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July 16, 2008

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments Concerning Proposed Regulations Relating to Extensions of the Time Under Section 2642(g)(1)

Dear Commissioner Shulman:

Enclosed are comments concerning proposed regulations relating to extensions of the time under section 2642(g)(1). These comments represent the views of the American Bar Association Section of Taxation and the Section of Real Property, Trust and Estate Law. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stanley L. Blend
Chair, Section of Taxation

Kathleen M. Martin
Chair, Section of Real Property, Trust and Estates Law

Enclosures

cc: Hon. Donald L. Korb, Chief Counsel, Internal Revenue Service
Hon. Eric Solomon, Assistant Secretary (Tax Policy), Department of the Treasury
Karen Gilbreath Sowell, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Catherine Hughes, Attorney-Advisor, Office of Tax Policy, Department of the Treasury
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**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION AND SECTION OF REAL PROPOERTY,
TRUST AND ESTATE LAW COMMENTS CONCERNING PROPOSED
REGUALTIONS RELATING TO EXTENSIONS OF TIME UNDER
SECTION 2642(g)(1)**

The following comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section of Taxation”) and Section of Real Property, Trust and Estate Law (“RPTE Section”). These Comments have not been approved by the House of Delegates or Board of Governors of the American Bar Association, and should not be construed as representing the position of the American Bar Association.

The Comments were prepared by members of the Estate and Gift Tax Committee and Generation Skipping Transfers Committee of the Trust and Estate Division of the RPTE Section, and of the Committee on Estate and Gift Taxes of the Section of Taxation. Principal responsibility for preparing these Comments was exercised by Julie K. Kwon, Chair of the Estate & Gift Tax Committee of the RPTE Section. Substantive contributions were made by Bobbi J. Bierhals, Carol A. Harrington, Amy E. Heller, Beth Shapiro Kaufman, Melissa Langa, Carlyn S. McCaffrey, Lloyd Leva Plaine and Pam H. Schneider. These Comments were reviewed by Steven B. Gorin on behalf of the RPTE Section’s Committee on Governmental Submissions, Douglas L. Siegler on behalf of the Section of Taxation’s Committee on Government Submissions, and John P. Barrie, Council Director for the Section of Taxation’s Committee on Estate and Gift Taxes.

Although the members of the Section of Taxation and the RPTE Section who participated in preparing these Comments have clients who might be affected by the federal tax principles addressed by these Comments, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise influence the development or the outcome of, the specific subject matter of these Comments.

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Date: July16, 2008

Executive Summary

These Comments respond to the request for public comment made by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (the “Service”) in a notice of proposed rulemaking under section 2642(g) published in the Federal Register¹ on April __, 2008 (the “Proposed Regulations”).² The Proposed Regulations provide guidance regarding the circumstances and procedures under which the Service will grant an extension of time under section 2642(g)(1) to allocate generation skipping tax (“GST”) exemption and make certain elections relating to allocations of GST exemption.

The recommendations contained in the Comments include the following:

- A transferor³ seeking relief under section 2642(g)(1) should be considered to have acted reasonably and in good faith if any one of a number of enumerated factors is satisfied, consistent with the corresponding requirement of the Regulations under section 9100.
- Each of the following factors should be irrelevant in determining whether the interests of the government would be prejudiced by a grant of relief under section 2642(g)(1): the expiration of a limitations period on a return reporting a transfer of property, the application of a valuation discount to the property transferred, and the occurrence of a GST subject to GST tax before relief is requested.
- A transferor’s efforts to benefit from hindsight in requesting relief under section 2642(g)(1) should not be relevant in determining whether a grant of relief would prejudice the interests of the Government, but rather should be relevant in determining whether the transferor acted reasonably and in good faith.
- The factors relevant in determining whether relief under section 2642(g)(1) should be denied based on a transferor’s attempt to benefit from hindsight should be narrowed, as some of the factors included in the Proposed Regulations are too broad and are likely to preclude extensions of time to allocate GST exemption or make GST elections in circumstances where relief is being sought simply to achieve the result that was intended at the time of the transfer.
- The procedural requirements that a transferor seeking relief under section 2642(g)(1) is required to follow should be no more burdensome than the corresponding procedural requirements under section 9100.

¹ 73 Fed. Reg. 20870-01 (Apr. 17, 2008).

² References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated, and references to Regulations are to the Treasury Regulations promulgated thereunder.

³ In cases of transfers at death, references herein to the “transferor” mean the executor of the transferor’s estate.

I. BACKGROUND.

Prior to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”),⁴ it was unclear whether transferors could obtain extensions of time to allocate GST exemption or make elections regarding allocations of GST exemption under Regulations sections 301.9100-1 through 301.9100-3 (“9100 relief”). The Service took the position that each such allocation or election was an election “whose due date is prescribed by statute” and, therefore, ineligible for 9100 relief.⁵ However, EGTRRA enacted new section 2642(g)(1) permitting transferors to seek extensions of time through 9100 relief to allocate GST exemption or make certain GST elections.

Section 2642(g)(1) directs the promulgation of regulations under which extensions of time will be granted (i) to allocate GST exemption to lifetime gifts or transfers at death under section 2642(b), (ii) to make elections under section 2632(b)(3) preventing deemed allocations of GST exemption to lifetime direct skips, and (iii) to make elections under section 2632(c)(5) into or out of the automatic allocations to indirect skips (elections described in (ii) and (iii) collectively referred to as “GST elections”) (such relief referred to as “Section 2642 relief”). 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.) Thus, section 2642(g)(1) does not limit the express application of the statute or regulations promulgated thereunder to any particular transfers in prior years before its enactment. Further, 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 legislative history of section 2642(g)(1) reflects Congress’s intent that the expiration of any statute of limitations should not be considered when evaluating requests for Section 2642 relief. Specifically, the Conference Report to EGTRRA states:

[T]he 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.⁶

For purposes of determining whether to grant Section 2642 relief, the statute mandates that “the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.” This specific statutory language echoing Regulations sections 301.9100-1

⁴ P.L. 107-16, 107th Cong., 1st Sess. (June 7, 2001).

⁵ Elections “whose due date is prescribed by statute” generally are ineligible for 9100 relief. *See* Reg. §§ 301.9100-1 through 301.9100-3; PLR 9840011 (October 02, 1998), PLR 9835025 (August 28, 1998), PLR 9827032 (July 02, 1998), PLR 9813013 (March 27, 1998), PLR 9226014 (June 26, 1992).

⁶ HR. Rept. 107-85, 107th Cong., 1st Sess. (May 26, 2001), page 102 (the “Conference Report”).

through 301.9100-3 indicates Congress's intent that these allocations and elections should be treated as regulatory elections eligible for 9100 relief.⁷

On August 1, 2001, the Service issued Notice 2001-50, 2001-34 IRB 189, which confirmed that transferors may seek extensions of time under section 2642(g)(1) by submitting requests for relief pursuant to Regulations section 301.9100-3 and following the procedures for requesting a private letter ruling described in the first revenue procedure of each year.

The Proposed Regulations would amend Regulations section 301.9100-3 by adding Regulations section 301.9100-3(g) providing that the procedures under Regulations sections 301.9100-1 and 301.9100-3 are not applicable for requests for Section 2642 relief with respect to private letter ruling requests filed on or after the date of publication of final regulations. The Proposed Regulations specify that Notice 2001-50 will become obsolete at that time.

II. COMMENTS ON PROPOSED REGULATION SECTION 26.2642-7.

We appreciate the thought and effort expended by Treasury and the Service in formulating the Proposed Regulations. We begin our comments by explaining general premises in section A that form the basis for our more detailed comments regarding the Proposed Regulations. We have summarized below in sections B, C, D and E our comments regarding specific provisions of the Proposed Regulations.

A. General Premises.

The general premises that we consider fundamental to an evaluation of any regulations issued under section 2642(g)(1) underlie our comments regarding specific provisions of the Proposed Regulations discussed in further detail below.

Section 2642(g)(1) and its legislative history reflect Congress's clear intent to provide liberal relief to transferors and their tax advisors who inadvertently fail to allocate GST exemption or make GST elections. Accordingly, we believe that any regulations issued under section 2642(g)(1) should conform to such Congressional intent to provide generous relief to remedy inadvertent failures to make such allocations or elections.

The Proposed Regulations reflect a concern that transferors deliberately may use hindsight to their advantage before applying for Section 2642 relief, to obtain results better than those they originally intended at the time of the transfer. However, given the complexity of the GST rules, our members have found that failures to allocate GST exemption or make GST elections still occur even though the transferor and the transferor's advisor have acted in good faith.⁸ Congress acknowledged this unfortunate reality in adopting the expansive relief provisions under section 2642(g)(1) to prevent and cure faulty allocations of GST exemption.⁹

⁷ See Reg. §§ 301.9100-1 to 301.9100-3.

⁸ Typically such errors are discovered when the transferor changes professional advisors or when the transferor dies and the professional advisor, while preparing the estate tax return, reviews prior gift tax returns, if any.

⁹ Several additional Code sections enacted together with section 2642(g)(1) under EGTRRA reflect a similar Congressional intent to provide taxpayers with relief with respect to failures to allocate GST exemption or make GST elections properly. For example, Congress enacted section 2632(c), which provides for the automatic

Consistent with the legislative intent to provide broad relief regarding allocations of GST exemption and GST elections, section 2642(g)(1) also directs that such allocations and elections must be considered regulatory elections. Thus, given Congress's clear intent to provide expansive relief, section 2642(g)(1) and the regulations thereunder should afford relief that is broader than, or at least no more restrictive than, the 9100 relief that is available currently for regulatory elections.

Adherence to the standard applicable currently for 9100 relief is logical, as it provides the standards generally applicable for regulatory elections¹⁰ for federal tax purposes. We are not aware of any aspects unique to Section 2642 relief meriting departure from the typical standards that otherwise generally apply to regulatory tax elections. To the contrary, an ongoing goal of tax policy is to maintain consistency in the application of tax laws and avoid departures from prevailing standards without good cause. Further, the criteria described in Regulations section 301.9100-3 are designed to preclude abusive requests for relief based on hindsight; consequently, satisfying those requirements should suffice to obtain Section 2642 relief. Under Regulations section 301.9100-3(b)(1) the transferor will not be considered to have acted reasonably and in good faith if the transferor "uses hindsight" in requesting relief.¹¹ Thus, the current 9100 relief requirements already address the potentially abusive requests for Section 2642 relief about which the Service seems to be concerned. For these reasons, we suggest that the Regulations under section 2642(g)(1) should continue to adopt the procedures for relief available currently for 9100 relief.

In addition, just as transferors should not be able to use hindsight to abuse the GST tax rules, the Service should not be able to use hindsight to deny relief because the transferor would have achieved a beneficial result if the transferor had properly implemented her intention to allocate GST exemption. In particular, in a situation where a taxpayer has timely filed a return that satisfies the Regulations' standards for adequate disclosure and is therefore sufficient to trigger the running of the statute of limitations, the taxpayer should not be denied Section 2642 relief because the Service did not challenge the valuation of the transferred property or another

allocation of GST exemption to "indirect skips," in order to prevent situations where "a taxpayer would desire allocation of generation-skipping transfer tax exemption, yet the taxpayer had missed allocating generation-skipping transfer tax exemption ... because the taxpayer or the taxpayer's advisor inadvertently omitted making the election on a timely-filed gift tax return or the taxpayer submitted a defective election." See H.R. Rept No. 107-37, 107th Cong., 1st Sess. (April 3, 2001) ("House Report"), page 35. Similarly, section 2642(g)(2), which provides that substantial compliance with the statutory and regulatory requirements for allocating GST exemption will suffice to establish that GST exemption was allocated to a particular transfer or trust, reflects Congressional concern that "the rules and regulations regarding the allocation of generation-skipping transfer tax exemption are complex [and]...it is often difficult for taxpayers to comply with the technical requirements for making a proper election to allocate generation-skipping transfer tax exemption." See House Report, page 40.

¹⁰ Reg. § 301.9100-2 provides an automatic 6-month extension from the date of the return (without extensions) 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). The corrective return must be filed within 6-months of the due date of the return (*without* extensions). However, in most 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.

¹¹ 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 transferor, the Service will not ordinarily grant relief absent strong proof that the decision to seek 9100 relief did not involve hindsight.

aspect of the return prior to the expiration of the limitations period.¹² In particular, the respective incentives of the transferor and the Service with respect to valuation of a transfer are the same for gift or estate tax purposes as they are for purposes of allocation of GST exemption. In fact, in almost all cases the incentive of the Government is greater to audit a gift or estate tax value, given that a tax is due immediately, or if not, likely much sooner than a GST tax would be due. Accordingly, the Service has the same or greater incentive to challenge a valuation that the Service considers too low for gift or estate tax purposes as the Service has to challenge that same valuation for purposes of allocation of GST exemption. In view of the legislative history of section 2642(g)(1) which, as described above, explicitly directs the Secretary to grant extensions of time “without regard to whether any period of limitations has expired,” the Proposed Regulations should not prejudice a taxpayer seeking relief in this situation.

B. Limitation on Relief.

Proposed Regulation section 26.2642-7(c) states that the amount of GST exemption that may be allocated to a transfer upon a grant of Section 2642 relief is limited to the amount of the transferor’s unused GST exemption as of the date of the transfer. This clarification that any increase in the transferor’s GST exemption after the date of the original transfer is not available for allocation upon receiving such relief is logical and helpful.

C. Basis for Determination.

Proposed Regulation section 26.2642-7(d)(1) and Regulations section 301.9100-3 both require that the transferor must establish to the Service’s satisfaction that the transferor acted reasonably and in good faith and that the grant of relief will not prejudice the interests of the Government.

1. Reasonableness and Good Faith.

Proposed Regulation section 26.2642-7(d)(2) provides a “nonexclusive list of factors that will be considered to determine whether the transferor or the executor of the transferor’s estate acted reasonably and in good faith for purposes of this section.” The Proposed Regulation itemizes each such factor without any connectors (such as “and” or “or”) between them to indicate the sufficiency or weight of any single factor. The Preamble uses the word “and,” which could be construed to indicate that all of the factors must be demonstrated to obtain relief. However, a number of the separate factors seem by their nature to constitute alternatives as they seem inconsistent with each other, or unlikely to apply to the same transferor. For example, Proposed Regulation section 26.2642-7(d)(2)(ii) addresses the diligence and lack of awareness of the transferor or executor, which does not seem relevant if such person had relied on a qualified tax professional as described in Proposed Regulation section 26.2642-7(d)(2)(v). Thus, it is unclear whether the transferor must establish more than one or all of such factors to demonstrate whether the transferor acted reasonably and in good faith. In contrast, Regulations section

¹² The statute of limitations on assessment of gift tax expires only when the transferor adequately discloses a transfer on a gift tax return, including substantiation of any applicable valuation discounts. While the Service frequently challenges the size of 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.

301.9100-3(b)(1) provides that if the taxpayer establishes any *one* of the five factors described in that regulation, the taxpayer is *deemed* to have acted reasonably and in good faith. Clarification of the sufficiency or relative importance of the factors described in Proposed Regulation section 26.2642-7(d)(2) would be helpful. The lack of clarity regarding the extent of required evidence may cause transferors to expend more time and other resources than necessary to satisfy this unclear standard, imposing undue burdens on transferors.

We recognize that Proposed Regulation section 26.2642-7(d)(2) deliberately may omit such clarification to give the Service very broad discretion in determining whether the transferor acted reasonably and in good faith. This Proposed Regulation lacks the presumption under Regulations section 301.9100-3(b)(1) deeming the taxpayer to have acted reasonably and in good faith upon establishing any one of several factors. Thus, the scope of circumstances in which relief may be available under this Proposed Regulation is narrower than the scope of circumstances in which 9100 relief is available. Such constriction of the availability of Section 2642 relief is inconsistent with the last sentence of section 2642(g)(1), which expressly deems the deadline for the allocation or GST election to be non-statutory, clarifying that 9100 relief is available to provide Section 2642 relief. Thus, narrowing the availability of such relief violates the legislative intent to provide relief at least as broadly available as is 9100 relief. Clarification that relief is available if *any* of several listed factors is available would not only restrain the unlimited discretion in making this determination, but also would promote the uniformity of application of standards to similarly situated taxpayers.

One of the factors that will be considered in determining whether the transferor acted reasonably and in good faith is the transferor's consistency with respect to allocation of the transferor's GST exemption.¹³ The Proposed Regulations note: "Evidence of consistency may be less relevant if there has been a change of circumstances or change of trust beneficiaries that would otherwise explain a deviation from prior GST exemption allocation decisions." In particular, the enactment of section 2642(g)(1) itself should be considered a "change of circumstances" that explains deviations from such prior decisions. Prior to enactment of section 2642(g)(1), effective as of December 31, 2000, no statute, regulation or Service rule authorized extensions of time to allocate GST exemption or to elect out of deemed allocations to direct skips. Thus, transferors generally could not remedy unintentional failures to make such allocations or elections after the due date for a timely filed gift tax return reporting the subject transfer. Transferors had to proceed with subsequent planning with that assumption, likely making decisions that would have differed if the transferors knew that relief described in section 2642(g)(1) later would become available. For these reasons, we suggest that the Proposed Regulations specify that the enactment of section 2642(g)(1) will be considered a "change of circumstances" that explains deviations from prior GST exemption allocation decisions with respect to transfers occurring prior to December 31, 2000.

2. Prejudice to the Interests of the Government.

Proposed Regulation section 26.2642-7(d)(3) ostensibly provides a "nonexclusive list of factors that will be considered to determine whether the interests of the Government would be prejudiced for purposes of this section." The Government interests suffer no prejudice if the

¹³ See Prop. Reg. § 26.2642-7(d)(2)(iv).

transferor merely achieves the same tax results that the transferor would have obtained if the transferor had allocated GST exemption or made GST elections as originally intended when the transfer was made, as reflected in Regulations section 301.9100-3(c)(1)(i). However, as noted earlier, Proposed Regulation section 26.2642-7(d)(3) reflects a concern that transferors may use hindsight to obtain relief and results superior to those they could have achieved had they timely made the requested allocation or election. While denial of requests for relief based on hindsight is appropriate, discussion of hindsight considerations properly belongs in Proposed Regulation section 26.2642-7(d)(2), addressing the transferor's good faith. Thus, we initially note that factors described in Proposed Regulation section 26.2642-7(d)(3) ostensibly addressing prejudice to the Government's interest actually demonstrate the transferor's lack of good faith which would bar relief in all events.

For example, Proposed Regulation section 26.2642-7(d)(3)(i) provides that the Government's interests would be prejudiced in several circumstances if the Service determines that the requested relief constitutes an attempt to benefit from hindsight rather than to achieve the result the transferor intended at the time when the transfer was made. Similarly, Proposed Regulation section 26.2642-7(d)(3)(ii) provides that the Government's interests would be prejudiced if the transferor "delayed the filing of the request for relief with the intent to deprive the Service of sufficient time to challenge the claimed identity of the transferor of the transferred property that is the subject of the request for relief, the value of that transferred property for Federal gift or estate tax purposes, or any other aspect of the transfer that is relevant for Federal gift or estate tax purposes." We suggest that these factors based on the transferor's subjective intentions should be moved to Proposed Regulation section 26.2642-7(d)(2), requiring that the transferor acted in good faith.

While we agree that purposely delaying the filing of a request for relief under section 2642(g) until a period of limitations has expired demonstrates bad faith and could prejudice the Government's interests, the failure to make a timely election never prejudices the Government's interests because such failures are always inadvertent if the taxpayer is acting in good faith. 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. No rational return preparer would conclude that a failure to allocate GST exemption would decrease the risk of an audit. Thus, if the taxpayer is concerned about a possible audit because an increase in value may occur, the taxpayer never secures any advantage by foregoing a timely allocation of GST exemption. In fact, if the return preparer believes that the reported value disclosed on the gift tax return is at the low end of the valuation range, it is advantageous to allocate GST exemption because an audit may not occur. In that event, the return preparer secures no advantage in failing to allocate, but gains exposure to adverse GST tax consequences and malpractice liability by failing to allocate timely. Accordingly, the requirement that the taxpayer act in good faith adequately protects against abuse.

Proposed Regulation section 26.2642-7(d)(3)(i) also states that the Government's interests would be prejudiced if "relief would permit an economic advantage or other benefit that results from the selection of one out of a number of alternatives (*other than whether or not to make an allocation or election*) that were available at the time the allocation or election could have been timely made" (emphasis added) if the benefit of hindsight improves the resulting

outcome. This language is vague and its literal terms could encompass a broad scope of circumstances in which relief should be appropriate. Accordingly, we suggest clarification of the types of situations that this provision contemplates, perhaps through examples, to facilitate and encourage compliance with its terms, and to discourage abuse.

We appreciate that the Proposed Regulations attempt to clarify that the expiration of a period of limitations on the assessment or collection of transfer taxes prior to the request for Section 2642 relief or the application of a discount in valuation of the property for transfer tax purposes, separately or in combination together, will not, by itself, prohibit a grant of relief.¹⁴ The Proposed Regulations, however, are not clear regarding the relevance of these two factors in determining whether to grant Section 2642 relief.

Although the Proposed Regulations state that the application of a valuation discount should not *by itself* prohibit a grant of relief, the Proposed Regulations imply that the application of a valuation discount to the subject property for transfer tax purposes could be considered when determining whether to grant relief. Considering the application of a valuation discount as a factor, even if it is not sufficient on its own to disqualify a request for relief, implies that a taxpayer who values property using a valuation discount somehow prejudices the Government or acts in bad faith. Courts have routinely held that valuation discounts are appropriate in a variety of circumstances. The application of valuation discounts consistent with established methods of valuation does not demonstrate a taxpayer's bad faith or prejudice the Government and should not be a consideration, even in combination with other factors, in determining whether relief should be granted under section 2642(g)(1).

Similarly, the Proposed Regulations state that the expiration of a period of limitations *by itself* will not prohibit a grant of relief. Again, this implies that the expiration of a period of limitations can be a consideration even if not the sole reason for denying relief. The legislative history of section 2642(g)(1), however, is clear that the expiration of a period of limitations should be irrelevant when determining whether relief should be granted under section 2642(g)(1). For example, 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*.¹⁵ (Emphasis added.)

This legislative history clearly establishes Congress's intent that the Service should disregard the expiration of *any* statute of limitations in considering requests Section 2642 relief. Contrary to this Congressional directive, the Proposed Regulations include the expiration of a period of limitations as a factor in considering requests for relief.

¹⁴ See Prop. Reg. § 26.2642-7(d)(3)(ii).

¹⁵ Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 107th Congress (JCS-1-03), January 24, 2003, at p. 81

The statute of limitations for GST tax purposes almost never will have expired before the transferor seeks Section 2642 relief, 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 transferor seeks such relief, because the Service has not been prejudiced with regard to the GST tax election by the expiration of the gift tax statute.

Proposed Regulation section 26.2642-7(d)(3)(iii) states that the interests of the Government may be prejudiced “if a taxable termination or taxable distribution occurred between the time for making a timely allocation of GST exemption or a timely election described in section 2632(b)(3) or (c)(5) and the time at which the request for relief under this section was filed.” We strongly believe that the occurrence of a taxable event before relief is requested should be irrelevant when the period of limitations on assessment of resulting GST tax has not expired when the request for such relief is filed. In such instances, the Government maintains the ability to recover any applicable GST tax and is not prejudiced at all by the request for Section 2642 relief. Accordingly, we suggest that, at a minimum, Proposed Regulation section 26.2642-7(d)(3)(iii) as adopted in the final regulations should not apply when the period of limitations on assessment of resulting GST tax has not expired when such relief is requested.

In addition, we believe that the occurrence of a taxable event before relief is requested should be entirely irrelevant, regardless of whether the period of limitations on assessment of resulting GST tax has expired. We believe Congress intended that the standard to obtain Section 2642 relief should be at least as broad as the 9100 relief standard. We know of no policy or regulation that restricts the granting of 9100 relief because a tax would be reduced or eliminated by the grant of such relief. In fact, the grant of 9100 relief often reduces or eliminates a tax that otherwise is owed at the time relief is requested.

For example, relief has been granted repeatedly to allow a late QTIP election for a decedent, which when granted, eliminates the estate tax that is already owed on the decedent’s estate tax return at the time relief was requested.¹⁶ A grant of 9100 relief also has reduced or eliminated an estate tax already due for a late QDOT election, alternate valuation date election, and special use valuation, and has allowed a GST tax already due to be eliminated by allowing a late election under Regulations section 26.2652-2(c).¹⁷ Furthermore, a grant of relief in the income tax area commonly reduces or eliminates a tax that otherwise would be due with the return on which the election was missed. By treating an intervening GST taxable event as prejudicial to the interests of the Government, relief under the Proposed Regulations is more restrictive than 9100 relief if the statute of limitations has not expired for the GST taxable transfer. Whether or not a GST taxable event has occurred prior to the submission of a request should be irrelevant if the transferor merely seeks to achieve the same tax consequences that would have resulted if the transferor had timely allocated GST exemption or timely made GST

¹⁶ See, e.g., PLR 200125012 (June 22, 2001), PLR 200117007 (April 27, 2001), PLR 200112009 (March 23, 2001), PLR 200026007 (June 30, 2000).

¹⁷ See, e.g., PLR 200712010 (March 23, 2007), PLR 200448027 (November 26, 2004), PLR 200420010 (May 14, 2004), PLR 200211021 (March 15, 2002), PLR 200146015 (November 16, 2001), PLR 200021021 (May 25, 2000), PLR 9612010 (March 22, 1996).

elections as intended. In such cases, the Government's interests cannot be prejudiced by granting relief because the Government does not lose tax revenue. Instead, granting relief simply puts the taxpayer in the same place the taxpayer would have been if the allocation had been timely.

More specifically, if a taxable termination or taxable distribution occurs prior to the submission of a request for Section 2642 relief, the potential results regarding GST tax liability demonstrate that the occurrence of such taxable event should not be considered in determining whether to grant relief. If the taxpayer paid any resulting GST tax due and the period of limitations for claiming a refund of such tax has not expired, the taxpayer can apply for a refund of such tax paid if the request for Section 2642 relief is granted. A taxpayer may pay the GST tax due upon the GST taxable event even when the taxpayer is aware of the need to request Section 2642 relief but did not recognize the necessity of such relief or could not obtain relief in time to avoid the taxable event. The ultimate elimination of a GST tax liability because the request for such relief is granted merely reproduces the result that the taxpayer would have achieved if the transferor had allocated GST exemption or made the GST election as originally intended.¹⁸ Similarly, if the taxpayer paid no GST tax upon the occurrence of the taxable distribution or taxable termination and the tax liability is eliminated because Section 2642 relief is granted to effectuate the transferor's original intention, then such relief merely restores the results that the transferor originally intended. Finally, Section 2642 relief would be unavailable if the transferor never intended to allocate GST exemption to the original transfer because the request would lack the required substantiation of the transferor's original intention to allocate and the elements of reasonableness and good faith. Thus, the Government's interests are not prejudiced by the occurrence of a taxable distribution or taxable termination prior to submission of a request for Section 2642 relief.

Moreover, transferors often become aware for the first time that Section 2642 relief is necessary when a GST occurs that causes the transferor or her advisors to review its GST tax consequences. In many cases, it may be a mere matter of chance due to events beyond the transferor's control as to whether or when a GST occurs. Accordingly, whether a GST taxable event has already occurred should not be a factor in determining whether relief is appropriate under section 2642(g)(1). Many requests for such relief may be denied if the Service treats the occurrence of a GST before submission of the request as prejudicial to the Government's interests, contrary to Congress's intent to provide Section 2642 relief that should be at least as broad as the current 9100 relief standard.

In addition, Proposed Regulation section 26.2642-7(d)(3)(iii) also notes that the difficulty of adjusting the GST tax consequences of the intervening termination or distribution will be considered in determining whether such GST constitutes prejudice. The difficulty associated

¹⁸ In some cases, prior to enactment of section 2642(g)(1), taxpayers attempted to ameliorate the effect of failures to properly allocate GST exemption to their original transfers by making late allocations of GST exemption. The Service has granted Section 2642 relief to such taxpayers with respect to those original transfers, and the superfluous late allocations became void to the extent they would allocate more GST exemption than necessary to produce inclusion ratios of zero. *See* Reg. § 26.2632-1(b)(2)(i); PLR 200407003 (February 13, 2004), PLR 200301027 (January 03, 2003), PLR 200241040 (October 11, 2002). Similarly, the fact that the grant of Section 2642 relief might eliminate a taxable distribution or taxable termination that otherwise would occur should not be considered in determining whether such relief should be granted.

with correcting an inadvertent failure to allocate GST exemption or make a GST election should be irrelevant for purposes of determining whether Section 2642 relief is appropriate. Congress enacted section 2642(g)(1) because of the very fact that the complexity of the GST tax rules has ensnared many unwitting practitioners with unusually costly results due to the high rate of GST tax. The cases with the greatest GST tax consequences are likely to be those that are in greatest need of Section 2642 relief. Thus, contrary to Congress's intent, many requests for Section 2642 relief may be denied if difficulty of adjusting GST tax consequences of intervening GSTs is treated as prejudicial to the Government. Moreover, we know of no policy or practice of requiring this factor to be considered to obtain general relief with respect to most other tax elections for which 9100 relief is available. Similarly, this factor should not preclude Section 2642 relief since Congress intended that the standard to obtain such relief should be at least as broad as the 9100 relief standard.

For these reasons, we suggest the elimination of entire Proposed Regulation section 26.2642-7(d)(3)(iii) from the final regulations and, instead, the addition of a sentence or example clarifying the fact that a GST tax otherwise would be due is not a relevant factor. If the final regulations adopt Proposed Regulation section 26.2642-7(d)(3)(iii), then we suggest that the final regulations at least provide transferors with the option to pay the GST tax resulting from the taxable termination or taxable distribution occurring prior to submission of the request for relief, or to forfeit any refund of GST tax to which the transferor otherwise would be entitled upon the grant of relief, such that the taxable event will not be treated as prejudicial to the Government's interests.

D. Denial of Relief: Situations Where the Standards of Reasonableness, Good Faith and Lack of Prejudice to the Interests of the Government Have Not Been Met.

Proposed Regulation section 26.2642-7(e)(1) states: "Relief will not be granted under this section to decrease or revoke a timely allocation of GST exemption as described in §26.2632-1(b)(4)(ii)(A)(1), or to revoke an election under section 2632(b)(3) or (c)(5) made on a timely filed Federal gift or estate tax return." Regulations section 26.2632-1(b)(4)(ii)(A)(1) addresses affirmative allocations of GST exemption to lifetime gifts, and section 2632(b)(3) or (c)(5) address GST elections with respect to lifetime gifts. This Proposed Regulation does not refer to transfers at death expressly or by reference to relevant Code sections or Regulations. While this Proposed Regulation does reference estate tax returns, such reference might mean allocations of GST exemption or GST elections that executors may make with respect to the transferor's lifetime gifts on the transferor's estate tax return. Thus, it is unclear whether this provision encompasses allocations of GST exemption or GST elections with respect to transfers at death. We suggest that the regulations, when finalized, clarify whether this provision includes any transfers at death.

If Proposed Regulation section 26.2642-7(e)(1) is clarified to include any transfer at death, then transfers reported on federal estate tax returns where death occurred prior to 2001 should be excluded from those for which relief is barred under Proposed Regulation section 26.2642-7(e)(1). As noted above, prior to enactment of section 2642(g)(1), effective as of December 31, 2000, no statute, regulation, or Service rule authorized extensions of time to allocate GST exemption or to elect out of deemed allocations to direct skips. An executor of a transferor's estate had to decide whether to allocate GST exemption or elect out of automatic

allocations to direct skips on a federal estate tax return for decedents dying before 2001, without knowing that relief described in section 2642(g)(1) later would become available. An executor generally made such affirmative allocations or elections because the automatic allocation rules of section 2632(e) otherwise would apply to determine the final allocation of the transferor's GST exemption. In many cases, such automatic allocations would produce results less optimal than results the executor could achieve with affirmative allocations or elections out of allocations to direct skips. Thus, an executor striving to fulfill applicable fiduciary duties to the estate beneficiaries often would make such affirmative allocations or elections as to transfers occurring at death. In such cases, the executor may not have been required to make such allocations or GST elections at all, or may have made them differently, if at that time, Section 2642 relief had been available. Accordingly, if transfers at death will be covered by Proposed Regulation section 26.2642-7(e)(1) we suggest that the regulations, when finalized, should not apply to bar relief for transfers at death reported on federal estate tax returns with respect to decedents dying before 2001.

In addition, a taxpayer may request Section 2642 relief for a transfer ("Transfer 1") that occurred prior to a subsequent transfer ("Transfer 2") where a timely allocation of GST exemption or timely GST election was made with respect to Transfer 2. If relief is granted with respect to Transfer 1, the later timely allocation to Transfer 2 could be reduced or eliminated if the now timely allocation to Transfer 1 uses enough GST exemption of the transferor that there is insufficient exemption remaining to effect the allocation originally reported for Transfer 2.¹⁹ Such reduction or effective elimination of a subsequent timely allocation or election merely results from the operation of the GST tax rules that would have applied if the taxpayer had made the allocation or election originally intended. However, Proposed Regulation section 26.2642-7(e)(1) might be construed to prohibit the grant of Section 2642 relief in those circumstances. Therefore, we suggest that the regulations, when finalized, clarify that the effect of Section 2642 relief on timely allocations or GST elections that occurred subsequent to the transfer as to which relief is requested is not a relevant consideration in determining whether relief should be granted. Relief with respect to Transfer 1 in such case could be conditioned on payment of any GST tax due, including interest, if the inclusion ratio with respect to Transfer 2, or the trust to which it was made, were increased due to the grant of relief for Transfer 1.

Proposed Regulation section 26.2642-7(e)(4) emphasizes that no relief will be granted if the request "is an attempt to benefit from hindsight rather than an attempt to achieve the result the transferor or the executor of the transferor's estate intended when the transfer was made." We agree that such requests should be denied, but we are concerned that some of the factors described as relevant to this determination are too broad and will include many circumstances in which relief should be granted. The Proposed Regulations continue:

One factor that will be relevant to this determination is whether the grant of relief will give the transferor the benefit of hindsight by providing an economic advantage that may not have been available if the allocation or election had been timely made. Thus, relief will not be granted if that relief will shift GST exemption from one trust to another trust

¹⁹ The allocation to Transfer 2 cannot become void pursuant to Reg. § 26.2632-1(b)(2)(i) because, by definition, for the allocation to Transfer 2 to be timely, a second transfer must have occurred. Thus even if Transfer 2 is to the same trust as Transfer 1, and the relief granted gave that trust an inclusion ratio of 0 after Transfer 1, the subsequent Transfer 2 to the same trust means that an additional allocation to the same trust would not be void.

unless the beneficiaries of the two trusts, and their respective interests in those trusts, are the same.

The term “economic advantage” is vague, and the scope of circumstances that the drafters of this provision intend is unclear. For example, a transferor typically seeks Section 2642 relief to implement the allocation of GST exemption or GST election that was originally intended, which likely will reduce or eliminate the probability of taxable GSTs occurring in the future. Of course, this result provides an “economic advantage” by reducing potential taxes overall, but a reduction in taxes is the whole point of seeking relief. No taxpayer would ask for permission to make an election late if the taxpayer believes that the result will be to increase taxes.

The particular example of shifts in GST exemption between trusts with different beneficiaries also may be overbroad. Different trusts rarely share exactly identical terms, and so two different trusts are highly unlikely to share the exact same identity of beneficiaries or beneficial interests. Further, an extension of time (i) to elect out of an automatic allocation to an indirect skip or (ii) to make a timely election at death that, therefore, negates an automatic allocation at death, would often cause the use of the GST exemption to shift between trusts where there might be differing beneficial interests. If construed narrowly, this provision likely will eliminate the utility of section 2642(g)(1) in the majority of cases where relief is appropriate, contrary to Congress’s intent to provide liberal relief. Moreover, this Proposed Regulation properly states the fundamental standard for granting relief based on the transferor’s original intention. Thus, any resulting economic advantage or shift in GST exemption among trusts should not preclude a grant of Section 2642 relief if the transferor seeks merely to achieve the result that was originally intended when the transfer is made. For these reasons, we suggest that the final regulations limit this provision to focus on whether the relief will produce the results that the transferor originally intended.

E. Procedural Requirements.

Proposed Regulation section 26.2642-7(h) provides that affidavits and declarations must be submitted from the transferor (or the executor of the transferor’s estate), and individuals who have knowledge or information about the events that led to the failure to allocate GST exemption or make a GST tax election and/or the discovery of the failure. Such individuals “must” include each agent or legal representative who participated in the transaction or in the preparation of the return, the preparer of the relevant gift or estate tax return, each individual who made a substantial contribution to the preparation of the relevant Federal estate or gift tax return, and each “tax professional” who advised or was consulted by the transferor or the transferor’s estate with respect to “any aspect of the transfer, the trust, the allocation of GST exemption and/or the election under section 2632(b)(3) or (c)(5).” This requirement for multiple affidavits and declarations is more burdensome than the affidavit requirement under Regulations section 301.9100-3(e)(3), which requires affidavits from a much more limited group of individuals. These more burdensome requirements for relief under Proposed Regulation section 26.2642-7(h) are inconsistent with the statutory mandate in section 2642(g)(1) to promulgate regulations under which extensions of time will be granted to make late allocations of GST exemption and/or the make the election under section 2643(b)(3) or (c)(5).

For example, under the Proposed Regulations, the taxpayer must provide an affidavit from each tax professional who advised or was consulted by the transferor or the executor with regard to “any aspect of the transfer, the trust, the allocation of GST exemption, and/or the election under section 2632(b)(3) or (c)(5).” Under Regulations section 301.9100-3(e)(3), that requirement only applies to an accountant or an attorney “who made a substantial contribution to the return . . . or who advised the taxpayer with respect to the election” and/or had knowledge or information about the discovery of the failure. The affidavit and declaration requirements in the GST area should be no more burdensome than those required with respect to all other regulatory elections under the regulations describing criteria for 9100 relief. Accordingly, we suggest that the final regulations revise Proposed Regulation section 26.2642-7(h) to conform to the regulations describing the affidavits and declarations required for 9100 relief.

We applaud the language prescribed for the declarations under Proposed Regulation sections 26.2642-7(h)(2)(iii) and (h)(3)(iv). It is appropriate that the individuals who sign affidavits attest only to their own affidavit and attachments, and not the entire ruling request, which would likely include information about which the affiants have no information. In addition, it is not unusual for two individuals who were involved in the making of an election in the GST area to have differing views of the facts, both of which cannot be true. The Proposed Regulations reflect the understanding that it makes no sense for each of them to be required to attest to the veracity of the other affidavits.

The requirement in Proposed Regulation section 26.2642-7(h)(3)(iii) that the affiant must include copies of “*any* writing (including, without limitation, notes and e-mails) and other contemporaneous documents within the possession of the affiant relevant to the transferor’s intent with regard to the application of GST tax to the transaction for which relief is being requested” (emphasis added) is overly burdensome and represents another deviation from what is required for 9100 relief in all other areas. If this requirement is retained, it also needs to be clarified. Specifically, a lawyer or an accountant should not be deemed to “possess” any documents in the possession of his or her law firm or accounting firm. While it would be reasonable to require a diligent search of the firm’s records, there could be documents in the possession of another accountant or attorney in the same firm that would not be discovered in a diligent search. We suggest that the final regulations clarify this provision to acknowledge that documents that the affiant discovers after conducting a reasonably diligent search of records in the affiant’s possession or subject to the affiant’s control in good faith should be sufficient to satisfy this requirement to produce relevant writings. We further suggest that the final regulations also should allow the redaction of non-relevant information from the writings (including notes and e-mails) provided to comply with Proposed Regulation section 26.2642-7(h)(2)(ii) and (h)(3)(iii).

In addition, Proposed Regulation section 26.2642-7(h)(3)(v) provides that if a person with knowledge or information about the events who would ordinarily be required to provide an affidavit under Proposed Regulation section 26.2642-7(h)(3)(i) has died or is not competent, the transferor or the executor of the transferor’s estate “must include a statement to that effect, as well as a statement describing the relationship between that individual and the transferor or the executor of the transferor’s estate and the information or knowledge the transferor or the executor of the transferor’s estate believes that individual had about the transfer, the trust, the allocation of exemption, or the election.” While a person’s death typically is relatively easy to confirm, his or

her competency is not. Many people who are not competent have not been formally declared incompetent by any judicial, medical or other authority. It would be inappropriate to require the transferor (or the transferor's executor) to determine and attest to an advisor's incompetency; in fact, medical privacy laws may prohibit those persons from seeking or obtaining information regarding an advisor's mental competency. Moreover, in addition to death and incompetency, we note that a person who might be required to provide an affidavit under Proposed Regulation section 26.2642-7(h)(3)(i) may be unable to do so because of serious physical illness or other physical impairment. Thus, we suggest that the final regulations provide that the transferor or the executor of the transferor's estate may satisfy the requirements of Proposed Regulation section 26.2642-7(h)(3)(v) with a statement that such transferor or executor could not obtain the affidavit required under Proposed Regulation section 26.2642-7(h)(3)(i) despite best efforts in good faith to obtain the affidavit and a statement of the reason why such affidavit could not be obtained to the best of the transferor's (or executor's) knowledge and belief.

Furthermore, it should be apparent that in many cases, much of the information requested in Proposed Regulation section 26.2642-7(h)(3)(v) simply will not be available if the advisor is incompetent or deceased. The requirements of that paragraph should be satisfied if the transferor or the transferor's executor responds with information that is within her knowledge or the knowledge of any other available advisors with respect to the information described in that paragraph. Accordingly, we suggest that the final regulations delete the provisions of Proposed Regulation section 26.2642-7(h)(3)(v).