

## Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:4- PLR-108901-02

Date:

JULY 01, 2002

Re:

### LEGEND:

Spouse	-
Decedent	-
Child	-
State	-
Country	-
Revocable Trust	-
Marital Trust	-
Residuary Trust	-
Trustee #1	-
Trustee #2	-
Trustee #3	-
Trustee #4	-
Date	-

Dear :

This is in response to your January 30, 2002 letter requesting a ruling concerning the application of section 2056A of the Internal Revenue Code.

### FACTS:

Decedent died on Date, survived by Spouse and Child. At the time of death, Decedent was a resident alien, domiciled in State, in the United States, and a citizen of Country. Decedent was married to Spouse, also a resident alien, domiciled in the United States and a citizen of Country. Prior to death, Decedent had established Revocable Trust, which is governed under the laws of State. Revocable Trust provides for the creation of two trusts, Marital Trust and Residuary Trust, upon Decedent's death. Marital Trust has four co-trustees; Trustee #1, a corporate trustee that is

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organized and operating under the laws of State, and Trustees #2, #3, and #4, individual trustees who are related to Decedent and citizens of the United States.

Under the terms of Revocable Trust, the Marital Trust is to be funded with an amount equal to the maximum marital deduction allowable, reduced by the aggregate value of any interest in property which has passed to Spouse under other provisions of the trust or by operation of law for which a marital deduction is allowable and further reduced by the largest amount which, taking into account certain specified credits, will result in no federal estate tax. Under the terms of Marital Trust, the trustee must pay all the net income at least quarterly to Spouse for Spouse's life. The trustee may also pay principal to Spouse for Spouse's reasonable health, support and maintenance.

Article 4.1.1 provides that, unless Spouse consents, unproductive property shall not be held as an asset of the Marital Trust for more than a reasonable time.

Article 4.2.1(f) contains provisions that are specifically applicable to retirement benefits. Article 4.2.1(f)(1) states that it is Decedent's intent that retirement benefits payable under any qualified retirement plan, individual retirement account or other retirement arrangement subject to "minimum distribution rules" of § 401(a)(9) or other comparable provisions be distributed to or held for only individual beneficiaries within the meaning of § 401(a)(9). Article 4.2.1(f)(2) provides that, if Marital Trust becomes the beneficiary of death benefits under any qualified retirement plan defined in § 401(a), any qualified retirement annuity defined in § 403(a) or 403(b), and/or any individual retirement account defined in § 408(a), the trustee must withdraw from such Marital Trust's share of the plan, in each calendar year, and deposit in the Marital Trust, the greater of (a) the net income of the Marital Trust's share of the plan for such year, or (b) the "minimum distribution amount" which is required to be withdrawn from such share under § 401(a)(9) or other comparable provision. Article 4.2.1(f)(3) requires that the trustee treat distributions from any qualified retirement plan defined in § 401(a), any qualified retirement annuity defined in § 403(a) or 403(b), and/or any individual retirement account defined in § 408(a), as income of the Marital Trust to the extent that the distribution represents income generated or deemed to be generated by such plan, annuity, or individual retirement account. In addition, the trustee has the right to withdraw any part or all of the remaining qualified plan benefit, annuity, or individual retirement account or to direct that the plan benefit, annuity, or individual retirement account be paid directly to the beneficiary of the Marital Trust who is entitled to the income of the Marital Trust.

Further, Article 4.2.1(f)(4) provides that Spouse shall have the right to direct the trustee to make any unproductive property productive or convert any non-income or low-income producing assets into income-producing assets or assets producing adequate income within a reasonable time.

Upon Spouse's death, the trustee shall pay to the personal representative of Spouse's estate an amount from the Marital Trust assets that is equal to federal and state estate or inheritance taxes payable by reason of inclusion of the value of Marital

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Trust in Spouse's gross estate. All remaining Marital Trust property will be distributed to Residuary Trust.

Under the terms of the Residuary Trust, the trustee may pay trust income, or if income is not sufficient, principal, to or for the benefit of the Spouse for the Spouse's health, support and maintenance, taking into account income from all other sources. Any excess income is to be added to trust corpus. Upon Spouse's death, the assets of the Residuary Trust will be distributed to Child or, if Child has predeceased Spouse, to Child's issue, per stirpes.

Article 5 of the Revocable Trust provides that, if Spouse is not a citizen of the United States at Decedent's death, the provisions of Article 5 apply to the Marital Trust so that the Marital Trust will qualify as a qualified domestic trust (QDOT), as described in § 2056A, and that the Decedent's personal representative will make the necessary election for QDOT treatment. Further, Article 5 provides that the Trust is intended to be a qualified domestic trust under section 2056A and that any ambiguity in its terms shall be resolved in accordance with that intention.

The pertinent terms of Article 5 are as follows:

Article 5.1 provides that at least one of the trustees of the Marital Trust must be a "U.S. Trustee," meaning a corporation created or organized under the laws of the United States, a U.S. state, or the District of Columbia as defined in section 20.2056A-2(c).

Article 5.2 provides that the trustee shall comply with the requirements for security arrangements for qualified domestic trusts as set forth in § 20.2056A-2(d)(1)(i) with respect to QDOTs in excess of \$2 million on the date of the decedent's death (determined without reduction for any indebtedness) and §§ 20.2056A-2(d)(1)(i) or (ii) with respect to QDOTs having a fair market value at the date of the decedent's death of \$2 million or less (determined without reduction for any indebtedness).

Under Article 5.2.4, for purposes of determining whether the fair market value of the trust assets exceeds \_\_\_\_\_, the trustee is authorized to make the election under § 20.2056A-2(d)(1)(iv)(A) with respect to real property used as a personal residence of Spouse. Article 5.2.4, provides that, for purposes of determining the amount of the bond or letter of credit, the trustee is authorized to make the election under § 20.2056A-2(d)(1)(iv)(B) with respect to real property used as the personal residence of the Spouse.

Article 5.2.5 provides that the trustee is directed to file any annual statements required under § 20.2056A-2(d)(3). Article 5.2.6 provides that, notwithstanding anything contained herein to the contrary, the U.S. Trustee is authorized to enter into alternative plans or arrangements with the Internal Revenue Service pursuant to § 20.2056A-2(d)(4) to assure collection of the deferred estate tax, in lieu of the provisions contained herein.

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Article 5.6 provides that, if the trustee pays or distributes principal of the Marital Trust, the U.S. Trustee shall withhold and pay the federal estate tax [imposed under § 2056A(b)] from the property to be paid or distributed. Article 5.8 requires that, upon the death of Spouse, the trustee shall pay from the principal of the Marital Trust its proportionate share of the federal estate tax assessed under § 2056A by reason of her death.

Under Article 5.9, the trustee is required to comply with the requirements prescribed by the regulations for qualified domestic trusts and may amend the terms of Marital Trust to comply with the requirements to be a qualified domestic trust.

If Spouse becomes a United States citizen after Decedent's death, and the requirements of § 2056(d)(4) or § 2056A(b)(12) have been satisfied, Article 5.10 provides that the provisions of Article 5 will no longer apply to the Marital Trust.

You have requested the following rulings:

1. The Marital Trust will qualify as a QDOT defined in § 2056A(a), provided a timely election is made under § 2056A(a)(3).
2. Property passing to the Marital Trust will qualify as qualified terminable interest property under § 2056(b)(7).
3. Because the Marital Trust qualifies as a QDOT, and meets the requirements of § 2056(b)(7), and assuming the elections under § 2056A(d) and § 2056(b)(7)(B)(v) are made, the property passing to the Marital Trust will be eligible for the marital deduction for federal estate tax purposes in Decedent's gross estate.

#### LAW AND ANALYSIS:

Section 2001(a) of the Internal Revenue Code imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Under § 2056(a), for purposes of the tax imposed by § 2001, the value of the taxable estate is determined, except as limited by § 2056(b), 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 his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

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.

Section 2056(b)(7) provides an exception to the rule of § 2056(b)(1) in the case

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of qualified terminable interest property.

Under § 2056(b)(7)(A), qualified terminable interest 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.

Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" as property: (1) which passed 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. Under § 2056(b)(7)(B)(ii), a surviving spouse has a "qualifying income interest for life" if (1) 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 (2) 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 § 2056(b)(7) 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 2044 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 with respect to which a deduction was allowed under § 2056(b)(7). Likewise, for gift tax purposes, § 2519 provides that any disposition of all or part of a qualifying income interest for life in property in which the decedent had a qualifying income interest for life with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all the interests in the property other than the qualifying income interest.

Section 20.2056(b)-7(d)(2) of the Estate Tax Regulations states that the principals of § 20.2056(b)-5(f) apply for purposes of determining whether the surviving spouse is entitled to all the income for life from the entire interest or a specific portion of the entire interest.

Section 20.2056(b)-5(f)(1) provides that, if an interest is transferred in trust, the surviving spouse is "entitled for life to all of the income from the entire interest or a specific portion of the entire interest," if the effect of the trust is to give her substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of the trust.

Section 20.2056(b)-5(f)(5) states that an interest passing in trust will not satisfy this requirement if the primary purpose of the trust is to safeguard property without providing the spouse with the required beneficial enjoyment. If the corpus of a trust consists substantially of property which is not likely to be income producing during the life of the surviving spouse and the spouse cannot compel the trustee to convert or otherwise deal with the property as described in § 20.2056(b)-5(f)(4), an interest passing to such a trust will not qualify, unless the applicable rules for trust

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administration require, or permit the spouse to require, that the trustee provide the required beneficial enjoyment, such as by payments to the spouse out of other assets of the trust.

Section 20.2056(b)-5(f)(8) provides that the terms “entitled for life” and “payable annually or at more frequent intervals” require that under the terms of the trust the income referred to must be currently (at least annually) distributable to the spouse or that the spouse must have such command over the income so that it is virtually the spouse’s.

Under § 2056(d)(1) and (d)(2)(A), if the surviving spouse of a decedent is not a United States citizen, the marital deduction is disallowed unless property passes to the surviving spouse in a qualified domestic trust (QDOT).

Under § 2056A(a), a trust qualifies as a QDOT if the trust instrument requires that at least one trustee of the trust be an individual citizen of the United States or a domestic corporation, and provides that no distribution (other than a distribution of income) may be made from the trust unless a trustee who is an individual citizen of the United States or domestic corporation has the right to withhold from such distribution the tax imposed under § 2056A(b) on the distribution. Further, the trust must meet such requirements as the Secretary may by regulations prescribe to ensure the collection of any tax imposed by § 2056A(b), and an election under § 2056A(d) must be made with respect to the trust.

Section 2056A(b)(1), in general, imposes an additional estate tax on distributions of corpus from a QDOT during the spouse’s lifetime, and on the value of the QDOT on the date of death of the surviving spouse.

Under § 20.2056A-2(b)(1) of the Estate Tax Regulations, if property passes from a decedent to a QDOT, then in order to qualify for the estate tax marital deduction, the trust must also satisfy the requirements for a marital deduction contained in either § 2056(b)(5) or § 2056(b)(7) or § 2056(b)(8).

In addition, under § 20.2056A-2(d), in order to qualify as a QDOT, the trust must contain certain provisions intended to ensure collection of the additional estate tax imposed under § 2056A(b)(1). Rev. Proc. 96-54, 1996-2 C.B. 386, contains sample paragraphs that may be utilized in a trust instrument to satisfy these requirements.

#### RULING #1:

The Marital Trust requires that at least one trustee be an individual citizen of the United States whose tax home is in the United States, or a domestic corporation. In this case, it is represented that all the individual co-trustees are citizens of the United States whose tax homes are in the United States and the corporate co-trustee is a domestic corporation organized and operating under the laws of State. The Marital Trust also provides that the trustee shall withhold the federal estate tax due under

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§ 2056A(b) on any distributions from the trust.

Further, the Marital Trust incorporates the sample paragraphs provided in Rev. Proc. 96-54, that may be used to satisfy the governing instrument requirements of §§ 20.2056A-2(d)(1)(i) and (d)(1)(ii) of the Estate Tax Regulations for a qualified domestic trust.

Accordingly, we conclude that Marital Trust will qualify as a QDOT defined in § 2056A(a), provided a timely election is made under § 2056A(d).

RULINGS #2 and #3:

The terms of Marital Trust direct the trustee to pay all the income to spouse in convenient installments at least as often as quarter-annually during Spouse's life. No person, other than Spouse, has a right to Marital Trust income or corpus during Spouse's life. In addition, Spouse has the right to direct the trustee to make any unproductive property productive and to convert any non-income or low income producing property. Accordingly, Spouse's income interest in the Marital Trust qualifies as a qualified income interest for life under § 2056(b)(7)(B)(i).

Further, in the event that Marital Trust is designated as the beneficiary of qualified retirement plans defined in § 401(a), qualified retirement annuities defined in § 403(a) or 403(b), and/or individual retirement accounts defined in § 408(a), the trustee is required to withdraw from each plan each year and deposit in the Marital Trust, the greater of the net income from that plan or the "minimum distribution amount," as described in § 401(a)(9). Each of these distributions from the plans to the Marital Trust must be allocated to income of the Marital Trust and distributed to Spouse. The trustee also has the right to withdraw part or all of each qualified plan benefit, annuity, or individual retirement account and direct that it be paid directly to Spouse.

The Marital Trust specifically requires that, unless Spouse consents, unproductive property, including benefits from qualified retirement plans defined in § 401(a), qualified retirement annuities defined in § 403(a) or 403(b), and individual retirement accounts defined in § 408(a), shall not be held in trust for more than a reasonable time.

Accordingly, to the extent the Marital Trust is designated as the beneficiary of retirement benefits, Spouse will receive a qualifying income interest for life in these benefits. See Rev. Rul. 89-89, 1989-2 C.B. 231; See also, Rev. Rul. 2000-2, 2000-1 C.B. 305.

We conclude that, if the election is made under § 2056(b)(7)(B)(v) with respect to the Marital Trust and any retirement benefits for which the Marital Trust is the designated beneficiary, then the Marital Trust and the retirement benefits will satisfy the requirements as qualified terminable interest property under § 2056(b)(7).

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Therefore, assuming that the elections described in § 2056(b)(7)(B)(v) and § 2056A(d) are timely made by the executor on the return of tax imposed by § 2001, we conclude that the property passing to the Marital Trust will qualify for the estate tax marital deduction under § 2056(a).

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. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative. A copy of this letter must be attached to any income tax return to which it is relevant.

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.

Sincerely,

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George L. Masnik  
Chief, Branch 4  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure (1)

Copy for 6110 purposes

cc: