

Internal Revenue Service

Number: **201850010**

Release Date: 12/14/2018

Index Number: 2056.01-00, 2652.01-02,
9100.00-00

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-109713-18

Date:
September 17, 2018

Re:

Legend

Decedent	=
Spouse	=
Executor	=
Law Firm	=
Trust	=

Share 1	=
Share 2	=
Trust A	=
Trust B	=
Attorney	=
Date 1	=
Date 2	=
Date 3	=

Dear :

This letter responds to your authorized representative's letter dated March 16, 2018, 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 qualified

terminable interest property (QTIP) trust into two trusts, the GST Non-Exempt QTIP Trust and the GST Exempt QTIP Trust. You further request an extension of time to make a reverse QTIP election under § 2652(a)(3) of the Internal Revenue Code with respect to the GST Exempt QTIP Trust, and apply the automatic allocation rules to allocate Decedent's Generation-Skipping Transfer (GST) exemption to the GST Exempt QTIP Trust.

Decedent executed Trust on Date 1. Decedent died on Date 2, survived by Spouse. Article FIFTH of Trust provides that if Spouse survives Decedent, the trustee is to divide Trust into two shares to be administered as two separate trusts: Share 1 and Share 2. Share 2 is funded with all assets remaining after the funding of Share 1. Share 2 is a QTIP Trust.

Article SEVENTH of Trust provides that if the property allocated to Share 2 exceeds Decedent's available GST tax exemption, the trustee is to establish two trusts, Trust A, a GST Exempt QTIP Trust and Trust B, a GST Non-Exempt QTIP Trust.

Under Article SEVENTH, Spouse is to receive the net income of Share 2 (consisting of the GST Exempt QTIP Trust, Trust A, and the GST Non-Exempt QTIP Trust, Trust B) at least annually. Trustee is to pay to or for the benefit of Spouse as much of the principal of Trust A and Trust B as the trustee, in the trustee's discretion, deems necessary for the health, support, or maintenance of Spouse in the condition to which she has become accustomed, taking into account Spouse's income from other sources. In addition, the trustee shall pay such amounts of the principal of Trust A and Trust B that Grantor's wife requests in any calendar year, not to exceed five percent of the value of the principal of the trusts. The trustee may pay to Spouse such other amounts of the principal of Trust A and Trust B as the trustee in its absolute and unreviewable discretion determines. In addition, Spouse may direct that any property that is not fully productive be converted to productive property.

At Spouse's death, any undistributed income of both the Share 2 trusts is to be distributed to Spouse's estate. The remaining principal of Trust A and Trust B is to be divided into separate equal shares for Grantor's then living issue *per stirpes*.

Upon Decedent's death, Decedent's estate retained Law Firm to prepare Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. Decedent's Form 706 was timely filed. On Schedule M, the estate made the election under § 2056(b)(7) (QTIP election) for the QTIP Trust (Share 2). However, the Form 706 did not indicate that the QTIP Trust was to be severed into GST Exempt and GST Non-Exempt QTIP trusts; nor did it make a reverse QTIP election with respect to the GST Exempt QTIP Trust. Accordingly, none of Decedent's GST exemption was allocated to any portion of Share 2.

Law Firm did not advise the estate of the need to sever the QTIP Trust, make a reverse QTIP election or apply Decedent's GST exemption to the GST Exempt QTIP Trust. The errors were discovered after Spouse's death, on Date 3. The Decedent's estate requests that we grant the following rulings:

1. An extension of time to sever QTIP Trust into a GST Exempt QTIP Trust and a GST Non-Exempt QTIP Trust pursuant to § 26.2654-1(b)(1) of the Generation-Skipping Transfer Tax Regulations.
2. An extension of time to make a "reverse" QTIP election under § 2652(a)(3) for the GST Exempt QTIP Trust; and
3. The automatic allocation rules of § 2632 apply to the GST Exempt QTIP Trust.

Law and Analysis

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, except as limited by § 2056(b), 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.

Under § 2056(b)(1), 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.

Under § 2056(b)(7)(A), qualified terminable interest 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 for purposes of § 2056(b)(1)(A). Qualified terminable interest property is defined under § 2056(b)(7)(B)(i) as property: (1) which passes from the decedent to the surviving spouse; (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)(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 § 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.

Under § 2044, any property in which the decedent had 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 generation-skipping transfer (GST) made by a transferor to a skip person. A GST is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Under § 2631(a) (as in effect at the time of Decedent's death), for purposes of determining the inclusion ratio, every individual is allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) that may be allocated by the individual (or his executor) to any property with respect to which the individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

Section 2632(a)(1) provides that an individual's GST exemption may be allocated 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 return is required to be filed.

Section 2632(c)(1) provides that any portion of an individual's GST exemption which has not been allocated within the time prescribed by subsection (a) shall be deemed to be allocated as follows - (A) first, to property which 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 a taxable termination might occur at or after such individual's death.

Section 26.2632-1(d)(2) of the Generation-Skipping Tax Regulations provides, in part, that a decedent's unused GST exemption is automatically allocated on the due date for filing Form 706 to the extent not otherwise allocated by the decedent's executor on or before that date. Unused exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)), on the basis of the value of the property as finally determined for estate tax purposes (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)) on the basis of the chapter 11 value of the nonexempt portion of the trust property to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. However, no automatic allocation of GST exemption 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.

Section 2652(a)(1) provides, in part, that for purposes of chapter 13, the term "transferor" means in the case of any property subject to the tax imposed by chapter 11, the decedent. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides that, in the case of any trust with respect to which a deduction is allowed under § 2056(b)(7), the estate of the decedent may elect to treat all of the property in such trust for purposes of chapter 13 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 GST tax purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GST exemption may be allocated to that QTIP trust.

Section 26.2652-2(a) provides that a reverse QTIP election is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies.

Section 26.2654-1(b)(1) provides, in part, that the severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if the governing instrument does not require or otherwise direct severance but the trust is severed pursuant to discretionary authority granted either under the governing instrument or under local law; and

(A) The terms of the new trust provide in the aggregate for the same succession of interests and beneficiaries as provided in the original trust;

(B) The severance occurs (or a reformation proceeding, if required, is commenced) prior to the date prescribed for filing the Federal estate tax return (including extensions actually granted) for the estate of the transferor; and

(C)(1) The new trusts are severed on a fractional basis. If severed on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the undivided trust. The trusts may be funded on a nonpro rata basis provided funding is based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

Under § 301.9100-1(c), 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 301.9100-3 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). Under § 301.9100-1(b), a regulatory election

includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. In accordance with § 2642(g)(1)(B) and Notice 2001-50, 2001-34 I.R.B. 189, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) under the provisions of § 301.9100-3.

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 has 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 representations made, we conclude that the standards of §§ 301.9100-1 and 301.9100-3 have been met. Therefore, an extension of time is granted until 120 days from the date of this letter to sever Share 2 (the QTIP Trust) into a GST Exempt QTIP Trust and a GST Non-Exempt QTIP Trust and to make a reverse QTIP election with respect to the GST Exempt QTIP Trust. Finally, we rule that the automatic allocation rules of § 2632(c) (as in effect on Date 2) will automatically allocate Decedent's unused GST exemption to the GST Exempt QTIP Trust.

The reverse QTIP election should be made on a supplemental Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return). The supplemental Form 706 should be filed on behalf of Decedent's estate with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached.

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 of the Code.

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.

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,

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 of this letter

Copy for § 6110 purposes

CC: