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July 16, 2007

Mr. Donald Korb
Chief Counsel
Office of the Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Section 9100 Relief for Allocations of GST Exemption

Dear Mr. Korb:

On behalf of the American College of Trust and Estate Counsel (the "College"), I submit this letter to express the concern of the College with an apparent informal change of the factors that the Internal Revenue Service (IRS) considers when evaluating requests for extensions of time to allocate GST exemption for generation-skipping transfer (GST) tax purposes authorized by Internal Revenue Code Section 2642(g)(1). We understand that the IRS is considering the issuance of a new, formal policy adopting this informal change in criteria for relief. This letter describes the factors that we believe the IRS should consider when evaluating these requests.

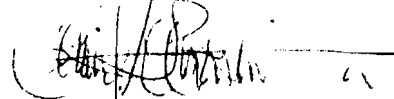
Publication of the factors that the IRS uses in evaluating these requests is helpful because it will notify taxpayers and their advisors of the IRS policy before beginning the lengthy and expensive process of seeking relief from inadvertent failures to allocate GST exemption. We hope, however, that the new policy will not require the IRS to consider factors that are unnecessary and inconsistent with Congressional intent reflected in the legislative history of Section 2642(g)(1). Such factors include the use of valuation discounts in reporting the original gift and the expiration of the statute of limitations for assessment of gift tax on that gift. We believe that the time-tested grounds for obtaining 9100 relief described in Treasury Regulation Section 301.9100-3, are appropriate and fair grounds for granting extensions to allocate GST exemption and are consistent with Congressional intent in enacting Section 2642(g)(1). For the reasons which are described more fully in the enclosed comments, we believe that the IRS should not consider the type of assets transferred in the original gift, the amount of ensuing appreciation or the expiration of the statute of limitations for assessment of gift tax when deciding whether to grant requests for relief under Section 2642(g)(1), except in the few limited cases that are discussed in those

comments.

The College is a professional association of over 2,600 lawyers from throughout the United States. Fellows of the College are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching and bar activities. The College offers technical comments about the law and practical comments about its effective administration. It does not take positions on matters of tax policy.

We appreciate your consideration of our recommendations and would welcome the opportunity to discuss them further with you.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Daniel H. Markstein, III", written over a horizontal line.

Daniel H. Markstein, III
President

cc: Eric Solomon, Assistant Secretary for Tax Policy, Treasury Department (Fax: 202-622-0605)
Catherine Hughes, Attorney Advisor, Treasury Department (Fax: 202-622-9260)
William P. O'Shea, IRS Associate Chief Counsel for Passthroughs and Special Industries (Fax: 202-622-4524)

AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

**COMMENTS ON FACTORS TO BE CONSIDERED IN CONNECTION WITH
REQUESTS FOR EXTENSIONS OF TIME UNDER SECTION 2642(g)(1)¹**

July 16, 2007

Introduction and Background.

The rules governing the generation-skipping transfer (GST) tax and allocation of GST exemption are complex. Consequently, inadvertent failures to allocate GST exemption occur even when taxpayers and their tax advisors have attempted in good faith to comply with the rules. Missed allocations of GST exemption can result in large, unanticipated adverse tax consequences for taxpayers and calamitous liability for tax professionals. Prior to the enactment of Section 2642(g)(1) in 2001, the IRS took the position that 9100 relief was not available to correct such mistakes.² Once this situation became clear to tax return preparers, many tax professionals refused to prepare gift tax returns because of the possibility of disastrous malpractice liability. Such refusals had the potential to deprive taxpayers of needed professional assistance in preparation of gift tax returns and allocation of GST exemption.

Congress attempted to provide a remedy for inadvertent failures to allocate GST exemption in EGTRRA. The remedies included new Section 2642(g)(1), which (1) directed the IRS to grant extensions of time to make GST elections, including the allocation of GST exemption, under certain circumstances and (2) made clear that the allocation of GST exemption is eligible for 9100 relief.³ We are concerned that changes in the factors that the IRS considers in evaluating requests for such relief will undermine the effectiveness of this remedy.

Section 2642(g)(1) does not restrict the availability of relief based on the type of assets transferred or on whether the period of limitations for assessment of gift tax has expired with respect to the original transfer. Instead, as discussed more fully in the Supplemental Discussion at the end of these comments, Section 2642(g)(1) and its legislative history reflect Congress's clear intent to provide liberal relief to taxpayers and their tax advisors who inadvertently failed to allocate GST exemption despite their good faith efforts to comply with the GST tax rules. The IRS should not deny such requests for 9100 relief that otherwise qualify for relief.

Requirements for Section 9100 Relief Prevent Abuse—Good Faith, No Prejudice to Government.

The College understands that the IRS is concerned that a taxpayer who made a gift of property valued at a discount may wait for the statute of limitations to expire on the gift tax return reporting the gift before applying for 9100 relief to allocate GST exemption. In the experience of College fellows, unintentional failures to allocate GST exemption occur even when the taxpayer and the advisor act in good faith. Congress acknowledged this unfortunate reality in adopting the expansive relief provisions to prevent and cure faulty allocations of GST exemption.

Requirement for 9100 Relief: Good Faith

The College acknowledges that it is possible for a taxpayer to fail to allocate GST exemption on a timely return intentionally, and then seek 9100 relief if the trust property appreciates instead of depreciates.⁴ However, taxpayers seeking 9100 relief to obtain the extension of time to allocate GST exemption must independently satisfy the criteria of Treasury Regulations Section 301.9100-3. These regulations are designed to preclude exactly the abuse that the IRS fears and, consequently, satisfying these requirements should suffice to obtain relief under Section 2642(g)(1). Under Treasury Regulations Section 301.9100-3(b)(1) the taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer “uses hindsight” in requesting relief.⁵

Similarly, the IRS should not use hindsight to deny relief because the taxpayer would have achieved a beneficial result if the taxpayer had properly implemented her intention to allocate GST exemption. Hindsight is particularly inappropriate when the only “abuse” is that the IRS failed to audit the return despite adequate disclosure sufficient to trigger the running of the statute of limitations.⁶ The IRS’s failure to challenge the valuation of the gift in time to assess gift tax should not prejudice taxpayers who otherwise have complied fully with the tax laws and are entitled to seek relief pursuant to Section 2642(g)(1).⁷

Treasury Regulations Section 301.9100-3(e) requires the sworn affidavit of the taxpayer and the tax return preparer detailing the events that led to the failure to make the election, its discovery, the engagement and responsibilities of any qualified tax professional and the extent of the taxpayer’s reliance on the professional.⁸ The most common reason for inadvertent failures to allocate GST exemption cited in private letter rulings issued to date under Section 2642(g)(1) is the taxpayer’s reasonable reliance on a qualified tax professional.⁹ As a result, affidavits are typically required from the original tax professional who failed to allocate, or advise the taxpayer to allocate, GST exemption to a transfer. Even if taxpayers are willing to commit perjury by signing false affidavits, the College doubts that tax professionals are willing to provide supporting affidavits when they could suffer criminal prosecution and other professional sanctions for perjury and direct liability for damages resulting from the failure to allocate GST exemption.¹⁰

Requirement for 9100 Relief: No Prejudice to Government

Treasury Regulations Section 301.9100-3(c)(1) notes that the interests of the government will ordinarily be prejudiced when the tax year in which the regulatory election should have been made, or any tax year affected by the election had it been made timely, are closed by the statute of limitations before the taxpayer’s receipt of a ruling granting 9100 relief.¹¹ However, the statute of limitations for GST tax purposes almost never will have expired before the taxpayer seeks 9100 relief under Section 2642(g)(1), because a GST subject to GST tax typically will not occur for many years after the initial transfer. The expiration of the separate statute of limitations for assessment of gift tax should not be relevant when the taxpayer seeks 9100 relief to allocate GST exemption for GST tax purposes because the IRS has not been prejudiced with regard to the election by the expiration of the statute. Further, the legislative history of section 2642(g)(1) specifically states that extensions of time to allocate GST exemption are to be granted “without regard to whether any period of limitations has expired.”¹²

The allocation of GST exemption does not affect the independent requirements of adequate disclosure to begin the running of the statute of limitations for assessment of gift tax, or the likelihood or success of an audit regarding valuation for gift tax purposes. It is difficult to imagine that any return preparer would conclude that the allocation of GST exemption would increase the risk of an audit. Thus, it is our view that the taxpayer never secures any advantage by foregoing a timely allocation of GST exemption when the taxpayer expects the gift to appreciate, and only gains exposure to adverse GST tax consequences and malpractice liability. The College believes that any meaningful abuse is unlikely to occur and that the requirements for 9100 relief adequately and reasonably protect against such abuse.¹³

Overall, the existing requirements to obtain 9100 relief forestall the abuse that the IRS seeks to prevent. The IRS need not, and should not, counter Congress's intent by imposing additional criteria to the existing requirements of Treasury Regulations Section 301.9100-3 designed to prevent abuse by taxpayers.

Notice to Taxpayers

For the reasons described above, the IRS should not deny requests for relief under Section 2642(g)(1) for allocation of GST exemption for gifts of discounted or appreciated assets because the statute of limitations to assess gift tax has expired. If, however, the IRS wishes to depart from the current regulatory basis in granting such relief, the IRS should articulate its new criteria in formal guidance available for public review and comment before it begins to use those criteria. Such guidance is necessary for taxpayers and tax professionals to make informed decisions regarding the likelihood of success in pursuing 9100 relief and promotes fair and efficient administration of the transfer tax system.

SUPPLEMENTAL DISCUSSION

Congressional Intent in Enactment of Section 2642(g)(1).

Section 2642(g)(1)(A) directs the Secretary to prescribe by regulation the circumstances and procedures under which the IRS will grant extensions of time to taxpayers to make such allocations or elections. Section 2642(g)(1)(B) directs the Secretary to 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 in determining whether to grant relief under this provision.

The Joint Committee on Taxation's discussion of Section 2642(g)(1) explains:

[Under EGTRRA], the Treasury Secretary is authorized and directed to grant extensions of time to make the election to allocate generation-skipping transfer tax exemption and to grant exceptions to the time requirement, without regard to whether any period of limitations has expired. If such relief is granted, then the gift tax or estate tax value of the transfer to trust would be used for determining generation-skipping transfer tax exemption allocation. (Joint Committee on Taxation's General Explanation of Tax Legislation Enacted in the 107th Congress, at p. 81 (emphasis added))

This legislative history irrefutably establishes Congress's intent that the IRS should disregard the expiration of any statute of limitations in considering requests for 9100 relief under Section 2642(g)(1).

Section 2642(g)(1), which applies to requests pending on, or filed after, December 31, 2000, requires that "[s]uch regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this paragraph." (Emphasis added.) Section 2642(g)(1) does not limit its express application to transfers in prior years before its enactment to transfers for which the statute of limitations for assessment of gift tax remain open. The lack of restrictions on the application of Section 2642(g)(1) is consistent with the express Congressional intention in the legislative history that the IRS should disregard any statute of limitations in considering requests for 9100 relief.

Section 2642(g)(1) does not limit the transfers eligible for relief by the type of assets or whether any period of limitations has expired with respect to that transfer. Instead, Section 2642(g)(1) and its legislative history reflect Congress's clear intent to provide liberal relief to taxpayers and their tax advisors who inadvertently failed to allocate GST exemption despite their good faith efforts to comply with the GST tax rules. The IRS should not deny such requests for 9100 relief that otherwise qualify for relief.

Allowance of Section 9100 Relief for Allocations of GST Exemption.

The IRS issued Notice 2001-50, 2001-34 IRB 189, on August 1, 2001. Notice 2001-50 confirmed that taxpayers may seek extensions of time under Section 2642(g)(1)¹⁴ by submitting a request for relief pursuant to Treasury Regulations Section 301.9100-3 and following the

procedures for requesting a private letter ruling described in the first Revenue Procedure of each year (i.e., Rev. Proc. 2001-1, 2001-1 C.B. 28 and its annual successors):

[R]elief will be granted if the taxpayer establishes to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the government. Taxpayers requesting relief should follow the procedures for requesting a private letter ruling under § 301.9100 contained in Section 5.02 of Rev. Proc. 2001-1 (or its successor), 2001-1 I.R.B. 1, 13.

IRS Approach Should Not Undermine the Statute of Limitations

Section 2642(g)(1) mandates that the Secretary promulgate regulations detailing the circumstances and procedures under which the IRS will grant extensions of time for allocations of GST exemption. No such proposed or final regulations have been issued to date despite the passage of six years since the enactment of Section 2642(g)(1). Moreover, none of the IRS' annual business plans since enactment of Section 2642(g)(1) have indicated an intention to issue such regulations.¹⁵ Thus, Notice 2001-50 confirming the availability of 9100 relief constitutes the primary published guidance from the IRS to taxpayers seeking relief under Section 2642(g)(1). The IRS should evaluate requests for relief under Section 2642(g)(1) in a manner consistent with the purpose and terms of Section 2642(g)(1) to promote fair treatment of similarly situated taxpayers. If the IRS issues regulations addressing 9100 relief for GST exemption allocations, those regulations must conform to Congressional intent. Legislative history clarifies that Congress intended to preclude the current IRS practice, as we understand it, of denying 9100 relief based on expiration of the gift tax statute of limitations.

Since Section 2642(g)(1) became effective as of January 1, 2001, the IRS has evaluated and granted several hundred requests for extensions of time to allocate GST exemption to rectify inadvertent failures. The private letter rulings granting such relief do not generally describe the transferred assets or state whether the statute of limitations for assessment of gift tax on the transfer has closed. However, we assume that many requests for such rulings did include such facts and anecdotal evidence confirms this assumption. The private letter rulings generally do not indicate that valuation discounts or the expiration of the statute of limitations for assessment of gift tax should be relevant considerations in deciding whether to grant relief. Instead, the rationale of these rulings properly focuses on the criteria described in Treasury Regulations Section 301.9100-3(c)(1).

Overall, none of Section 2642(g)(1), its legislative history, Notice 2001-50 or numerous published letter rulings indicate that Section 2642(g)(1) excludes gifts of property valued with discounts for which the statute of limitations for assessment of gift tax has expired. Thus, such exclusion would unfairly and adversely prejudice taxpayers seeking relief for such transfers and contravene the purpose of Section 2642(g)(1) to provide liberal relief for inadvertent failures to allocate GST exemption.

The College advocates the enforcement of the gift tax laws to promote certainty and consistency in their application to taxpayers. The College also recognizes that it is impossible for the IRS to audit every gift tax return within the statute of limitations for assessment of gift

tax. However, statutes of limitation ensure that matters become final for both the taxpayer and the IRS at some time. Such finality assures that neither delays unduly in pursuing claims against the other. By their nature, statutes of limitation inevitably create injustices by barring a taxpayer's rightful claim to a refund or the government's rightful assessment of a tax. If this were not so, limitation periods would have no effect and, therefore, serve no purpose. To promote the public policy of efficient and final determination of the parties' respective rights, the IRS should not circumvent the valid expiration of the gift tax statute of limitations by denying legitimate, qualified requests for 9100 relief for GST tax purposes.

¹ The principal drafters of these comments are Carol A. Harrington, Lloyd Leva Plaine, Carlyn S. McCaffrey, and Pam H. Schneider, all or whom are fellows of the College, and Julie K. Kwon.

² Prior to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), P.L. 107-16, 107th Cong., 1st Sess. (June 7, 2001), taxpayers could not remedy unintentional failures to allocate GST exemption in a manner that would treat the allocation as if it had been timely made. The IRS maintained that allocations of GST exemption were statutory elections and thus ineligible for the discretionary extension of time to make regulatory elections under Treasury Regulations Section 301.9100-3 ("9100 relief"). See PLRs 9840011, 9835025, 9827032, 9813013, 9226014. Treasury Regulations Section 301.9100-2 provides an automatic 6-month extension for regulatory or statutory elections whose due dates are the due date of the return (including extensions) if the return was timely filed by the due date (including extensions). However, in many cases when an error concerning the allocation of GST exemption has occurred, no gift tax returns have been filed or the errors are not discovered within 6 months of the due date of the return.

³ A task force of representatives from several professional organizations, the American Institute of Certified Public Accountants, the American Bar Association, the American Bankers Association and the American College of Trust and Estate Counsel, recommended to the Chairmen of the Committee on Finance of the United States Senate and the Committee on Ways and Means of the United States House of Representatives by letter dated July 29, 1998, that legislation permit the IRS to grant such 9100 relief. Congress adopted the task force's recommendation to allow 9100 relief to remedy unintentional failures to allocate GST exemption as part of EGTRRA.

⁴ The statute does allow taxpayers to forgo a timely allocation of GST exemption deliberately with the option to allocate at a later date if the transferred property has depreciated in value from the time of the gift to the time of the late allocation. This planning opportunity is well known, but in the experience of the members of the College, not used by most advisors because of practical difficulties and risks involved.

⁵ The regulations make clear that when specific facts have changed since the original due date of the election that make a later election advantageous to a taxpayer, the IRS will not ordinarily grant relief absent strong proof that the decision to seek 9100 relief did not involve hindsight.

⁶ The College recognizes that it is frustrating for the IRS to encounter requests to exercise its discretion to aid taxpayers where the IRS believes that an audit should have occurred before the gift tax statute of limitations expired. Nonetheless, the College believes that the IRS should not exercise its discretion to punish taxpayers who erred in failing to allocate GST exemption because the IRS concludes with hindsight that the statute of limitations benefits the taxpayer.

⁷ The statute of limitations on assessment of gift tax expires only when the taxpayer adequately discloses a transfer on a gift tax return, including substantiation of any applicable valuation discount. While the IRS may challenge discounts in the valuation of gifts, the courts consistently recognize that discounts are valid for gift tax purposes and cannot be denied *per se* under current law. If the IRS objects to the effect of the period of limitations on enforcement of gift tax laws, the appropriate remedy is a proposal for legislative change rather than the use by the IRS of its discretionary authority to deny 9100 relief for GST tax purposes.

⁸ Treas. Reg. § 301.9100-3(e)(2)-(3). In addition, the affidavit must be signed and accompanied by a dated declaration stating that, under penalties of perjury, “I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all relevant facts relating to the request, and such facts are true, correct, and complete.”

⁹ See, e.g., PLRs 200620003, 200618005, 200602027, 200549001, 200538023, 200411009, 200411006, 20041006, 200408014, 200408005, 200338005, 200302038, 200302017, 200301037, 200301027, 200243042, 200240030, 200240019, 200237021, 200235013, 200227017, 200252065, 200242030, 200242020, 200242016, 200241043, 200241040, 200241021, 200240029, 200240019, 200238018, 200238028, 200238003, 200223016, 200218015, 200218012, 200218001, 200212025.

¹⁰ Such abuse requires that the practitioner decide upon filing the gift tax return that he or she will submit perjured affidavits when requesting 9100 relief and ensure that no record exists of his or her recommendation to omit the allocation of GST exemption. Consequently, no record would protect the advisor from malpractice or the cost of requesting 9100 relief if such request is denied. Without any secure benefit for the advisor, the advisor would assume enormous risk of liability. The members of the College do not believe that advisors could possibly be engaging in such abuse to any meaningful degree.

Even if such abuse posed a meaningful threat, denial of 9100 relief based on valuation discounts does not address the problem. In fact, the most aggressive taxpayers applying the greatest valuation discounts to their gifts are the most likely to benefit from a timely allocation of GST exemption, assuming they understand the effect of allocation. Consequently, these aggressive taxpayers are the least likely to intentionally forego an initial, timely allocation of GST exemption that shelters subsequent appreciation from transfer taxes. The IRS could consider any significant decrease in the value of the trust from the date of the original gift to the gift tax return due date as one of multiple factors when determining whether the taxpayer deliberately failed to allocate GST exemption. However, the College understands that the IRS does not merely seek to identify a relevant factor for consideration in revising its criteria for 9100 relief.

¹¹ See Treas. Reg. § 301.9100-3(c)(1)(ii).

¹² See the Conference Report to H.R. 1836, H. Rept. 107-84 (May 26, 2001) (“Conference Report”) at p. 202.

¹³ The College acknowledges that an advisor might discover a failure to allocate while the statute of limitations is open and deliberately delay seeking 9100 relief until the statute has expired to avoid possible resulting audit exposure. This may be a valid inquiry for the IRS in evaluating requests because a taxpayer who deliberately waits until expiration of the gift tax statute of limitations to seek relief under Section 2642(g)(1) using “hindsight” is disqualified from such relief. In addition, the taxpayer may be acting in bad faith, which would also disqualify the taxpayer from such relief.

¹⁴ Section 2642(g)(1) also directs the Secretary to promulgate regulations describing the circumstances and procedures by which the IRS will grant relief without limiting the IRS to 9100 relief. However, Section 2642(g)(1)(B) also specifies that “the time for making the allocation [of GST exemption] (or election) shall be treated as if not expressly prescribed by statute.” This language in Section 2642(g)(1)(B) reflects the legislative intent that the allocation of GST exemption should be treated as a regulatory election for purposes of 9100 relief. Thus, taxpayers are not required to wait until the issuance of regulations under Section 2642(g)(1) to obtain relief to allocate GST exemption to a prior transfer. Instead, the statute allows immediate relief for taxpayers falling within the parameters for 9100 relief, even though more expansive regulations under Section 2642(g)(1) may be issued in the future

¹⁵ The IRS did provide a simplified alternate method for obtaining Section 9100 relief for certain annual gift tax exclusion gifts made before 2001, but it is only available in limited circumstances. See Rev. Proc. 2004-46, 2004-31 I.R.B. 142 (August 2, 2004). This Revenue Procedure applies only if:

- (1) On or before December 31, 2000, the taxpayer made or was deemed to have made a transfer by gift to a trust from which a GST may be made;
- (2) At the time the taxpayer files the request for relief under this revenue procedure, no taxable distributions have been made and no taxable terminations have occurred;
- (3) The transfer qualified for the annual exclusion under §2503(b), and the amount of the transfer, when added to the value of all other gifts by the transferor to that donee in the same year, was equal to or less than the amount of the applicable annual exclusion for the year of the transfer;
- (4) No GST exemption was allocated to the transfer, whether or not a Form 709 was filed; and
- (5) At the time the taxpayer files a request for relief under this revenue procedure, the taxpayer has unused GST exemption available to allocate to the transfer.

Taxpayers unable to obtain an extension of time using this alternate method described in this Revenue Procedure still may request 9100 relief by requesting a letter ruling.