

Internal Revenue Service

Department of the Treasury

Number: **200336014**
Release Date: 09/05/2003
Index Number: 2056-07.01

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4-PLR-164865-02
Date:

Re:

MAY 30, 2003

LEGEND:

- Decedent =
- Spouse =
- Executor =
- Trust =
- Spouse's Trust =
- Marital Trust =

- Family Trust =
- Residence Property =

- County =
- x properties =
- Date 1 =
- Date 2 =
- Date 3 =

Dear :

This is in response to your representative's letter of October 11, 2002, requesting an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make a qualified terminable interest property election under § 2056(b)(7) with respect to the portion of the Residence Property held by Decedent at his death.

The facts submitted state that, on Date 1, Decedent executed Trust, a revocable trust to be held for his benefit during his life. At the same time, Spouse created Spouse's Trust for her own benefit. Decedent's will, also executed on Date 1, provides that the residue of his estate (i.e., all property other than tangible personal property) is to pass to Trust at his death.

Under Article VIII of Trust, on Decedent's death, the trustee is to divide the Trust

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property into the Marital Trust (as described in Article VIII of Trust) and the Family Trust (as described in Article X of Trust). The Marital Trust satisfies the requirements for a marital deduction as qualified terminable interest property under § 2056(b)(7).

Under Article VIII, Paragraphs A and B, only assets that qualify for the marital deduction may be used to fund the Marital Trust. The Marital Trust is to be funded with property equal in value to the maximum allowable marital deduction, reduced by an amount if any, needed to increase Decedent's taxable estate to the largest amount which, after allowing for the unified credit and credit for state death taxes, will result in no federal estate tax being payable. The remaining Trust property is to be distributed to the Family Trust.

As of Date 1, Decedent was the sole owner of the Residence Property. On Date 2, shortly after Date 1, Decedent attempted to transfer the ownership of the Residence Property to Spouse's Trust. He forwarded to his attorney a copy of a deed presumably containing a legal description of the entire property. The attorney used this legal description in preparing the new deed, which was executed by Decedent. After the transfer, Spouse's Trust annually received a single County property tax bill for the entire Residence Property.

After Decedent died on Date 3, Executor engaged an experienced certified public accountant to prepare the federal estate tax return (Form 706) for Decedent's estate and an attorney specializing in estate planning and probate matters to represent the estate. Executor was appointed the trustee of the Marital Trust and the Family Trust pursuant to the terms of Trust.

Executor filed the estate tax return and included a supplemental schedule listing the assets (i.e., x properties) comprising the Family Trust. On Schedule M of the return, Executor listed the assets qualifying for the marital deduction, including the assets passing to the Marital Trust. Executor attached a supplemental schedule specifically identifying the assets passing to the Marital Trust and indicating that a marital deduction was being claimed for 100% of the value of the Marital Trust, determined based on the assets listed as passing to the Marital Trust.

The instructions on Schedule M of Form 706 filed by the estate provide that if a trust satisfies the requirements of § 2056(b)(7), and the trust or other property is listed on Schedule M, and a deduction is claimed for the value of the trust, then the executor is deemed to have made the election under § 2056(b)(7) to have the property treated as qualified terminable interest property.

At the time the estate tax return was filed, it was assumed that Decedent had conveyed the entire Residence Property to Spouse's Trust on Date 2. Consequently, the Residence Property was not reported as includible in Decedent's gross estate. However, later, when the trustee of Spouse's Trust attempted to obtain mortgage financing on the Residence Property, it was discovered that the Residence Property consisted of two parcels rather than one, and Decedent had effectively conveyed only

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one of the parcels to Spouse's Trust on Date 2. The other parcel was owned by Decedent at his death and passed, under the residuary provision of Decedent's will, to the Trust. Under the formula provision of Article VIII in the Trust, the parcel passed to the Marital Trust. As the discovery was made while the estate tax return was under examination, the parcel was thereupon included in Decedent's gross estate. It is represented by affidavit that the estate's accountant, personal representative and attorney were unaware that Decedent had only conveyed a portion of the property to the Spouse's Trust.

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or 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 from the decedent to the surviving spouse.

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, and on such termination, the property passes to a person other than the surviving spouse or the spouse's estate.

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

Under § 2056(b)(7)(B)(i), the term "qualified terminable interest property" means property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under § 2056(b)(7)(B)(v) applies. Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, and no person has a power to appoint any part of the property to any person other than the surviving spouse during the surviving spouse's life.

Section 2044(a) provides that the value of the gross estate shall include the value of any property in which the decedent had a qualifying income interest for life. Section 2044(b)(2) provides that § 2044(a) applies to any property if § 2519 did not apply with respect to a disposition by the decedent of part or all of such property.

Section 301.9100-1(c) provides that the Commissioner has discretion to 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

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in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I. Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute).

In this case, based on the facts submitted and representations made, including a review of the Form 706 filed by the estate, we conclude that, on Schedule M of Form 706, Executor made the election under § 2056(b)(7) with respect to 100% of the value of the property passing to the Marital Trust, which election necessarily includes the value of the portion of the Residence Property that Decedent owned at his death and that passed to the Marital Trust under the terms of Decedent's testamentary instruments.

Accordingly, it is not necessary to address the question of whether the relief requested to make an election should be granted. Rather, the election under § 2056(b)(7) made by Executor on the estate tax return applies to the value of the portion of the Residence Property owned by Decedent at the time of his death that is included in his gross estate and that passed to the Marital Trust. Correspondingly, this portion of the Residence Property will be includible in Spouse's gross estate under § 2044.

Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the facts described above under the cited provisions or any other provisions of the Code or regulations.

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

Sincerely yours,

George Masnik
Chief, Branch 4
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
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