

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-108934-18

Date:

September 12, 2018

In Re:

### LEGEND

Decedent	=
Date 1	=
Spouse	=
Trust 1	=
Date 2	=
Date 3	=
Date 4	=
Mother	=
Date 5	=
Trust 2	=
Child	=
CPA	=
Date 6	=
<u>x</u>	=
<u>y</u>	=
<u>a</u>	=
<u>b</u>	=
<u>z</u>	=
Year	=
Attorney	=

Dear :

This letter responds to the letter dated March 9, 2018, submitted by your authorized representative, 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 (Code) and rulings regarding the applicability of § 2632 to certain trusts.

## FACTS

The facts submitted and the representations made are as follows:

Decedent died testate on Date 1, a date after December 31, 2000, survived by Spouse and children.

On Date 2, Decedent established a revocable trust, Trust 1, which was amended on Date 3 and Date 4. Trust 1 became irrevocable upon Decedent's death.

Pursuant to the terms of Trust 1, as amended, upon Decedent's death, the trust estate is to be held in further trust for the benefit of Mother (Mother's Trust). During Mother's lifetime, the trustee is to pay to or apply for the benefit of Mother so much of the net income and/or principal of Mother's Trust as the trustee deems advisable for Mother's health, education, support and maintenance. Any income not distributed is to be added to principal. Upon the death of Mother, the trust estate is to be held in further trust for the benefit of Spouse and Decedent's issue.

Pursuant to Article VI of Trust 1, if any of Decedent's exemption is allocated to property of a trust created under Trust 1, and the trust results in a generation-skipping inclusion ratio of other than zero, then the trustee must immediately create two separate trusts and each separate trust will have a generation-skipping inclusion ratio of either zero (exempt portion) or one (non-exempt portion). The trustee may combine trusts having the same inclusion ratio with the same beneficiaries, or may separate trusts with different terms for different beneficiaries. Mother survived Decedent and then subsequently died on Date 5.

Also on Date 2, Decedent and Spouse established a revocable trust, Trust 2, which was amended on Date 4. Trust 2 became irrevocable upon Decedent's death.

Article VI, Paragraph 6.D of Trust 2 provides that at the death of the first to die of Decedent and Spouse, the residue of Trust 2 is to be divided into two separate trusts, Trust A (Credit Shelter Trust) and Trust B (QTIP Trust).

Under Article VI, Credit Shelter Trust shall consist of the maximum pecuniary amount of Decedent's estate which will not cause any more than the minimum possible federal estate tax at the death of Decedent.

Article VI, Paragraph 6.D.(2)(b) provides that only assets eligible for the estate tax marital deduction shall be allocated to the QTIP Trust. Moreover, it is the settlors'

intention for QTIP Trust to qualify for the marital deduction under § 2056(b)(7). During Spouse's lifetime, trustee shall pay to or apply for the benefit of Spouse the net income of QTIP Trust in quarter-annual or more frequent installments. Spouse has the power to require the trustee to make all or part of the principal of QTIP Trust productive or to convert promptly any unproductive part of the trust fund into productive property. The trustee shall also pay to or apply for the benefit of Spouse such sums of principal of QTIP Trust as trustee, in trustee's discretion considers necessary for Spouse's proper health, support and maintenance. On the death of Spouse, the remaining principal of QTIP Trust is to be distributed in exempt and non-exempt shares, as applicable, under the terms of Credit Shelter Trust.

Spouse and Child are the co-trustees of Trust 1 and Trust 2, and the co-executors of Decedent's estate under § 2203. The co-executors engaged CPA to prepare the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return for Decedent's estate. A Supplemental Form 706 was filed on Date 6. On the Schedule M of both the original Form 706 and Supplemental Form 706, CPA failed to make an election to treat the property passing to QTIP Trust as "qualified terminable interest property." Thus, no QTIP election under § 2056(b)(7) was made with respect to property passing to QTIP Trust.

On Schedule R of the original Form 706 and Supplemental Form 706, CPA reported no lifetime allocations of Decedent's GST exemption. On Part I, Line 9 of the Schedule R, CPA allocated Decedent's GST exemption between Credit Shelter Trust and Mother's Trust. However, CPA incorrectly reported the amount of Decedent's GST exemption applied to Credit Shelter Trust as \$x and to Mother's Trust as \$a. Upon subsequent review, it was discovered that Credit Shelter Trust was funded with \$y, instead of \$x. Accordingly, Credit Shelter Trust was overfunded by \$z.

In Year, the co-executors consulted with Attorney for assistance in completing the administration of the estate. The errors made on Decedent's Form 706 and Supplemental Form 706 were discovered upon Attorney's review of the estate.

You 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) to treat QTIP Trust as QTIP property.
2. The GST tax inclusion ratio with respect to Mother's Trust is zero; and
3. The GST tax inclusion ratio with respect to Credit Shelter Trust is zero.

## LAW AND ANALYSIS

Ruling 1

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 shall 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, but only to the extent that such interest is included in determining the value of the gross estate.

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

Under § 2056(b)(7), a marital deduction is allowed for qualified terminable interest property (QTIP), which is defined 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 § 2056(b)(7)(B)(v) applies. Section 2056(b)(7)(B)(v) provides that an election 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)(2)(i) of the Estate Tax Regulations provides that the QTIP election may relate to all or any part of property that meets the requirements of § 2056(b)(7)(B)(i), provided that any partial election must be made with respect to a fractional or percentage share of the property. The fraction or percentage may be defined by a formula.

Section 20.2056(b)-7(b)(2)(ii)(A) provides that, in general, a trust may be divided into separate trusts to reflect a partial election that has been made, or is to be made, if authorized under the governing instrument or otherwise permissible under local law. Any such division must be accomplished no later than the end of the period of estate administration. If, at the time of the filing of the estate tax return, the trust has not yet been divided, the intent to divide the trust must be unequivocally signified on the estate tax return.

Section 20.2056(b)-7(b)(4)(i) 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 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 § 301.9100-1(c) of the Procedure and Administration Regulations, 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 six 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.

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.

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).

Requests for relief under § 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, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, the executors are granted an extension of time of 120 days from the date of this letter to make a QTIP election with respect to QTIP Trust.

The QTIP election should be made on a supplemental Form 706 filed with the Cincinnati Service Center at the following address: Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for this purpose.

### Rulings 2 and 3

Section 2601 imposes a tax on every GST. A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2602 provides that the amount of the tax imposed by § 2601 is the taxable amount multiplied by the applicable rate.

Section 2641(a) defines the applicable rate as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a), the inclusion ratio with respect to any property transferred in a GST is the excess (if any) of one over the applicable fraction. The applicable fraction, as defined in § 2642(a)(2), is a fraction, the numerator of which is the amount of the GST exemption under § 2631 allocated to the trust, and the denominator of which is the value of the property transferred to the trust.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of his or her 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 26.2632-1(b)(4)(i) of the Generation-Skipping Transfer Tax Regulations provides, in part, that an allocation of GST 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 26.2632-1(d)(1) provides, in part, 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) filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions actually granted). An allocation of GST exemption to a trust (whether or not funded at the time the Form 706 is filed) is effective if the notice of allocation clearly identifies the trust and the amount of the decedent's GST exemption allocated to the trust.

Section 2632(e)(1) provides that any portion of such individual's GST exemption which has not been allocated within the time prescribed by § 2632(a) shall be deemed to be allocated as follows: first, to property that is the subject of a direct skip occurring at such individual's death; and 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.

In this case, under the terms of Trust 2, as amended, \$y passed to Credit Shelter Trust. Accordingly, based upon the facts submitted and the representations made, the

allocation of GST exemption made on Schedule R with respect to Credit Shelter Trust in excess of \$y was void as provided in § 26.2632-1(b)(4)(i), because an allocation of \$y was the amount necessary to obtain an inclusion ratio of zero with respect to the trust. Consequently, pursuant to § 2632(e)(1), the amount of Decedent's available GST exemption remaining after the allocation of \$y to Credit Shelter Trust, was automatically allocated to Mother's Trust effective as of Decedent's date of death. Mother's Trust has an inclusion ratio of zero, provided the amount of GST exemption allocated to this trust is equal to the amount transferred to this trust for federal estate tax purposes.

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

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) of the Code provides that it may not be used or cited as precedent.

Sincerely,

Associate Chief Counsel  
(Passthroughs & Special Industries)

*Leslie H. Finlow*

By: \_\_\_\_\_  
Leslie H. Finlow  
Senior Technician Reviewer, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2)  
Copy for §6110 purposes  
Copy of this letter