Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B04 – PLR-150487-02
Date:
January 12, 2004

Re

LEGEND:

Donor	-
Spouse	-
Child 1	-
Grandchild 1A	-
Grandchild 1B	-
Trust 1A	-
Trust 1B	-
Child 2	-
Grandchild 2A	-
Trust 2A	-
Trust 2B	-
Child 3	-
Grandchild 3A	-
Grandchild 3B	-
Grandchild 3C	-
Trust 3A	-
Trust 3B	-

Trust 3C	-
Accountant	-
Attorney	-
Paralegal	-

LEGEND (cont.):

Date 1	-
Date 1A	-
Date 2	-
Date 3	-
Date 4	-
Date 5	-
Date 6	-
Year 1	-
Year 2	-
Year 3	-
Property #1	-
Corporation #1	-
Corporation #2	-

Dear :

This is in response to the your letter dated August 28, 2002, submitted by your authorized representative, requesting an extension of time under § 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: As of Date 1, Spouse and Donor had 3 children, Child 1, Child 2, and Child 3, and 6 grandchildren, Grandchild 1A and Grandchild 1B of Child 1, Grandchild 2A of Child 2, and Grandchild 3A, Grandchild 3B, and Grandchild 3C of Child 3.

Spouse and Donor hired Accountant and Attorney for estate planning advice. On Date 1, after September 25, 1985, pursuant to the advice of these representatives, Spouse and Donor established 7 irrevocable trusts. Trust 1A was established for the benefit of Child 1 and Grandchild 1A, Trust 1B for the benefit of Child 1 and Grandchild 1B, Trust 3A for the benefit of Child 3 and Grandchild 3A, Trust 3B for the benefit of Child 3 and Grandchild 3B, and Trust 3C for the benefit of Child 3 and Grandchild 3C. As of Date 1, Child 2 had one child, Grandchild 2A. Accordingly, Trust 2A was established for the benefit of Child 2 and Grandchild 2A, and Trust 2B for the benefit of Child 2 and an, as yet, unborn child of Child 2. Child 1 is the trustee of both Trust 1A and Trust 1B. Child 2 is the trustee of Trust 3A, Trust 3B, and Trust 3C. Child 3 is the trustee of Trust 2A and Trust 2B. The terms of each trust are identical except for the beneficiaries and the trustees. All of the trusts are governed by the law of Indiana. The trusts were primarily drafted by Paralegal, who was hired by and under the supervision of Attorney.

Article II of each trust provides that the trust will terminate no later than 21 years after the death of the last survivor of the Donor, the Spouse, and the Donor's descendants, if any, living on the date the trust is established, at which time the trust corpus will be distributed to the then current income beneficiaries.

Article III of each trust enumerates the powers of the trustee and provides that, "with reference to the trust estate created herein and every part thereof (subject to the powers given to the Advisory Committee, if any), the trustee shall have the following rights and powers without limitation and in addition to powers conferred by law: . . . ".

Article VII(A) of each trust provides that:

> 1. During the lifetime of [Child 1, Child 2, or Child 3, as the case may be], the Trustee shall pay to or use for the benefit of the said trust beneficiary [Child 1, Child 2, or Child 3, as the case may be] the entire net trust income in quarterly or more frequent installments.
>
> 2. The Trustee is authorized and empowered in the Trustee's sole and absolute discretion at any time and from time to time, during the lifetime of said beneficiary [Child 1, Child 2, or Child 3, as the case may be], to disburse from the principal of the trust estate created under this Article (even to the point of completely exhausting same), such amounts as the Trustee may deem advisable. In determining the amount of principal to be so disbursed, the Trustee shall take into consideration any other income or property which such beneficiary may have from any other source; and the Trustee's discretion shall be conclusive as to the advisability of any such disbursement and the same shall not be questioned by anyone. For all sums so disbursed, the Trustee shall have full acquittance.
>
> 3. Upon the death of the trust beneficiary [Child 1, Child 2, or Child 3, as the case may be], if [the specified grandchild; Grandchild 1A, et. al.] is then living, the trust shall be held, administered and distributed as provided in Article VIII of this instrument. If [the specified grandchild] is not then living, the trust shall terminate, and the entire remainder shall be distributed to the estate of [Child 1, Child 2, or Child 3, as the case may be].

Article VIII of each trust provides:

A. 1. During the lifetime of [the specified grandchild], the Trustee shall pay to or use for the benefit of the said trust beneficiary the entire net trust income in quarterly or more frequent installments.

2. The Trustee is authorized and empowered in the Trustee's sole and absolute discretion at any time and from time to time, during the lifetime of the said beneficiary, to disburse from the principal of the trust estate created under this Article (even to the point of completely exhausting same), such amounts as the Trustee may deem advisable. In determining the amount of principal to be so disbursed, the Trustee shall take into consideration any other income or property which such beneficiary may have from any other source; and the Trustee's discretion shall be conclusive as to the advisability of any such disbursement and the same shall not be questioned by anyone. For all sums so disbursed, the trustee shall have full acquittance.

* * *

Article XIII of each trust establishes an Advisory Committee as follows:

A. There is hereby created an Advisory Committee composed of [Donor, Spouse, and an unrelated third party]. The Trustee shall consult with the Advisory Committee on all important matters in connection with the management of the trust herein created, including, but not restricted to, such matters as general investment policy, discretionary payments of principal, and decisions involving real estate and closely held business interests, and in addition shall have such specific powers as are herein prescribed.

B. The Trustee shall not take any action involving general investment policy, discretionary payments on income and principal, real estate and closely held business interests without the unanimous consent or approval of the Advisory Committee.

* * *

E. If the Advisory Committee fails to give directions to the Trustee within thirty (30) days of a request by the Trustee, the Trustee shall act in its own discretion as if no Advisory Committee had been appointed.

F. The Advisory Committee shall be self-perpetuating. Vacancies shall be filled by agreement among the remaining members of the Committee.

G. The Advisory Committee acting unanimously may remove and replace an acting Trustee and/or select a Successor Trustee, at any time and from time to time, at the discretion of the Advisory Committee.

Article XIV of each trust provides that, upon the death, incapacity, or resignation of [Child 1, Child 2, or Child 3, as the case may be], a Successor Trustee shall be selected by the Advisory Committee.

It is represented that, on Date 1A in Year 1, Donor agreed to transfer a portion of her interest in Property #1, a parcel of real property, to Trust 1A and Trust 1B. Although the Donor's representatives contend that the transfers occurred on Date 1A in Year 1, deeds transferring the property were not executed and accompanying documentation was not filed or otherwise completed until Year 2. The documentation lists the transfer date as Date 1A. Also, on Date 1A, Donor transferred shares of stock in Corporation #1 to Trust 1A and Trust 1B. Donor contends that the shares of stock in Corporation #1 had no value at the time of the transfer. Pursuant to the advice of her representatives, Donor filed an application for Automatic Extension of Time to file U.S. Individual Income Tax Return for Year 1, on which Donor indicated that she expected to file a U.S. Gift (and Generation-Skipping Transfer) Tax Return` (Form 709) for Year 1. Donor subsequently filed a gift tax return for Year 1`with the following statement: "No Gifts in [Year 1] - This Return Filed Because Taxpayer Requested An Extension Of Time For Filing For [Year 1]." No gifts were reported on the gift tax return and no GST tax exemption was allocated on Schedule R of the return.

On Date 2 in Year 2, both Spouse and Donor each transferred shares of stock in Corporation #2 to Trust 2A, Trust 2B, Trust 3A. Trust 3B, and Trust 3C. At the same time, Donor transferred an additional portion of her interest in Property #1 to Trust 1A. Donor filed a gift tax return for Year 2, reporting the gifts. However, no GST tax exemption was allocated on the return with respect to the transfers.

On Date 3 in Year 3, Donor transferred an additional interest in Property #1 to Trust 1A and Trust 1B. During Year 2, Spouse intended to transfer stock in Corporation #2 to Trust 1A and Trust 1B. However, the documents evidencing the transfer were not executed and filed until Year 3. No gift tax return was filed by either Donor or Spouse for any Year 3 transfer and no GST tax exemption allocation was made for the Year 3 transfers.

It is represented that Spouse and Donor relied upon Accountant and Attorney to create the estate plan, draft the terms of the trusts, make all required elections, allocate GST exemption to the various trusts, and file the necessary returns. Attorney represented that he relied on Accountant to make the necessary elections and file the necessary gift tax returns. Accountant represented that he failed to file the necessary gift tax returns for Year 1 and Year 3 and allocate Donor's GST exemption for the transfers in Year 1, Year 2, and Year 3 due to an oversight. These mistakes were discovered during a review by a third party of Child 1's marital assets and estate plan.

On Date 4, Spouse and Donor resigned from the Advisory Committee, described in Article XIII of each of the trusts. Spouse died on Date 5.

On Date 6, Donor and all other interested parties, including Child 1, Child 2, and Child 3 in their capacities as trustees and beneficiaries, and the grandchildren as beneficiaries, obtained a court order that retroactively reformed Article VII(A)(2) and Article VIII(A)(2) of each of the seven trusts to include certain language that the parties contended had been omitted from the trust documents. Pursuant to the court order, Article VII(A)(2) and Article VIII(A)(2) were each reformed to read as follows:

> 2. The Trustee is authorized and empowered in the Trustee's sole and absolute discretion at any time and from time to time, during the lifetime of said beneficiary, to disburse from the principal of the trust estate created under this Article (even to the point of completely exhausting same), such amounts as the Trustee may deem advisable *to provide adequately and properly for the support and maintenance of the said beneficiary thereof, including but not by way of limitation, expenses incurred by reason of illness, disability and education.* In determining the amount of principal to be so disbursed, the Trustee shall take into consideration any other income or property which such beneficiary may have from any other source; and the Trustee's discretion shall be conclusive as to the advisability of any such disbursement and the same shall not be questioned by anyone. For all sums so disbursed, the Trustee shall have full acquittance. [Emphasis added].

The parties contended that the italicized language was contained in early drafts of the trusts, but had been inadvertently deleted from the final versions that were executed by Spouse and Donor. In conjunction with a civil law suit, the parties involved had been deposed on issues concerning the creation of the trusts, including the deletion of the language at issue, (hereinafter referred to as ascertainable standard language). These depositions formed part of the record in the reformation action.

The submitted information further indicates that, after the trusts were established and funded, Child 1, as trustee of Trust 1A and Trust 1B, invested the principal of both trusts in a business owned and operated solely by him. As trustee, he purchased real estate with Trust 1A and Trust 1B assets and leased the real estate to his business. Child 1 invested cash held in Trust 1A and Trust 1B in his business, for which the trusts received stock "proportionate to the cash investment." Child 1 also used assets of Trust 1A and Trust 1B as collateral for bank loans for the benefit of his separate business. In fact, upon Child 1's divorce, the value of both Trust 1A and Trust 1B were included in the marital estate in recognition of Child 1's ability as trustee to distribute assets of both trusts to himself.

Child 2, as trustee of Trust 3A, Trust 3B, and Trust 3C, loaned the principal of each of the three trusts to Child 3 to be used to construct a residence for Child 3. It is represented that Child 3 repaid the principal to each of the trusts. In addition, Child 3, who is the trustee of Trust 2A and Trust 2B, distributed principal from Trust 2B to Child 2 that Child 2 used to purchase a residence. Trust 2B holds the mortgage on the residence. Child 3 also makes periodic distributions from principal, not to exceed 5 percent of corpus, from both Trust 2A and Trust 2B to provide Child 2 with additional funds. You contend that these additional distributions for the benefit of Child 2, the income beneficiary, was necessary due to the recent decline in the market value of the assets of both trusts and the corresponding decline in the income produced by both trusts.

Donor has requested the following rulings.

1. Donor requests that we rule that the gifts made to the trusts were not subject to an estate tax inclusion period (ETIP) under § 2642(f) of the Internal Revenue Code.

2. Donor requests that we grant an extension of time under § 2642(g) and §§ 301.9100-1 and 301.9100-3 to allocate the Donor’s GST exemption:

   a. to the Year 1 transfers to Trust 1A and Trust 1B;

   b. to the Year 2 transfers to Trust 1A, Trust 2A, Trust 2B, Trust 3A, Trust 3B, and Trust 3C; and

   c. to the Year 3 transfers to Trust 1A and Trust 1B.

3. Assuming Rulings 1 and 2 are granted, then Donor requests a ruling that the allocations will be effective as of the date of the transfers to the trusts, and the inclusion ratio for each trust will be determined based on the value of the property transferred to the trusts as of the date the respective transfers were made to each trust.

Law and Analysis:

Section 2601 of the Internal Revenue Code imposes a tax on every generation-skipping transfer (GST) made by a transferor to a skip person as defined in § 2613.

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 the 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 the GST exemption under § 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 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 generally 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, the value of such property for purposes of determining the inclusion ratio under § 2642(a) shall be its value as finally determined for gift tax purposes. In the case of an allocation deemed to have been made at the close of an estate tax inclusion period described in § 2642(f), the value of such property for purposes of determining the inclusion ratio under § 2642(a) shall be its value at the time of the close of such estate tax inclusion period.

Section 2642(f)(1) states that, for purposes of determining the inclusion ratio, if an individual makes an inter vivos transfer of property, and the value of such property would be includible in the gross estate of such individual under chapter 11 if such individual died immediately after making such transfer (other than by reason of § 2035), any allocation of GST exemption to such property shall not be made before the close of the estate tax inclusion period (ETIP). Section 2642(f)(2) provides that the value of such property shall be its value for purposes of chapter 11, if such property is includible in the gross estate of the transferor (other than by reason of § 2035), or, if not, its value as of the close of the estate tax inclusion period (or, if any allocation of GST exemption to such property is not made on a timely filed gift tax return for the calendar year in which such period ends, its value as of the time such allocation is filed with the Secretary).

Section 2642(f)(3) provides that the term “estate tax inclusion period” means any period after the transfer described in § 2642(f)(1) during which the value of the property involved in such transfer would be includible in the gross estate of the transferor under chapter 11 if the transferor died. In no event will such period extend beyond the earlier of (A) the date on which there is a generation-skipping transfer with respect to such property, or (B) the date of death of the transferor. Under § 26.2632-1(c)(1) of the Generation-skipping Transfer Tax Regulations, if any part of a trust is subject to an ETIP, then the entire trust is subject to the ETIP.

Under § 2652(a)(1) and § 26.2652-1(a)(1), the individual with respect to whom the property was most recently subject to federal gift or estate tax is the transferor of that property for GST purposes.

Section 2038(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, where the enjoyment of the property was subject at the date of death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent’s death.

Section 20.2038-1 provides that § 2038 applies to any power affecting the time or manner of enjoyment of property or its income, even though the identity of the beneficiary is not affected, and that it is immaterial whether the power is exercisable alone or in conjunction with another person or persons , whether or not having an adverse interest. For example, § 2038 is applicable to a power reserved by the grantor of a trust to accumulate income and distribute it to A, and to distribute corpus to A, even though the remainder is vested in A or his estate and no other person has any beneficial interest in the trust.

Rev. Rul. 73-143, 1973-1 C.B. 407, addresses a situation where the decedent was the grantor and trustee of two irrevocable trusts, one established for the benefit of his son and the other for the benefit of his daughter. With respect to the daughter’s trust, the trustee had the power to distribute principal to the daughter as he deemed advisable for her support and maintenance. With respect to the son’s trust, the trustee had the power to distribute principal to the son as he deemed advisable. The ruling concludes that the value of the property held in trust for the benefit of the daughter was not includible in the decedent’s gross estate under § 2038, because the retained power to invade was limited by an ascertainable standard. The value of the property held in trust for the benefit of the son was includible, because the power was not so limited.

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Court considered whether a state trial court's characterization of property rights conclusively binds a federal court or agency in a federal estate tax controversy. The Court concluded that the decision of a state trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter. If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving "proper regard" to the state trial court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

Section 30-4-3-25 of Ind. Code Ann. (Michie 2002) provides:

> Recission and reformation. - Upon petition by an interested party, the court may rescind or reform a trust according to the same general rules applying to rescission or reformation of nontrust transfers of property.

In Estate of Reasor v. Putnam County, Indiana, 635 N.E. 2d 153 (Ind. 1994), the Indiana Supreme Court noted that written instruments are presumed to reflect the intentions of the parties to those instruments. Accordingly, ". . . to succeed in a reformation action a party must show either mutual mistake or fraud by clear and convincing evidence . . . [and] a party seeking reformation must also show the original intent or agreement of the parties by clear and convincing evidence." Estate of Reasor v. Putnam County, Indiana, 635 N.E. 2d at 160. See also, Heavenridge v. Mondy, 49 Ind. 434 (Ind. 1875) ("It is settled law, that to entitle a party to the reformation of a written instrument, it must be clearly and satisfactorily shown that there was a mistake of fact, and not of law. It must be shown that words were inserted that were intended to be left out, or that words were omitted which were intended to be inserted."); Seufert v. Mulzer, 2000 U.S. Dist. Lexis 13665 (S.D. Ind. 2000) (Indiana law is in accord with the pricnciple enunciated in Bogert & Bogert, The Law of Trusts and Trustees, 991 (2d ed. rev. 1983) to the effect that reformation will not be granted where the mistake was as to the legal effect of the wording of the instrument.)

In the instant case, we do not believe the record provides clear and convincing evidence that a mistake of fact was made, as required under Indiana law. On the contrary, in the depositions noted above, Attorney testified that he had no recollection of why the ascertainable standard language was removed. On the other hand, there is specific testimony from Accountant that Spouse intended to delete the ascertainable standard language and that Spouse and Donor intended to make the invasion power very broad, and that Attorney had to be aware of the changes. Further, as discussed above, the actions of the trustees in managing the assets of the trusts have been consistent with the absence of any limitation that would have been imposed by the ascertainable standard language. Thus, our review of the record does not indicate that there was "clear and convincing evidence" of a mutual mistake or clear and convincing evidence that the terms of the executed instrument were contrary to the original intent of the grantors, the standard for reformation under Indiana law. Estate of Reasor v. Putnam County, Indiana, cited above. Thus, we conclude the reformation should not be given retroactive effect for transfer tax purposes.

Ruling #1

Donor and Spouse were members of the Advisory Committee from the creation of the trusts on Date 1, until their resignations on Date 4. Article XIII requires that the trustee consult with the Advisory Committee on all important matters, including discretionary payments of principal. Under the Article, the trustee is prohibited from taking any action involving discretionary payments of income and of principal without the unanimous consent or approval of the Advisory Committee. Only if the Advisory Committee fails to act within the time prescribed, may the trustee act in its own discretion "as if no Advisory Committee had been appointed." In addition, the Advisory Committee, acting unanimously and at its own discretion, may remove and replace an acting trustee and/or select a successor trustee, at any time and upon the death, incapacity, or resignation of a current trustee.

As discussed above, we have concluded that the trustee's power to distribute corpus was not limited by an ascertainable standard. Accordingly, if this power was held directly by Donor and Spouse, as trustees, the corpus of each trust would be subject to inclusion in their respective gross estates under § 2038, to the extent of their contributions to the trusts. Rev. Rul. 73-143, cited above. In this case, although neither Donor nor Spouse were trustees, as members of the Advisory Committee, their consent was required before the trustee could make any distribution. The fact that this consent or veto power could be exercised only after the trustees initiated action does not alter the nature of the power as a power exercisable by Donor or Spouse in conjunction with others, within the purview of § 2038. Rev. Rul. 70-513, 1970-2 C.B. 194, citing Estate of Grossman v. Commissioner, 27 T.C. 707 (1957). [1]

Because Donor and Spouse initially retained a power over the trusts that would cause trust property to be included in their gross estates under § 2038, the transfers by Donor and Spouse to the trusts were subject to an "estate tax inclusion period" under § 2642(f)(3), for purposes of the generation-skipping transfer tax. The estate tax

1 The amount includible under § 2038 is limited to the value of property interest subject to the retained power. Rev. Rul. 70-513, supra.

inclusion period did not terminate until Date 4, the date that Donor and Spouse resigned from the Advisory Committee with respect to each of the trusts.

Accordingly, for purposes of the generation-skipping transfer tax, an estate tax inclusion period did exist with respect to the transfers made by Donor and Spouse to the trusts.

Rulings #2 and #3

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.

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 trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may request 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, Donor is granted an extension of time of 60 days from the date of this letter to make allocations of Donor's available GST exemption, with respect to the transfers to Trusts 1A, !B, 2A, 2B, 3A, 3B, and 3C described above. These allocations should be made on supplemental Forms 709 United States Gift (and Generation-Skipping Transfer) Tax Return (or, in the case of the Year 3 transfers for which no return has previously been filed, on an original Form 709) and filed with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the original and supplemental Forms 709. A copy is enclosed for this purpose.

You have also requested a ruling that, assuming an extension to allocate Donor's GST exemption to the trusts is granted, then the allocations will be effective as of the date of the transfers to the trusts, and the inclusion ratio for each trust will be determined based on the value of the property transferred to the trusts as of the date the respective transfers were made to each trust. However, as discussed above, we have concluded that the transfers to Trusts 1A, !B, 2A, 2B, 3A, 3B, and 3C made in Year 1, Year 2 and Year 3, were subject to an estate tax inclusion period (ETIP) as described in § 2642(f). We have also concluded that the ETIP terminated on Date 4, the date that Donor and Spouse resigned from the Advisory Committee. Accordingly, we conclude that in accordance with § 2642(f)(1) and (f)(2), the allocations subject to the extensions granted above will be effective as of Date 4, the date the estate tax inclusion period closed and therefore, the inclusion ratio for each trust will be determined based on the value of the corpus of each trust as of Date 4. See also, § 26.2632-1(c)(1).

Finally, you contend that, in the event that the IRS concludes that the trusts are not retroactively reformed for federal tax purposes and that each trust was subject to an ETIP, that Donor should be granted an extension to make an allocation, effective on the dates of the transfers in Year 1, Year 2, and Year 3, with respect to the part of each transfer that was a completed gift. However, under § 2631(a), in the case of a transfer to a trust, the GST exemption can only be allocated to the property transferred to the trust. The exemption cannot be specifically allocated to the various beneficial interests (e.g., income interests and remainder interests) created in the transferred property under the terms of the trust. See also, §§ 2642(a)(2) and (b), under which the inclusion ratio is determined with respect to the entire trust estate. These rules also apply under § 2642(f). Any allocation of GST exemption must be made with respect to the entire trust corpus and not with respect to income or remainder interests created under the terms of the trust. In the case of a transfer to a trust where all, or a portion, of the entire trust corpus is subject to inclusion in the gross estate, and thus subject to an ETIP, the ETIP rule delays the effective date of any allocation until the date the ETIP closes, at which time the inclusion ratio for the entire trust is determined. See § 26.2632-1(c)(1).

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 any of the trusts.

We are specifically not ruling on whether the transfers to Trust 1A and Trust 1B, for the benefit of Child 1 and Grandchild 1A and Grandchild 1B, with respect to which Child 1 is the trustee, are transfers of property over which Child 1 held a general power of appointment as defined in § 2041 or if so, whether the subsequent consent by Child 1 to reform those trusts, may be considered a release of a general power of appointment.

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