

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200436001**

Release Date: 9/3/04

Index Number: 2056.07-01; 9100.00-00

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:04 – PLR-101275-04

Date: APRIL 27, 2004

Re:

Legend

Decedent =
Spouse =
Trust =

Date 1 =
Date 2 =
Date 3 =
Accountant =

Dear :

This is in response to your letter, dated December 26, 2003, submitted on behalf of Decedent's estate, requesting an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a qualified terminal interest property election (QTIP election) under section 2056(b)(7)(B)(v) of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: On Date 1, Decedent and Spouse created Trust, a revocable trust. On Date 2, Decedent died testate survived by Spouse. The trustee of Trust is Spouse.

PLR-101275-04

Paragraphs 5.0 and 5.1 of Trust provides that upon the death of the first spouse, the trustee shall divide one-half of the trust estate assets, without being required to make physical segregation of the trust estate except to the extent necessary to make distribution, into shares. One share, to be known as Trust A, shall consist of that amount (referred to as the marital deduction amount) of the trust estate that will equal the maximum marital deduction allowable for federal estate tax purposes on the death of the spouse reduced by (i) the federal estate tax values as finally determined of all other property interests includable in the deceased spouse's gross estate for federal estate tax purposes that pass or have passed to the survivor under other provisions of Trust or otherwise and that qualify for the federal estate tax marital deduction and (ii) an amount necessary to increase the deceased spouse's taxable estate to the largest amount that will not result in a federal estate tax being imposed by reason of the spouse's death, after allowing for the unified credit and, to the extent it does not increase the amount of death taxes payable to any state, the credit for state death taxes, but no other credits, allowable to the deceased spouse's estate.

The trustee shall satisfy the marital deduction amount in cash or in kind, or partly in each, with assets selected by the trustee from the trust estate that qualify for the marital deduction for federal estate tax purposes. The assets so allocated in kind shall be deemed to satisfy the marital deduction amount on the basis of their value at the date or dates of distribution to Trust A.

Paragraph 5.1.1. provides that one share, to be known as Trust B, shall consist of the balance of the trust estate.

Paragraph 5.1.3. provides that the terms "gross estate", "taxable estate", "marital deduction", and "interests in property that pass or have passed", as used shall have the same meanings as they have under the estate tax provisions of the Internal Revenue Code and the Federal Estate Tax Regulations. It is the trustors' intent that Trust A qualify for the marital deduction for federal estate tax purposes under the Internal Revenue Code, that the provisions of Trust relating to Trust A, including any power, duty or discretionary authority, comply with the marital deduction provisions of the Internal Revenue Code and that they be construed to conform to that intent except as indicated below regarding the election under section 2056(b)(7)(B)(v). To the extent that any such provision cannot be construed to conform to that intent, it shall be deemed void. In no event shall the executor or the trustee take any action or have any power that will impair the marital deduction and all provisions regarding Trust A shall be interpreted to conform to the primary objective except that the trustee shall have the discretionary authority contained in Trust not to make the election under section 2056(b)(7)(B)(v).

PLR-101275-04

Paragraph 5.3.1. provides that the trustee shall pay to the surviving spouse during the spouse's lifetime the entire net income in convenient installments not less often than annually.

Paragraph 5.3.2. provides that the trustee shall pay to or apply for the benefit of the surviving spouse so much of the principal of Trust as the trustee in the trustee's absolute discretion deems necessary to maintain the surviving spouse in the spouse's accustomed manner of living so long as the spouse lives, after taking into consideration, to the extent the trustee considers advisable, any other income or resources of the surviving spouse known to the trustees.

Paragraph 5.3.3. provides that in addition, the surviving spouse shall have the right to withdraw from the principal of Trust A each calendar year an amount which shall not exceed the great of five thousand dollars or five percent of the value of Trust's principal on the last day of such calendar year. Such right shall be noncumulative and shall be exercised, if at all, by an instrument in writing executed by the surviving spouse and delivered to the trustee within the last ten calendar days of the calendar year within which the withdrawal is requested.

Paragraph 5.4. provides that on the death of the surviving spouse, the remainder shall pass into Trust B provided under the terms of Trust and administered and distributed as provided for Trust B.

Paragraph 5.5. provides that the trustee is, in the trustee's sole discretion, authorized to make or not make the election provided by section 2056(b)(7)(B)(v) to treat all or a specific portion of Trust A as qualified terminable interest property for the purpose of qualifying all or a specific portion of Trust for the federal estate tax marital deduction, recognizing that, if the trustee does not make such an election, Trust A will not qualify for such marital deduction. In exercising such discretion, the trustee may, but need not, take into account all relevant factors, including, but not limited to, the potential benefits and detriments of reducing the federal estate tax estate and increasing such tax on the estate of the surviving spouse, including the potential benefits of eliminating from the surviving spouse's gross estate such appreciation in value of the marital deduction share as may occur after death and prior to the death of the surviving spouse. This discretion of the trustee shall be absolute, notwithstanding any beneficial or adverse effect the making or not making of this election may have on the deceased spouse's estate, the surviving spouse's estate, or the beneficiaries of these estates. The trustee shall not incur personal liability for exercising or not exercising this election and the deceased spouse's estate and Trust shall hold the trustee harmless against all claims with regard to having made or not having made the election.

PLR-101275-04

Spouse engaged Accountant to prepare Form 706, Federal Estate (and Generation-Skipping Transfer) Tax Return, for Decedent's estate. When the Form 706 was filed on Date 3, no marital deduction was claimed for bequests to Decedent's spouse. No QTIP election was made on the return with respect to any property included on the return. It is represented that Accountant inadvertently failed to make, or advise Spouse to make the QTIP election.

You request an extension of time under section 301.9100-3 to make a QTIP election under section 2056(b)(7)(B)(v).

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 section 2001, the value of the taxable estate shall, except as limited by section 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

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

Section 2056(b)(7)(B)(i) defines the term "qualified terminable interest property" as 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 section 2056(b)(7) applies.

Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if: (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property; and (II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Section 2056(b)(7)(B)(v) provides that an election under section 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by

PLR-101275-04

section 2001. Such an election, once made, shall be irrevocable.

Under section 301.9100-1(c), the Commissioner may grant a reasonable extension of time under the rules set forth in sections 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, in pertinent part, that requests for extensions of time for regulatory elections that do not meet the requirements of section 301.9100-2 must be made under the rules of section 301.9100-3. Requests for relief subject to section 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) provides, in part, except as provided in section 301.9100-3(b)(3)(i) through (iii), 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.

Section 301.9100-3(c)(1) provides, in pertinent part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Based on the facts submitted and the representations made, we conclude that the requirements of section 301.9100-3 have been satisfied. Accordingly, an extension of time of 60 days from the date of this letter is granted for making the QTIP election under section 2056(b)(7). The election should be made on a supplemental Form 706 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the form. A copy is enclosed for this purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. 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.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury

PLR-101275-04

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.

In accordance with the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Heather C. Maloy
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter