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Person To Contact:
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Telephone Number:

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PLR-155263-04

Date:
June 17, 2005

LEGEND

Decedent	=
Date 1	=
Wife	=
Children	=
Trust	=
Law Firm	=
Date 2	=
<u>\$a</u>	=
Date 3	=

Dear :

This responds to your letter dated October 11, 2004, and subsequent correspondence, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to sever a trust and make a "reverse" qualified terminable interest property (QTIP) election under Internal Revenue Code § 2652(a)(3).

Decedent died testate on Date 1, survived by Wife, Children, and Children's descendants. Pursuant to Decedent's Last Will and Testament, Decedent's estate passed to the trustees of Trust.

Trust provides, generally, that upon Decedent's death, the balance of Trust remaining after certain pecuniary bequests to Wife shall be divided into a marital deduction share, known as QTIP Trust B, and a credit shelter share, known as the Family Trust.

Following Decedent's death, Wife and Children had a dispute regarding Wife's proper share of the estate. While the dispute was ongoing, the curator of Decedent's estate retained Law Firm to provide certain estate administration services, including the preparation and filing of Decedent's Form 706, United States Estate (and Generation-

Skipping Transfer) Tax Return. Law Firm also assisted the separate counsel for Wife and Children in their settlement negotiations. As part of a proposed settlement between Wife and Children, Law Firm suggested funding the Family Trust with an amount equal to Decedent's remaining GST exemption, even though the Family Trust would not have otherwise been created because Decedent had exhausted his unified credit during his lifetime.

Decedent's Form 706 was prepared by Law Firm and timely-filed on Date 2. Schedule M of the return indicated that a QTIP election was being made under § 2056(b)(7) with respect to QTIP Trust B. Law Firm, believing that the parties would eventually come to an agreement that was consistent with the proposed settlement, allocated \$a of Decedent's GST exemption to the Family Trust on Schedule R of Decedent's Form 706. Because the allocation of Decedent's GST exemption to the Family Trust exhausted Decedent's available GST exemption, no "reverse" QTIP election was made with respect to QTIP Trust B.

On Date 3, which was almost a year after Decedent's Form 706 was filed, the parties entered into a final settlement agreement. The final settlement agreement made no provision for the funding of the Family Trust.

In light of the foregoing, Decedent's estate now requests the following rulings:

1. The estate will be granted an extension of time under §§ 301.9100-1 and 301.9100-3 to sever QTIP Trust B into two shares (Exempt QTIP Trust B and Non-exempt QTIP Trust B) and to make a "reverse" QTIP election under § 2652(a)(3) with respect to Exempt QTIP Trust B.
2. The allocation of \$a of Decedent's GST exemption to assets passing to the Family Trust is null and void under § 26.2632-1(d)(1), because the Family Trust has no GST potential with respect to such transfer.
3. The automatic allocation rules of § 2632(c) will operate to cause the unused portion of Decedent's GST exemption to be allocated to QTIP Trust B.

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 or has passed from the decedent to the surviving spouse.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, the entire property shall be treated as passing to the surviving spouse for

purposes of § 2056(a), and no part of the 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) defines "qualified terminable interest property" as property: (1) which passes from the decedent, (2) in which the surviving spouse has a qualifying income interest for life, and (3) to which an election under § 2056(b)(7)(B)(v) applies.

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

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

Under § 2632(a), the allocation of the GST exemption may be made at any time on or before the date prescribed for filing the individual's estate tax return (including extensions). Under § 2632(c), any portion of an individual's GST exemption not allocated within the time prescribed in § 2632(a), is allocated automatically.

Section 2632(c)(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 the individual's death, and (B) second, to trusts with respect to which the individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after the individual's death.

Section 26.2632-1(d)(1) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of a decedent's unused GST exemption by the executor of the decedent's estate is made on the appropriate United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706 or Form 706NA) filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions actually granted (the due date)). An allocation of GST exemption to a trust is void if the allocation is made with respect to a trust that has no GST potential with respect to the transferor for whom the allocation is being made, as of the date of the transferor's death. For this purpose, a trust has GST potential even if the possibility of a GST is so remote to be negligible.

Section 26.2632-1(d)(2) supplies the method for the automatic allocation of any unused GST exemption. First, the exemption is allocated pro rata to direct skips on the basis of the value of property as finally determined for purposes of Chapter 11. The balance is then allocated pro rata, on the basis of value, to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. In the case of trusts that are not included in the gross estate, the GST exemption is allocated on the basis of the date of death value of the trust. No automatic allocation 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 trust. The automatic allocation is irrevocable.

Section 2652(a)(3) provides that in the case of any trust with respect to which a deduction is allowed to the decedent's estate under section 2056(b)(7), the estate of the decedent may elect to treat all of the property in the trust, for purposes of Chapter 13, as if the election to be treated as QTIP had not been made. This election is referred to as the "reverse" QTIP election. The consequence of a "reverse" QTIP election is that the decedent remains, for GST tax purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GST tax exemption may be allocated to the QTIP trust.

Section 26.2652-2(a) provides that the election must be made with respect to all property held in a QTIP trust. Section 26.2652-2(b) provides that a "reverse" QTIP election is made on the return on which the QTIP election is made.

Section 2642(A)(3)(A) provides, generally, that if a trust is severed in a qualified severance, the trusts resulting from such severance shall be treated as separate trusts thereafter for GST tax purposes.

Section 2642(a)(3)(B)(i) provides, generally, that for purposes of § 2642(a)(3)(A), the term "qualified severance" means the division of a single trust and the creation (by any means available under the governing instrument or under local law) of two or more trusts if the single trust was divided on a fractional basis, and the terms of the new trusts, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust.

Section 2642(a)(3)(B)(ii) provides that if a trust has an inclusion ratio of greater than zero and less than 1, a severance is a qualified severance only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before the severance. In such case, the trust receiving such fractional share shall have an inclusion ratio of zero and the other trust shall have an inclusion ratio of one.

Section 2642(a)(3)(B)(iii) provides that the term "qualified severance" includes any other severance permitted under regulations prescribed by the Secretary.

Section 2642(a)(3)(C) provides that a severance pursuant to this paragraph may be made at any time. The Secretary shall prescribe by forms or regulations the manner in which the qualified severance shall be reported to the IRS.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time 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 Internal Revenue Code except Subtitles E, G, H, and I.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. § 301.9100-1(a).

Section 301.9100-2 provides automatic extensions 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 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(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

In this case, since a QTIP election was made on the Form 706, the assets of QTIP Trust B are currently includible in Wife's gross estate pursuant to § 2044. In addition, Wife is considered the transferor of such property for GST tax purposes, thereby initially precluding the allocation of any of Decedent's GST exemption to QTIP Trust B. However, if QTIP Trust B is severed into a GST Exempt Trust and a GST Non-exempt Trust in accordance with § 2642(a)(3) and Decedent's estate is granted an extension of time to make a "reverse" QTIP election under § 2652(a)(3) with respect to the assets of the GST Exempt Trust, Decedent will be treated as the transferor of those assets for GST tax purposes. Further, if the allocation of Decedent's GST exemption to the Family Trust made on Schedule R of Decedent's Form 706 is deemed void, the automatic allocation rules set forth in § 2632(e) will operate to allocate Decedent's remaining GST exemption to the Exempt QTIP Trust B.

Based on the facts submitted and representations made in this case, we conclude that the allocation of Decedent's GST exemption to assets passing to the Family Trust is null and void under § 26.2632-1(d)(1) because, at the time of Decedent's death, the Family Trust had no GST potential. In addition, we conclude that the standards of §§ 301.9100-1 and 301.9100-3 have been satisfied. Accordingly, we grant Decedent's estate an extension of time of 60 days from the date of this letter to sever QTIP Trust B into the Exempt QTIP Trust B and the Non-exempt QTIP Trust B and to make a "reverse" QTIP election under § 2652(a)(3). Once the "reverse" QTIP election is made, § 2632(e) will operate to allocate Decedent's remaining GST exemption to the Exempt QTIP Trust B. The election should be made on a supplemental Form 706. The

supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the return. A copy is enclosed for this purpose.

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.

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.

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

Sincerely,

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

Enclosures

Copy of letter

Copy for 6110 purposes

cc: