

either Decedent or Spouse, each of their children shall have the unrestricted right to demand and immediately receive from Trust a share equal to the value of the property contributed and the amount of premiums paid, divided by the number of the children living on January 1 of such year. The maximum amount which a child may demand in any calendar year is limited to \$10,000. Each year on December 31, the total amount a child may withdraw shall be reduced by the greater of \$5,000 or 5 percent of the principal of the Trust as of December 31.

Upon the death of the survivor of Decedent and Spouse (the date of division), the principal and accumulated income of Trust is to be divided into equal shares, one for each living child of Decedent and Spouse and one for each deceased child who is survived by issue. Each share shall be set aside in a separate trust. The Trustees shall distribute income to the child for whom the separate trust is set aside, in quarterly or other convenient installments. The Trustees may also distribute principal to or for the benefit of a class consisting of the child and the child's issue, for health, support, maintenance and complete education. After the expiration of one year from the date of division, a child has the right to withdraw one-third of the market value of the trust principal. After the expiration of four years from the date of division, a child has the right to withdraw one-half of the market value of the trust principal. After the expiration of seven years from the date of division, a child has the right to withdraw all the remaining principal of his or her trust. Upon withdrawal, the child's separate trust shall terminate.

Upon the death of a child, the Trustees shall distribute any remaining principal to or for the benefit of persons and organizations, exclusive of the child's creditors, the child's estate or the creditors of the child's estate, as the child shall appoint by specific reference in the child's will. However, if a federal GST tax would be imposed upon the child's death with respect to the trust property over which he or she has a power of appointment, and if said tax would be imposed at a rate equal to or higher than the marginal federal estate tax rate which would be imposed if the child's trust were included in the child's taxable estate, then the child may also exercise the power of appointment in favor of his or her creditors or his or her estate. Any unappointed trust principal shall be distributed to the child's issue, per stirpes, but if the child is not represented by issue, then to the issue of Decedent and Spouse.

The separate trust for a child who predeceased Decedent and Spouse shall be distributed to or for the benefit of persons and organizations, exclusive of the predeceased child's creditors, the child's estate or the creditors of the child's estate, as the predeceased child shall appoint by specific reference in the child's will. However, if a federal GST tax would be imposed upon the child's death with respect to the trust property over which he or she has a power of appointment, and if said tax would be imposed at a rate equal to or higher than the marginal federal estate tax rate which would be imposed if the child's trust were included in the child's taxable estate, then the child may also exercise the power of appointment in favor of his or her creditors or his

or her estate. Any unappointed Trust principal shall be distributed to the child's issue, per stirpes.

During Year 1, Year 2, and Year 3, various gifts and deemed gifts were made to Trust. Decedent and Spouse elected to treat the transfers as being made one-half by each spouse under section 2513. Decedent and Spouse timely filed United States Gift (and Generation-Skipping Transfer) Tax Returns, Forms 709, for gifts made in Year 1, Year 2, and Year 3. Decedent's and Spouse's Forms 709 were prepared by Law Firm. The Forms 709, however, did not properly reflect gifts made or deemed to be made during Year 1, Year 2, and Year 3. Accordingly, Amended Forms 709 for Year 1, Year 2, and Year 3 were filed in Year 5 to correct certain defects in the original Forms 709. Despite the filing of Amended Forms 709 for Year 1, Year 2, and Year 3, an election to opt out of the automatic allocation rules was not made on any of the Forms 709.

At the time Trust was created, an "indirect skip" and "generation-skipping trust" as well as the automatic allocation rules under section 2632(c), were not in effect. Decedent and Spouse were not aware of the need to make the election under section 2632(c)(5) for transfers to Trust made in 2001 and thereafter. During the course of administering Decedent's estate, it became apparent that a portion of Decedent's and Spouse's GST tax exemptions may have been inadvertently allocated to transfers to Trust, as a result of the gifts and deemed gifts made in Year 1, Year 2, and Year 3.

Decedent's estate and Spouse request a ruling that they each be granted an extension of time, under section 301.9100-3, to elect pursuant to section 2632(c)(5)(A)(i)(II) to have the automatic allocation rules under section 2632(c) not apply to Decedent's and Spouse's transfers to Trust in Year 1 and for all future years.

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under section 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.

Under section 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is 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 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), reduced by the sum of certain taxes and charitable deductions.

Section 2631(a), as in effect at the time of the transfers in this case, 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 section 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 2631(b) provides that any allocation under section 2631(a), once made, shall be irrevocable.

Section 2632(c)(1), effective for transfers subject to the gift or estate tax after December 31, 2000, provides that if any individual makes an indirect skip during such individual's lifetime, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. If the amount of the indirect skip exceeds such unused portion, the entire unused portion shall be allocated to the property transferred.

Section 2632(c)(3)(A) provides that the term "indirect skip" means any transfer of property (other than a direct skip) subject to the gift tax made to a GST trust. Section 2632(c)(3)(B) provides, in part, that the term "GST trust" means a trust that could have a generation-skipping transfer with respect to the transferor unless the trust falls within any of six enumerated exceptions.

Under section 2632(c)(5)(A), an individual may elect to have the automatic allocation of GST exemption not apply to an indirect skip. Section 2632(c)(5)(B) provides that the election shall be deemed to be timely if filed on a timely filed gift tax return for the calendar year in which the transfer was made or on such later date or dates as may be prescribed by the Secretary.

Section 26.2632-1(b)(2)(iii)(A) of the Generation-Skipping Transfer Tax Regulations provides that a transferor may prevent the automatic allocation of GST exemption (elect out) with respect to any transfer or transfers constituting an indirect skip made to a trust. In the case of a transfer treated under section 2513 as made one-half by the transferor and one-half by the transferor's spouse, each spouse shall be treated as a separate transferor who must satisfy separately the requirements of section 26.2632-1(b)(2)(iii)(B) to elect out with respect to the transfer.

Section 26.2632-1(b)(2)(iii)(B) provides the manner for making an election out. To elect out, the transferor must attach a statement (election out statement) to a Form 709. The election out statement must identify the trust, and specifically must provide that the transferor is electing out of the automatic allocation of GST exemption with respect to the described transfer or transfers. Further, unless the election out is made for all transfers made to the trust in the current year and/or in all future years, the current-year transfers and/or future transfers to which the election out is to apply must be specifically described or otherwise identified in the election out statement.

Section 26.2632-1(b)(2)(iii)(C) provides that the Form 709 with the attached election out statement must be filed on or before the due date for timely filing of the Form 709 for the calendar year in which the first transfer to be covered by the election out was made.

Section 2642(g)(1)(A) provides, in relevant part, that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an election out under section 2632(c)(5).

Section 2642(g)(1)(B) provides that in determining whether to grant relief, 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, the time for making the election shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-2 C.B. 189, provides, in relevant part, that under section 2642(g)(1)(B), the time for electing out of the automatic allocation rules is 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 election described in section 2632(c)(5) under the provisions of section 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 sections 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 section 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 section 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an election described in section 2632(c)(5) under the provisions of section 301.9100-3.

Requests for relief under section 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.

A GST trust is defined in section 2632(c)(3)(B), in general, as any trust that could have a generation-skipping transfer. A trust is a GST Trust unless it meets one of the exceptions described in section 2632(c)(3)(B)(i) through (vi) where a sufficient possibility exists (based on the statutory criteria) that the trust corpus will not be distributed to lower generations. Based upon the facts submitted and the representations made, none of the exceptions in section 2632(c)(3)(B) apply to Trust and, accordingly, Trust is a GST Trust for purposes of section 2632(c).

Based on the facts submitted and representations made, we conclude that the requirements of section 301.9100-3 have been satisfied. Therefore, Decedent's estate and Spouse are each granted an extension of time of 60 days from the date of this letter to make the election out of the automatic allocation of GST exemption under section 2632(c)(5) with respect to the transfers to Trust in Year 1 and all future transfers.

The election should be made in accordance with the provisions of section 26.2632-1(b)(2)(iii) of the regulations. The Supplemental Form 709 and election out statement are to be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Form 709. A copy is enclosed for this purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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.

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

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.

Sincerely,

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

Enclosures

Copy for section 6110 purposes
Copy of letter