early Year 7 during a personal divorce, Son became aware of the issues regarding the GST tax and the need to make allocations to Trust. As a result, Grandparent 1 filed her Form 709 and made a late allocation of her GST exemption to her respective trust share, Sub-trust 1, on Date 3. Grandparent 2 filed his Form 709 and made a late allocation of his GST exemption to his respective trust share, Sub-trust 2, on Date 4.

The trust instrument was prepared by Law Firm. The attorney who prepared the trust instrument signed an affidavit stating that she had no record of providing advice to Grandparent 1 or Grandparent 2 regarding the proper allocation of the GST exemption to contributions to Trust.

From Year 2 until the present, Accounting Firm has been the accountant for Trust. Accountant represents that distributions were made during Year 2 through Year 6 to Son, Daughter-in-law and Grandson. In Year 7, distributions were made to Son and Daughter-in-law. No distributions were made to Grandson in Year 7. Accountant also represents that no GST tax has ever been paid.

In Year 1, both Grandparent 1 and Grandparent 2 had sufficient GST exemption available to allocate sufficient GST exemption to Trust in order for Trust to have an inclusion ratio of zero. The only allocation of GST exemption by either Grandparent 1 or Grandparent 2 has been the Year 7 late allocations discussed above.

Law and Analysis

Section 2601 of the Internal Revenue Service 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.

Section 2631(a), as in effect for the tax years at issue, provided 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. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2654(b) provides that, for purposes of chapter 13, the portions of a trust attributable to transfers from different transferors shall be treated as separate trusts.

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.

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

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 such transfer or is deemed to be made under § 2632(b)(1) or (c)(1) the value of such 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)), or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, its value at the time of the close of the estate tax inclusion period, and such allocation shall be effective on and after the date of such transfer, or, in the case of an allocation deemed to have been made at the close of an estate tax inclusion period, on and after the close of such estate tax inclusion period.

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 this paragraph, 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 under this paragraph, 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.

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.

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). 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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Grandparent 1 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 Sub-trust 1 in Year 1. The allocation will be effective as of the respective date of the transfer to Sub-trust 1, and the inclusion ratio of Sub-trust 1 will be determined based on the value of the transfers to Sub-trust 1 as determined for federal gift tax purposes and the amount of exemption allocated to Sub-trust 1.

This allocation should be made on a supplemental Form 709 and filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center – Stop 82, Cincinnati, OH 45999. A copy of this letter should be attached to the 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 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 taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: