

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:P&SI:7-PLR-113080-99
Date:
April 12, 2000

Re:

Legend

Decedent:

Spouse:

Daughter:

Child 1:

Child 2:

Trust:

Trustee:

State:

Date 1:

Date 2:

Date 3:

\$x:

\$y:

\$z:

Dear

This responds to a letter dated June 7, 1999, submitted by your authorized

representative, requesting: (1) an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make a “reverse” qualified terminable interest property election under § 2652(a)(3) of the Internal Revenue Code, and (2) a ruling that the automatic allocation rules of § 2632(c) be deemed to cause the unused portion of the Decedent’s generating-skipping tax (GSTT) exemption to be allocated to an exempt marital trust so that such trust has an inclusion ratio of zero.

On Date 1, a trust agreement (Trust) was made between the Decedent and Spouse wherein they are described as both the Settlers and Trustees. As described below, when Decedent died, the Trust called for the creation of a number of subtrusts. After first making a specific bequest to Daughter of \$x, Trust estate was divided into a “Survivor’s Trust” and a “Residual Trust.” The Residual Trust was then divided into a “Credit Trust” and a “Marital Trust,” and Marital Trust was further divided into an “Exempt Marital Trust” and a “Non-Exempt Marital Trust.” Subsequent to Decedent’s death, Spouse functions as Trustee of Trust and its subdivisions.

Decedent died on Date 2, survived by Spouse, Daughter, Child 1 and Child 2. Pursuant to an extension, the estate tax return was timely filed on Date 3. A copy of the Trust and the Decedent’s will were attached to the tax return.

You represent that the Exempt and Non-Exempt Marital Trusts will qualify for a marital deduction under § 2056(b)(7) of the Code, as qualified terminable interest property (QTIP) since Spouse is entitled to all income for life, payable annually, and no person had a power to appoint any part of these trusts to any person other than Spouse. The Credit Trust does not qualify for a marital deduction under § 2056(a), as Spouse’s interest does not satisfy the income component of the qualified terminable interest property requirements.

As set forth in Decedent’s federal estate tax return, \$y passed to the Credit Trust. An additional amount, \$z, which consisted of a policy insuring Decedent’s life (Policy), was reported as Item 1 on Schedule D of Decedent’s federal estate tax return. The Policy was also included as Item 6 on Schedule M, and a marital deduction was taken for the entire amount of Policy proceeds. Since Policy was payable to Trust and is used to fund the Exempt Marital Trust, a valid QTIP election was made with respect to the proceeds of Policy by listing it on Schedule M of the return.

However, in preparing the Form 706 and for purposes of describing the various subtrusts called for in the Trust, the Exempt Marital Trust was inadvertently omitted from page 2, item 5 of Part 4 and Schedule R of the return. As a result of the omission, no portion of the GSTT exemption was allocated to the Exempt Marital Trust, and a “reverse” QTIP election was not made for this trust. As indicated in Schedule R, Part 1, Line 8, of the estate’s original Form 706, Decedent’s entire \$1,000,000 GSTT exemption was allocated to Credit Trust which had a value of \$y. The sum of \$y and \$z is less than \$1,000,000.

Concurrent with the mailing of this request for a ruling, an amended estate tax return with a revised Schedule R was filed on behalf of the estate showing the Credit Trust funded with \$y and the Exempt Marital Trust funded with \$z. Further, Schedule R reflects an allocation of Decedent's GSTT exemption to these two trusts, causing both trusts to have an inclusion ratio of zero and indicating that a reverse QTIP election under § 2652(a)(3) was made in regard to the assets in the Exempt Marital Trust.

Article 5.2.1 of the Trust provides for the creation of the Survivor's Trust and indicates that it shall consist basically of the deceased spouse's personal property and the surviving spouse's community and separate property.

Article 5.2.2 of the Trust provides that the Residual Trust shall consist of the balance of the trust estate which basically consists of the deceased spouse's community and separate property.

Article 6.2 of the Trust provides that the Residual Trust shall be divided into two separate trusts, designated as the "Credit Trust" and the "Marital Trust".

Article 6.4 of the Trust basically provides that the Credit Trust shall consist of that portion of the Residual Trust equal to an amount which would allow decedent's estate to utilize fully any available federal estate and gift tax unified credit. Said amount shall be reduced by (i) the value of all property that is includible in the deceased spouse's gross estate for federal estate tax purposes and that does not qualify for the marital deduction or charitable deduction, and (ii) the amount of nondeductible administrative expenses.

Article 6.5 of the Trust provides that the Marital Trust shall consist of the balance of the Residual Trust. The Marital Trust shall be further divided into two (2) trusts: the "Exempt Marital Trust" and the "Non-Exempt Marital Trust."

Article 6.5.1 of the Trust effectively provides that the Exempt Marital Trust shall consist of an amount equal to the deceased spouse's available generation-skipping transfer tax (GSTT) exemption. Article 6.5.2 of the Trust provides that the Non-Exempt Marital Trust shall consist of the balance of the Marital Trust.

Article 6.9 of the Trust provides that from the time of death of the deceased spouse, the Trustee shall pay to or apply for the benefit of the surviving spouse the entire net income of the Survivor's Trust and the Marital Trusts, in annual or more frequent installments. In addition, the Trustee shall pay to or apply for the benefit of the surviving spouse as much of the net income of the Credit Trust as the Trustee, in the Trustee's discretion, deems necessary for the surviving spouse's support in his or her accustomed manner of living as of the date of death of the deceased spouse. Any net income of the Credit Trust not so distributed shall be accumulated and added to principal.

Article 7.4 of the Trust provides, in effect, that, after the death of the surviving spouse, Child 1 and Child 2 shall be entitled to so much of the income and principal of the assets of the Residual Trust (held in trust for each child) as the Trustee in his discretion deems necessary for Child 1's and Child 2's proper support, maintenance and education. The article further contemplates that, on the respective death of Child 1 and Child 2, the assets of their respective trusts will be distributed to their respective issue.

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)(1) provides the general rule that no deduction is allowed for an interest passing to the surviving spouse if, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest will terminate or fail.

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 the property is treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" as property: (1) that 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 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 a return of tax imposed by § 2001. The election, once made, is irrevocable.

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

Section 2601 imposes a tax on every generating-skipping transfer. Under § 2631(a), with regard to the GSTT, each individual is allowed an exemption of \$1,000,000 that may be allocated by such individual (or by his or her executor) to any property with respect to which such individual is the transferor.

Under § 2632(a), the allocation 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)(1), any portion of an individual's GSTT exemption not allocated within the time prescribed in § 2632(a), is allocated: (A) first to property that 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 taxable termination might occur at or after such individual's death. Under § 2632(c)(2)(A), the allocation under paragraph (c)(1) is made among the properties described in subparagraph (A) thereof and the trusts described in subparagraph (B) thereof, as the case may be, in proportion to the respective amounts (at the time of allocation) of the nonexempt portions of such properties or trusts. The term "nonexempt portion" means the value (at the time of allocation) of the property or trust, multiplied by the inclusion ratio with respect to such property or trust.

Section 26.2632-1(b)(2) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of generating-skipping tax exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero with respect to the trust.

Section 2652(a)(1) provides, in part, that the "transferor" of property subject to the federal estate tax is the decedent in whose gross estate the property is included. Thus, in the case of property subject to a QTIP election that is subsequently includible in the surviving spouse's gross estate under § 2044, the surviving spouse would be the transferor of the property for GSTT purposes.

However, § 2652(a)(3) states that, with respect to any trust for which a deduction is allowed under § 2056(b)(7), the estate of the decedent may elect to treat all of the property in the trust for purposes of the GSTT provisions as if the QTIP election 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 GSTT purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GSTT exemption may be allocated to the QTIP trust.

Section 301.9100-1(c) provides that the Commissioner, in an exercise of discretion, 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 not 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 301.9100-2 and 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make the election under § 301.9100-1(a).

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do

not meet the requirements of § 301.9100-2.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interest of the government.

Based on the facts and representations submitted with your request, we have determined that the requirements of § 301.9100-3 have been satisfied. Therefore, an extension of time is granted, until 30 days from the date of this ruling, for making an election under § 2652(a)(3) with respect to the Exempt Marital Trust.

Section 26.2631-1(b)(2) provides that an allocation of generation-skipping tax exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero, with respect to a trust. The Decedent's entire \$1 million GSTT exemption was allocated to the Credit Trust on Schedule R of the return as originally filed. However, page 2, item 5 of the same return shows that only \$y was actually added to the Credit Trust. You represent that the page 2 figure is correct and is the only amount transferred to the Credit Trust. Therefore only \$y of the Decedent's exemption was necessary for the Credit Trust to have an inclusion ratio of zero. As a result, the excess of the decedent's exemption is available to be allocated elsewhere, and should therefore be allocated pursuant to the automatic allocation provisions of § 2632(c).

Under the allocation rules of § 2632(c)(1), any portion of a decedent's GSTT exemption not allocated within the time prescribed in § 2632(a), is allocated: (A) first to property that is the subject of a direct skip occurring at the decedent's death, and (B) second to trusts with respect to which decedent is the transferor and from which a taxable distribution or taxable termination might occur at or after decedent's death.

If the "reverse" QTIP election is made with respect to the Exempt Marital Trust within the extended period of time granted by this ruling, Decedent will be the "transferor" of the Exempt Marital Trust from which a taxable distribution or a taxable termination might occur at or after Decedent's death. The allocation rules of § 2632(c) will then apply to the Exempt Marital Trust.

Since no direct skips occurred by reason of the Decedent's death in the present case, the unused portion of Decedent's GSTT exemption can only be allocated to the Exempt Marital Trust.

Based solely on the information submitted and the representations made, and because a reverse QTIP election under § 2652(a)(3) was made coincident to the submission of this request, we conclude that, the amount of the Decedent's GSTT exemption allocated to the Credit Trust which is in excess of the amount necessary for that trust to achieve an inclusion ratio of zero is void. We further conclude that, under § 2632(c), the unused portion of Decedent's GSTT exemption will be allocated to the

Exempt Marital Trust. Accordingly, Decedent's GSTT exemption is properly allocated as follows: (1) \$y to the Credit Trust, and (2) \$z to the Exempt Marital Trust.

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions or under any other provision of the Code.

This letter 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,
Paul F. Kugler
Assistant Chief Counsel
(Passthroughs and Special Industries)

Enclosure

Copy for § 6110 purpose