

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:
(202) 622-7830
Refer Reply To:
CC:PSI:B9 / PLR-100859-02
Date:
May 8, 2002

Re:

LEGEND

- Decedent =
- Spouse =
- State =
- Revocable Trust =
- Date 1 =
- Date 2 =
- Date 3 =
- Children =
- Date 4 =
- \$x =
- \$y =

Dear

This responds to your letter dated December 6, 2001, and subsequent correspondence, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a qualified terminable interest property (“QTIP”) election under § 2056(b)(7) of the Internal Revenue Code and a “reverse” QTIP election under § 2652(a)(3).

The facts and representations submitted are summarized as follows: Decedent and Spouse, both residents of State, created Revocable Trust on Date 1. Decedent and Spouse amended and restated Revocable Trust in its entirety on Date 2.

Decedent died testate on Date 3, survived by Spouse and Children. Pursuant to Decedent’s Last Will and Testament, the Decedent’s estate passed to Spouse as the surviving trustee of Revocable Trust.

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Revocable Trust provides that upon Decedent's death, the trustee shall divide the trust estate into three separate shares designated as the Exemption Trust, the Marital Trust and the Survivor's Trust.

Article 4.02.3 of Revocable Trust provides that the Exemption Trust shall consist of a pecuniary amount equal to the maximum amount that can be allocated to a trust that does not qualify for the federal estate tax marital or charitable deduction to any extent, without producing any federal estate tax.

Article 4.02.4 provides that the Marital Trust shall consist of a pecuniary amount, which, when added to the amount set aside in the Exemption Trust, equals the amount of the generation-skipping transfer ("GST") tax exemption available to the Decedent under Internal Revenue Code § 2631.

Article 4.02.5 provides that the Survivor's Trust shall consist of: Spouse's separate property that is a part of the trust estate; Spouse's interest in Decedent's and Spouse's community property included in or added to the trust estate; and Decedent's separate property and interest in community property not allocated to the Exemption Trust or the Marital Trust.

Article 4.03.1 provides that the trustee shall distribute the entire net income of the Survivor's Trust to Spouse during Spouse's lifetime, in convenient installments, at least annually.

Article 4.03.3 provides that the trustee may pay to or apply for the benefit of Spouse as much of the principal of the Survivor's Trust as the trustee considers necessary for Spouse's health, education, support and maintenance in accordance with Spouse's standard of living on the death of Decedent. Article 4.03.3 further provides that Spouse shall have the right from time to time to direct the trustee to pay Spouse such amounts of principal of the Survivor's Trust, up to the whole thereof, as Spouse may designate.

Article 4.03.7 provides that after Spouse's death, the trustee shall distribute any remaining balance of the Survivor's Trust, including principal and accrued or undistributed income to one or more persons and entities, including Spouse's estate, Spouse's creditors or the creditors of Spouse's estate, on any terms and conditions, either outright or in trust, in present and future interest, or any combination thereof, and in any proportion that Spouse shall appoint by submitting written instructions to the trustee expressly exercising such power or by Spouse's will or codicil specifically referring to and exercising such power of appointment.

In addition to the foregoing, Article 3.03 provides that after Decedent's death, Spouse may amend, revoke or terminate the Survivor's Trust.

Article 4.04.1 provides that the trustee shall distribute the entire net income of the Marital Trust to Spouse during Spouse's lifetime, in convenient installments, at least

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annually. Article 4.04.1 further provides that no person shall have the power to appoint any part of the trust property to any person other than Spouse.

Article 4.04.2 provides that the trustee may pay to or apply for the benefit of Spouse as much of the principal of the Marital Trust as the trustee considers necessary for Spouse's health, education, support and maintenance in accordance with Spouse's standard of living on the death of Decedent. This section further provides that in exercising discretion, the trustee shall take into consideration other income or resources of Spouse held free of the Marital Trust.

Article 4.04.3 provides that no person has the power to appoint any part of the trust property of the Marital Trust during Spouse's lifetime to any person other than Spouse. However, upon the death of Spouse, the trustee shall distribute or retain and administer the Marital Trust as Spouse may appoint by her Last Will and Testament, or a Codicil thereto, to or for the benefit of any one or more of Decedent's issue.

Article 4.04.4 provides, in part, that upon Spouse's death, the then remaining balance of the Marital Trust, to whatever extent it has not been appointed pursuant to Spouse's power of appointment created in Article 4.04.3, shall be added to and administered as part of the Exemption Trust.

According to the information submitted, following Decedent's death the attorney for Decedent's estate prepared the Form 706, Estate (and Generation-Skipping Transfer) Tax Return.

You now request the following rulings:

- (1) An extension of time under §§ 301.9100-1 and 301.9100-3 to make a QTIP election under § 2056(b)(7) with respect to the Marital Trust; and
- (2) An extension of time under §§ 301.9100-1 and 301.9100-3 to make a "reverse" QTIP election under § 2652(a)(3) with respect to the Marital Trust.

Section 2001(a) of the Code imposes a tax on the transfer of the taxable estate of every decedent who is a resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse.

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Section 2056(b)(1) provides, in pertinent part, that no deduction shall be allowed under § 2056(a) where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail.

Section 2056(b)(5) provides that, in the case of a property interest passing from the decedent, if the surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse - (A) the interest or such portion thereof so passing shall, for purposes of § 2056(a), be considered as passing to the surviving spouse, and (B) no part of the interest so passing shall, for purposes of § 2056(b)(1)(A), be considered as passing to any person other than the surviving spouse. These provisions shall apply only if such power in the surviving spouse to appoint the entire interest or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, the entire property is treated as passing to the surviving spouse for purposes of § 2056(a), and no part of such property shall be treated as passing to any person other than the surviving spouse for purposes of § 2056(b)(1)(A).

Section 2056(b)(7)(B)(i) provides that the term "qualified terminable interest property" means property: (i) which passes from the decedent; (ii) in which the surviving spouse has a qualifying income interest for life; and (iii) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides, in relevant part, that the surviving spouse will be considered to have a qualifying income interest for life if: (1) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, and (2) no person, including the surviving spouse, has a power to appoint any part of the property to any person other than the surviving spouse during the surviving spouse's lifetime.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that, in general, the election referred to in §§ 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001 (or § 2101). For purposes of this paragraph, the term "return of tax imposed by § 2001" means the last estate tax return filed by the executor on or

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before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Under § 2044, any property in which the decedent had a qualifying income interest for life and for which a deduction is allowed under § 2056(b)(7) is includible in the decedent's gross estate.

Section 2044(c) provides that for purposes of chapter 11 and chapter 13, property includible in the decedent's gross estate under § 2044 (a) shall be treated as property passing from the decedent.

Section 2601 imposes a tax on every generation-skipping transfer.

Section 2611(a) provides that the term "generation-skipping transfer" means: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2632(a)(1) 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(e)(1) provides that, in general, any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows— (A) first, to property which is the subject of a direct skip occurring at such individual's death, and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after such individual's death.

Section 2652(a)(1) provides, in pertinent part, that for purposes of chapter 13, the term "transferor" means— (A) in the case of any property subject to the tax imposed by chapter 11, the decedent, and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides that in the case of— (A) any trust with respect to which a deduction is allowed to the decedent under § 2056 by reason of subsection (b)(7) thereof, and (B) any trust with respect to which a deduction to the donor spouse is allowed under § 2523 by reason of subsection (f) thereof, the estate of the decedent or the donor spouse, as the case may be, may elect to treat all of the property in such

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trust for purposes of this chapter as if the election to be treated as qualified terminable interest property had not been made.

Section 26.2632-1(d)(2) of the Generation-Skipping Transfer Tax Regulations provides, in pertinent part, that no automatic allocation of GST exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the new trust.

Section 26.2652-2(b) provides that a “reverse” QTIP election is made on the return on which the QTIP election is made.

Under § 301.9100-1(c) the Commissioner may grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I.

Section 301.9100-2 provides an automatic extension of time for making certain elections.

Section 301.9100-3(a) provides that, in general, requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3. Requests for relief subject to § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based on the facts submitted and the representations made, the Marital Trust qualifies for the QTIP election under § 2056(b)(7) because Spouse is entitled to all the income from the trust property, payable annually, and no person, including Spouse, has a power to appoint any part of the property to any person other than Spouse during Spouse's lifetime. The Survivor's Trust qualifies for the marital deduction under § 2056(b)(5) because Spouse is entitled to all the income from the trust property, payable annually, and Spouse may appoint the entire interest of the trust, with no power in any other person to appoint any part of the interest to any person other than Spouse.

We conclude that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government. Also, we grant an extension of time until 60 days from the date of this letter for (i) funding the Marital Trust and making the QTIP election under section 2056(b)(7) with respect to the Marital Trust;

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and (ii) making a reverse QTIP election under section 2652(a)(3) with respect to the Marital Trust. These elections should be made on a supplemental Form 706 filed with the Cincinnati Service Center. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for that purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter. We note, however, that an extension of time to make the "reverse" QTIP election under § 2652(a)(3) does not extend the time to allocate any of Decedent's remaining GST exemption. In the instant case, no allocation of Decedent's GST exemption was made on Decedent's estate tax return. Accordingly, in view of the "reverse" QTIP election, Decedent's GST exemption is allocated as follows: \$x to the Marital Trust and \$y to the Exemption Trust.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,
Paul F. Kugler
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure

Copy of this letter
Copy for 6110 purposes