

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4\PLR-117111-03
Date:

AUGUST 27, 2003

Re:

Legend:

Trust	=	
Settlor		=
Wife	=	
State	=	
Partnership	=	
Company 1	=	
Company 2	=	
CPA 1		=
Attorney 1	=	
CPA 2		=
Attorney 2	=	
B	=	
C	=	
D	=	
E	=	
F	=	
Grandchild	=	
Date 1		=
Year 1		=
<u>\$</u> w	=	

\$x =

Dear ,

This is in response to your authorized representative's February 28, 2003, submission in which an extension of time was requested under § 301.9100-3 of the Procedure and Administration Regulations and § 2642(g) of the Internal Revenue Code to allocate Settlor's and Wife's GST exemption to Trust.

According to the facts submitted, on Date 1, Settlor established Trust, an irrevocable trust, for the benefit Wife, Settlor's children (B, C, D, E, and F), and Settlor's grandson (Grandson).

Article 1, Section 1.1(A) of Trust provides that while Settlor and Wife are both living, the trustees may pay part or all of the income and principal of Trust to, or for the benefit of, any one or more members of a class consisting of Wife, Settlor's descendants, and the spouses of Settlor's descendants, for health, support, maintenance or education. Payments may be made in such amounts and proportions as to be determined from time to time in the discretion of the trustees, without regard to equality of distribution. Any income not paid is to be accumulated and added at least annually to principal; provided that first priority is to be given to the needs of Wife. The trustees may also allocate any part of the income or principal of Trust to a separate share trust for Wife or any descendant of Settlor. Any portion that is allocated to a separate share is to be held by the trustees pursuant to Article 1, Section 1.2 of Trust.

Under Article 1, Section 1.1(B), during Settlor's lifetime, no principal or income of Trust is to be used to satisfy any support or other legal obligation of Settlor or of the trustees.

Section 1.2 provides the term for administration of property allocated by the trustees to a separate share trust for the benefit of Wife or any descendant of Settlor. In general, the trustees may pay any part or all of the income and principal of the trust to, or for the benefit of, any one or more members of the class consisting of the beneficiary for whom the separate share trust is created and the beneficiary's descendants, for health, support, maintenance or education. During Settlor's lifetime, no principal or income of the trust is to be used to satisfy any support or other legal obligation of the Settlor or of the trustees. Upon the death of the beneficiary, all of the remaining principal of the trust is to be distributed to, or for the benefit of, such one or more of the beneficiary's descendants, in such manner and proportions, in trust or otherwise as the beneficiary shall appoint.

Article 2, Article 2.1 provides for the creation of a marital trust upon the death of Settlor, if Wife survives Settlor, and if any policy insuring the life of Settlor in which Settlor had incidents of ownership was transferred to Trust within three years of Settlor's death. The proceeds of the policy are to be held in the marital trust. Wife is entitled to all the income from the marital trust and discretionary distributions of principal for Wife's health, support or maintenance.

Under Section 2.2, if Wife survives Settlor, the trustees are to hold the balance of the Trust estate (or all thereof if no marital trust is created under Article 2, Section 2.1 above), except any portion of the Trust estate that has been allocated to a separate share trust created under Article 2.1, as a family trust. The trustees are to pay any part or all of the income and principal of the family trust to any one or more members of a class consisting of Wife, Settlor's descendants, for health, support, maintenance and education. Payments may be made in such amounts and proportions as determined in the discretion of the trustees, without regard to equality of distribution; provided that first priority is given to the needs of Wife. Any income not paid is to be accumulated and added at least annually to principal.

Article 3, Section 3.1 provides that upon the death of Wife, all of the remaining principal of the family trust (and if Settlor survives, the Trust property except any portion that has been allocated to a separate share trust) is to be distributed to, or for the benefit of, such one or more persons or legal entities (other than Wife, Wife's estate, Wife's creditors, or the creditors of Wife's estate), in such manners as Wife shall appoint, but no later than the date that is 30 days after the death of Wife.

Any assets not appointed by Wife, if Settlor is not then surviving, are to be set apart into equal shares so that there is one share for each then surviving child of Settlor and one share for each then deceased child of Settlor. Each share for a deceased child is to be distributed to, or for the benefit of, such one or more of the child's descendants in such manner and proportions, as the child shall appoint. In addition, the child may appoint any part or all of his or her share to a spousal trust. Any portion of such share that is not appointed or not fully or effectively appointed is to be distributed, subject to Section 3.3, to the child's then surviving descendants, per stirpes, or if there is none, to Settlor's then surviving descendants, per stirpes.

Under Article 3, Section 3.2, if Wife predeceases Settlor, the trustee is to hold the balance of the Trust estate not appointed by Wife and to pay any part or all of the income and principal of the trust to, or for the benefit of, any one or

more members of a class consisting of Settlor's descendants and the spouses of Settlor's descendants for health, support, maintenance and education. Upon Settlor's death, the remaining principal of the trust is to be set apart into equal shares so that there is one share for each surviving child of Settlor and one share for each then deceased child of Settlor. Each share for a deceased child is to be distributed to, or for the benefit of, such one or more of the child's descendants, in such manner and proportions, in trust or otherwise, as the child shall appoint.

Article 6, Section 6.2 provides that except as otherwise specifically provided in the Trust Agreement, in connection with the exercise of a discretionary power to distribute income and principal to any person, there shall be no requirement to take into account such person's other income or capital resources.

On Date 1, Settlor transferred a 33% limited partnership interest in Partnership, a family limited partnership, to Trust. Settlor continued to own a 66% limited partnership interest in Partnership and Settlor and Wife each owned a .5% general partnership interest comprising 100% of the general partnership interests in Partnership. Settlor and Wife agreed to report the transfer as made one-half by each for gift tax purposes pursuant to section 2513 of the Code, and each filed a timely gift tax return, Form 709, reporting a taxable gift (after the allowance of annual exclusions) of \$w. The gift tax returns for Settlor and Wife were prepared by CPA 1 and reviewed by Attorney 1. However, on the returns, Settlor and Wife failed to allocate GST exemption to the transfers. It is represented that no further gifts to Trust were made after Date 1.

In Year 1, Settlor obtained the services of CPA 2 and Attorney 2. CPA 2 and Attorney 2 advised Settlor and Wife that a portion of each of Settlor and Wife's generation-skipping transfer (GST) tax exemption should have been allocated to the Date 1 gift to Trust that was reported as made one-half by Wife and one-half by Settlor under section 2513. Attorney 2, on behalf of Settlor and Wife, requests an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to allocate a total of \$w of Settlor's and Wife's remaining GST exemption under § 2642(b)(1) to Trust. Attorney 2 requests that such allocation is to be made based on the federal gift tax value of the property transferred to Trust as of Date 1.

Section 2501(a) imposes a tax on the transfer of property by gift during each calendar year by any individual.

Section 2513(a)(1) provides that a gift made by one spouse to any person other than the donor's spouse is considered for purposes of the gift tax as made one-half by the donor and one-half by the donor's 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 in order to qualify for this "split gift" treatment, both spouses must signify their consent to the application of § 2513(a)(1) in the case of all gifts made during the calendar year by either while married to each 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 2601 imposes a tax on every generation-skipping transfer (GST) made by a transferor to a "skip person."

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 section 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 section 2642(a)(2), is a fraction, the numerator of which is the amount of GST exemption under section 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the 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 the individual (or his executor) to any property with respect to which the individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

Section 26.2632-1(b)(2)(i) 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 section 2652(a)(1) and § 26.2652-1(a)(1), generally, the transferor for purposes of the GST tax is the individual with respect to whom the property was last subject to Federal estate or gift tax. Section 2652(a)(2) and § 26.2652-1(a)(4) provide that, if, under section 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 section 2513.

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)).

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.

Under § 301.9100-1(c), 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. Notice 2001-50, 2001-2 C.B. 189, 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.

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 the grant of 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. Accordingly, Settlor, and Wife, are granted an extension of time until 60 days after the date of this letter to allocate \$x of each of Settlor's and Wife's remaining available GST exemption to the transfer to Trust.

The allocations of GST exemption for Settlor and Wife should be made on Forms 709. The supplemental Forms 709 are to be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to each supplemental Form 709. Two copies are enclosed for this purpose.

The ruling contained in this letter is 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. We are expressing no opinion as to whether the transfer is subject to an estate tax inclusion period under section 2642(f). We are specifically not ruling regarding the value of Settlor's gift for gift tax purposes, as of Date 1. We are also not ruling on whether the transfer was

properly reported under § 2513 in view of Wife's beneficial interest in Trust. See §25.2513-1(b)(4).

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
Copies of this letter