

Washington Reports



Wednesday, April 12, 2017

17.04.12

PLR Holds Trust Providing Limited Power of Appointment and Withdrawal Power to Non-Skip Person is a GST Trust

PLR 201714008 ruled that a trust created by taxpayer for the benefit of his brother, his brother's spouse, and his brother's descendants was a "GST Trust" for purposes of the automatic allocation of taxpayer's GST tax exemption to the trust. The IRS held that the trust qualified as a GST Trust despite the brother having withdrawal rights and a limited power of appointment exercisable in favor of the brother's spouse and descendants because: (1) the trust did not mandate distributions to non-skip beneficiaries, (2) the non-skip beneficiary only held a limited power of appointment, and (3) since the withdrawal powers of each non-skip beneficiary could not exceed the annual gift tax exclusion, the withdrawal amount would not be considered includible in the gross estate of a non-skip person or subject to a right of withdrawal under GST tax rules. See PLR 201714008.

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201714008**
Release Date: 4/7/2017
Index Number: 2632.02-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-120295-16
Date:
December 19, 2016

Legend

Donor
Brother
Date
Trust
a

Dear _____ :

This letter responds to your authorized representative's letter dated June 15, 2016, and subsequent correspondence, requesting a ruling regarding the application of § 2632 of the Internal Revenue Code to Donor's transfer to Trust.

The facts and representations submitted are as follows:

On Date, a date occurring after 2001, Donor created Trust for the benefit of Brother, Brother's spouse, and Brother's descendants. On the same date, Donor transferred \$a to Trust.

Under the trust instrument, Brother has a lifetime and testamentary limited power to appoint trust assets to Brother's spouse or lineal descendants, subject to an ascertainable standard, and the power to appoint trust assets to any charitable organization, but has no power to appoint assets in favor of himself, his estate, his creditors, the creditors of his estate, or to discharge any of his legal obligations.

Under the trust instrument, Brother has a withdrawal power in an amount equal to any contribution to Trust and upon his death, the withdrawal power passes to

Brother's spouse. The withdrawal power may not exceed the least of (i) the total amount of contributions to Trust during that year, (ii) the amount allowable at the time of the first contribution as an exclusion from gift tax under § 2503(b)(3) (or twice this amount if the donor is married on the date of the last of all contributions made during that year), and (iii) the greater of \$5,000 or 5 percent of the value of Trust. Trust provides that any unexercised right of withdrawal shall lapse at the end of each year or, if earlier, thirty days after the contribution to which it relates.

Donor was advised by his counsel that Trust is a "GST trust" as defined in § 2632(c)(3)(B) and, thus, the rules regarding the automatic allocation of generation-skipping transfer (GST) exemption contained in § 2632(c)(1) applied to Trust. Donor is now advised by his counsel that Trust may not be a "GST trust" as defined in § 2632(c)(3)(B).

You request a ruling that on the date of Donor's transfer, Trust was a "GST trust" as defined in § 2632(c)(3)(B) and, therefore, Donor's available GST exemption was automatically allocated to the transfer to Trust. In the alternative, you request an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to allocate Donor's GST exemption to Donor's transfer on Date.

LAW AND ANALYSIS

Section 2501 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 2503(b) provides that in the case of gifts (other than gifts of future interest in property) made to any person by the donor during the calendar year, the first \$10,000 (adjusted for inflation) of such gifts to such person shall not, for purposes of § 2503(a), be included in the total amount of gifts made during such year.

Section 2601 imposes a tax on every GST. A GST is defined under § 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. Section 2642(a) provides the method for determining the inclusion ratio.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount 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 2632(a) provides that any allocation by an individual of his 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 2632(c)(1) 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 tax imposed by chapter 12 made to a GST trust.

Section 2632(c)(3)(B) provides that the term "GST trust" means a trust that could have a generation-skipping transfer with respect to the transferor unless—

- (i) the trust instrument provides that more than 25 percent of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons (I) before the date that the individual attains age 46, (II) on or before one or more dates specified in the trust instrument that will occur before the date that such individual attains age 46, or (III) upon the occurrence of an event that, in accordance with regulations prescribed by the Secretary, may reasonably be expected to occur before the date that such individual attains age 46;
- (ii) the trust instrument provides that more than 25 percent of the trust corpus must be distributed to or may be withdrawn by one or more individuals who are non-skip persons and who are living on the date of death of another person identified in the instrument (by name or by class) who is more than 10 years older than such individuals;
- (iii) the trust instrument provides that, if one or more individuals who are non-skip persons die on or before a date or event described in clause (i) or (ii), more than 25 percent of the trust corpus either must be distributed to the estate or estates of one or more of such individuals or is subject to a general power of appointment exercisable by one or more of such individuals;
- (iv) the trust is a trust any portion of which would be included in the gross estate of a non-skip person (other than the transferor) if such person died immediately after the transfer;
- (v) the trust is a charitable lead annuity trust (within the meaning of § 2642(e)(3)(A)) or a charitable remainder annuity trust or a charitable

remainder unitrust (within the meaning of § 664(d)); or

- (vi) the trust is a trust with respect to which a deduction was allowed under § 2522 for the amount of an interest in the form of the right to receive annual payments of a fixed percentage of the net fair market value of the trust property (determined yearly) and which is required to pay principal to a non-skip person if such person is alive when the yearly payments for which the deduction was allowed terminate.

For purposes of § 2632(c)(3)(B), the value of transferred property shall not be considered to be includible in the gross estate of a non-skip person or subject to a right of withdrawal by reason of such person holding a right to withdraw so much of such property as does not exceed the amount referred to in § 2503(b) with respect to any transferor, and it shall be assumed that powers of appointment held by non-skip persons will not be exercised.

Section 26.2632-1(b)(2)(i) of the Generation-Skipping Transfer Tax Regulations provides, in relevant part, that an indirect skip is a transfer of property to a GST trust as defined in § 2632(c)(3)(B) provided that the transfer is subject to gift tax and does not qualify as a direct skip. In the case of an indirect skip made after December 31, 2000, to which § 2642(f) does not apply, the transferor's unused GST exemption is automatically allocated to the property transferred (but not in excess of the fair market value of the property on the date of the transfer). The automatic allocation is effective whether or not a Form 709 is filed reporting the transfer, and is effective as of the date of the transfer to which it relates. An automatic allocation is irrevocable after the due date of the Form 709 for the calendar year in which the transfer is made.

In this case, Trust is a trust that could have a GST with respect to the transferor. Under the terms of Trust, no provision is made for mandatory distributions to beneficiaries who are non-skip persons. Although Brother is granted a power of appointment over Trust corpus, the power is limited to a certain class of beneficiaries and Brother has no power to appoint assets in favor of himself, his estate, his creditors, the creditors of his estate, or to discharge any of his legal obligations. Although Trust provides withdrawal powers to beneficiaries who are non-skip persons, since the amount of the annual withdrawal rights in Trust do not exceed the amount referred to in § 2503(b), the amount subject to the withdrawal right shall not be considered to be includible in the gross estate of a non-skip person or subject to a right of withdrawal pursuant to § 2632(c)(3)(B). Furthermore, the withdrawal rights lapse each year in their entirety. Accordingly, based on the facts submitted and the representations made, we conclude that none of the exceptions to the definition of a "GST trust" in § 2632(c)(3)(B) apply. Therefore, on the date of Donor's Transfer to Trust, Trust was considered a "GST trust" under § 2632(c)(3)(B) and, accordingly, we conclude that Donor's available GST exemption was automatically allocated to the transfer to Trust on Date pursuant to § 2632(c)(1).

In accordance with the Power of Attorney on file with this office, we have sent a copy of this letter to your authorized representatives.

Except as expressly provided herein, we neither express nor imply any opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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.

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,

Karlene M. Lesho

Karlene M. Lesho
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for § 6110 purposes

Copy of this letter