Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-149197-04
Date: DECEMBER 26, 2005

Re:

Legend

Husband =

Wife =

Trust 1 =

Trust 2 =

Date 1 =
Date 2 =
Date 3 =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Year 5 =
Year 6 =
Year 7 =
x =
Amount 1 =
Amount 2 =
Amount 3 =
Accountant =
Accounting Firm =

Dear :

This is in response to a letter from your authorized representative dated September 13, 2004, requesting rulings that certain transfers to trusts are eligible for gift splitting under § 2513 of the Internal Revenue Code and an extension of time under § 301.9100 of the Procedure and Administration Regulations to make allocations of generation-skipping transfer (GST) exemption.

The facts and representations submitted are summarized as follows: Husband established an irrevocable trust, Trust 1, on Date 1 for the primary benefit of Husband and Wife's children and their descendants. Article III, Paragraph C of Trust 1 grants Husband's issue a noncumulative right to withdraw all or part of each contribution to Trust 1. Article V provides that if (1) Husband's death occurs within three years from the date of any funding of Trust 1 by Husband, and (2) all or a substantial portion of the assets that comprise Trust 1 are includable in the Husband's gross estate for federal estate tax purposes, and (3) if Husband has a surviving spouse, then such trust assets are to be held in a qualified terminable interest trust with an ascertainable standard for invasion on behalf of the surviving spouse.

On Date 2, Husband and Wife established an irrevocable trust, Trust 2. Trust 2 is an educational trust for the benefit of Husband and Wife's grandchildren. Neither Husband nor Wife has any interest in Trust 2.

In Year 1, Husband transferred x and cash in the amount of Amount 1 to Trust 1. Thereafter, for Years 2 through 7, Husband transferred cash in the amount of Amount 1 to Trust 1.

Trust 2 was established during Year 3 and for Years 3 through 6, Husband and Wife transferred cash in the amount of Amount 2 to Trust 2. In year 7, Husband and Wife transferred cash in the amount of Amount 3 to Trust 2.

As a result of Accountant's on-going health problems, Husband and Wife's Forms 709 (United States Gift (and Generation-Skipping Transfer) Tax Return were not filed, or if filed, the returns were not correct. Specifically, for Years 1 and 2, Accountant did not prepare and neither Husband nor Wife filed Forms 709. For Years 3, 4, and 5, Husband filed a Form 709, however the transfers were not accurately reported and GST exemption was not allocated effectively on those returns. Husband also elected to treat the gifts as made one-half by Husband as permitted under § 2513. Wife's consent to split gifts was signified on Husband's gift tax return, however Wife did not sign Husband's return. Wife did not file a Form 709 for Years 3, 4, or 5. For Years 6 and 7,

Husband and Wife each filed separate Forms 709, electing not to split the gifts. Once again, however, the GST exemption was not allocated effectively on those returns. Accountant died on Date 3. Accounting Firm discovered the errors in the returns after Accountant's death.

Taxpayers represent that there are no facts that have changed since the original dates of the gifts to Trust 1 and Trust 2 between Years 1 through 7. Husband and Wife are United States citizens. You have requested the following rulings:

1. That Husband and Wife may elect split gift treatment under § 2513 for gifts they made between Year 1 and Year 5, including gifts they made to Trust 1 and Trust 2.
2. An extension of time under § 2642 and §§ 301.9100-1 and 301.9100-3 to make allocations of the respective GST exemptions of Husband and Wife with respect to the transfers to Trust 1 between Year 1 and Year 7 and to Trust 2 between Year 3 and Year 7.
3. That the allocations will be effective as of the respective dates of the transfers to Trust 1 and Trust 2.
4. That the value of the transferred assets to Trust 1 and Trust 2 as of the respective dates of the original transfers to Trust 1 and Trust 2 will be used in determining the amount of Husband's and Wife's GST exemption to be allocated to such trusts.

Gift Splitting Issue

Section 2501(a)(1) 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(a) 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, generally, that a gift made by one spouse to any person other than his spouse shall, for the purposes of chapter 12, 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 2513(b)(2)(a) provides that consent to the application of § 2513(a)(1) may not be signified after the 15th day of April following the close of such year, unless

before such 15th day no return has been filed for such year by either spouse, in which case the consent may not be signified after a return for such year is filed by either spouse.

Section 25.2513-1(b)(4) of the Gift Tax Regulations provides that if one spouse transferred 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 at the time of the gift and severable from the interest transferred to the spouse.

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 among the spouse of the donor and other descendants of the donor at such times and in such proportions and amounts as the trustee determined 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 any invasion power is ascertainable and thus deductible for estate tax purposes (under rules in effect prior to the enactment of § 2055(e)(1) and (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 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.

As discussed above, in Years 1, 2, and 3 Wife has an interest in Trust 1 as a contingent beneficiary if she survives Husband, his death occurs within three years from the date of any funding by Husband, all or a substantial portion of trust assets are includable in his gross estate for federal estate tax purposes and she is his surviving spouse at his death. Wife's interest in Trust 1 is susceptible of determination and severable from the gifts to the other beneficiaries. Therefore, based on the facts and representations, we conclude that the Year 1, 2, and 3 transfers to Trust 1 are eligible for gift splitting for gift tax purposes under § 2513 to the extent the value of the transfers

exceed the actuarial value of Wife's interest in Trust 1 determined under § 7520. Neither Husband nor Wife has an interest in Trust 2 and, therefore, transfers to Trust 2 are eligible for gift-splitting.

In Years 1 and 2, Husband and Wife did not file gift tax returns. Since no returns were filed, if Husband and Wife file gift tax returns for Years 1 and 2 and signify consent to gift-split, then the consent will be effective for purposes of § 2513. Section 2513(b)(2)(A).

For Years 3, 4, and 5, Husband and Wife evidenced their intent to elect to split gifts with respect to transfers to Trust 1 and Trust 2 on Husband's gift tax return. Wife did not file a gift tax return for those years. Based on the facts and representations, we conclude that consent to gift-split was signified by both spouses and is effective for purposes of § 2513. See § 25.2513-2(a)(1).

Section 301.9100 Issue

Section 2601 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 2631(a), as in effect for the tax years at issue, provided that, for purposes of determining the GST tax, 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 2652(a) and § 26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations provide that, if, under § 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 § 2513.

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) 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.

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 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).

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

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 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) 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. 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. For GST purposes, Husband and Wife are each treated as the transferor of one-half of the value of the entire property transferred to Trust 1 and Trust 2. Therefore, Husband is granted an extension of time of 60 days from the date of this letter to make an allocation of Husband's available GST exemption, with respect to Husband's transfers to Trust 1 and Trust 2 in Years 1 through 7. In addition, Wife is granted an extension of time of 60 days from the date of this letter to make an allocation of Wife's available GST exemption, with respect to Wife's transfers to Trust 1 and Trust 2 in Years 1 through 7. The allocations will be effective as of the respective date of the transfers, and the value of the transferred assets to Trusts 1 and 2 as of the respective date of the original transfers to Trusts 1 and 2 will be used in determining the amount of Husband's and Wife's GST exemption to be allocated to Trusts 1 and 2.

Husband should make these allocations on Form 709 for Years 1 and 2, and on supplemental Forms 709 for the Years 3 through 7. Wife should make these allocations on Form 709 for Years 1 through 5 and on supplemental Forms 709 for Years 6 and 7. All forms should be 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 forms. This ruling does not extend the time to file any 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: