

Internal Revenue Service

Department of the Treasury

Number: **200345038**

Washington, DC 20224

Release Date: 11/07/2003

Index Numbers: 2632.01-00; 2642.00-00
2513.00-00; 9100.00-00

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:9-PLR-113328-03

Date:

July 28, 2003

LEGEND:

Date 1 =

Husband =

Trust 1 =

Trust 2 =

Trust 3 =

Wife =

Daughter =

Son 1 =

Son 2 =

Date 2 =

X =

Year 1 =

Accounting Firm =

Date 3 =

Dear :

PLR-113328-03

This is in response to your letter dated February 20, 2003, submitted by your authorized representative, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make allocations of generation-skipping transfer (GST) tax exemption.

The facts and representations submitted are summarized as follows. On Date 1, Husband established three irrevocable trusts, Trust 1, Trust 2, and Trust 3 for the purpose of providing for his descendants.

The primary beneficiaries of Trust 1 are Wife and Daughter. Pursuant to the terms of Trust 1, the trustee is to pay to or for the benefit of the primary beneficiaries as much of the trust's income and principal as the trustee determines necessary or appropriate for their health, maintenance, education, and support. Any income not distributed may be accumulated and added to principal. In addition, Trust 1 provides Daughter, by instrument during her life or by will at her death, with the power to appoint the remaining trust estate to or for the benefit of her lineal descendants.

Trust 1 terminates upon the death of Daughter. To the extent Daughter has not appointed the trust assets, the trust assets are to be divided into separate shares, per stirpes, for her lineal descendants and, if none, to Husband's lineal descendants, per stirpes.

The terms of Trust 2 and Trust 3 are the same as Trust 1 except Wife and Son 1 are the primary beneficiaries of Trust 2 and Wife and Son 2 are the primary beneficiaries of Trust 3.

On Date 2, Husband transferred X to each trust. Husband and Wife elected on their Year 1 gift tax returns to treat Husband's transfers as being made one half by Husband and one half by Wife. It was also determined that Husband and Wife should elect to allocate their respective GST exemption to any transfers to the trusts.

Husband and Wife engaged Accounting Firm to prepare their Year 1 gift tax returns. Accounting Firm was aware of Husband's and Wife's intention to allocate their respective GST exemption to the Date 2 transfers but inadvertently failed to make the allocations. Accounting Firm subsequently discovered the error and on Date 3 informed Husband and Wife of the failure to make the allocations.

Husband and Wife request (1) that for GST tax purposes, Husband and Wife are each the transferor of one-half of the Date 2 transfers, and (2) an extension of time under §§ 301.9100-1 and 301.9100-3 to allocate their respective GST exemption to the Date 2 transfers to Trust 1, Trust 2, and Trust 3 and that such allocations be effective as of Date 2, the date of the transfers to each trust.

PLR-113328-03

RULING 1

Section 2501 of the Internal Revenue Code 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 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 2513(a)(1) provides that a gift made by one spouse to any person other than his spouse shall, for the 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 25.2513-1(b)(4) provides that if one spouse transfers property in part to his or her spouse and in part to third parties, "split gift" treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable and severable from the interest transferred to the spouse.

Section 25.2513-2(a)(1) provides that if both spouses file gift tax returns within the time for signifying consent, it is sufficient if (i) the consent of the husband is signified on the wife's return, and the consent of the wife is signified on the husband's return; (ii) the consent of each spouse is signified on his own return; or (iii) the consent of both spouses is signified on one of the returns.

Section 2652(a)(2) provides 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 such individual's spouse, then such gift shall also be treated as if made one-half by each spouse for purposes of the GST tax.

Section 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations provides that in the case of a transfer with respect of which the donor's spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513. The donor is treated as the transferor of one-half of the value of the entire property.

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

PLR-113328-03

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.

In Wang v. Commissioner, T.C. Memo. 1972-143, the court stated that in determining whether a remainder interest is ascertainable as of the time of the gift and thus eligible for split gift treatment under § 2513, the same principles are applied as are employed in determining whether a charitable remainder interest subject to an invasion power is ascertainable and thus deductible for estate tax purposes (under rules in effect prior to the enactment of § 2055(e)(1) and (e)(2)).

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 also Wang v. Commissioner, *supra*. 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.

In the present case, Trust 1, Trust 2, and Trust 3 each provide that income and principal may be paid for Wife's "health, maintenance, education and support." We conclude that this standard for invasion is ascertainable, and the spouse's right to receive income or principal is susceptible of determination. See § 2041(b) and

§ 20.2041-(1)(c)(2) of the Estate Tax Regulations, which provide that this standard constitutes an ascertainable standard for purposes of § 2041. Therefore, the gift to Wife is severable from the gifts to the other beneficiaries. Accordingly, we conclude that the Date 2 transfers to Trust 1, Trust 2, and Trust 3 were eligible for gift-splitting for gift tax purposes, to the extent not attributable to Wife's ascertainable and severable interest. Further, under § 26.2652-1(a)(4), Wife is treated for GST purposes as the transferor of one-half of the entire value of the property transferred by Husband, regardless of the interest Wife is actually deemed to have transferred under § 2513. Therefore, Husband and Wife are each the transferor for GST purposes of one-half of each Trust 1, Trust 2, and Trust 3.

Based upon your representations, Accounting Firm inadvertently reported on Husband's and Wife's Year 1 gift tax returns that the transfers to Trust 1, Trust 2, and Trust 3 were made one-half from Husband and one-half from Wife. In order to correct this error, Husband and Wife must file amended gift tax returns for Year 1, reflecting that Husband made the transfers to Trust 1, Trust 2, and Trust 3 and that Wife elected to treat one-half of the transfers, not attributable to Wife's ascertainable and severable

PLR-113328-03

interest, as made by her. Husband and Wife must also amend all gift tax returns filed for years subsequent to Year 1 to reflect the Year 1 transfers.

RULING 2

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

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 § 2631(c)) that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2632(a)(1) 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 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, 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 § 2642(g)(1), which was enacted into law on June 7, 2001.

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.

PLR-113328-03

Notice 2001-50, 2001-34 I.R.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 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.

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). 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.

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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Husband and Wife are granted an extension of time of 60 days from the date of this letter to make allocations of their available GST tax exemption with respect to Husband's transfers to Trust 1, Trust 2, and Trust 3 on Date 2. The allocations will be effective as of Date 2, the date of the transfers to Trust 1, Trust 2, and Trust 3, and the gift tax value of the transfers will be used in determining the amount of GST exemption to be allocated to each trust.

These allocations should be made on supplemental Forms 709 United States Gift (and Generation-Skipping Transfer) Tax Return and filed with the Internal Revenue

PLR-113328-03

Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 709. A copy is 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.

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. In addition, we express or imply no opinion regarding the value of the property transferred to the Trust.

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

This ruling is directed only to the taxpayers 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