

**Internal Revenue Service**

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Department of the Treasury  
Washington, DC 20224

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04 – PLR-143492-03

Date: APRIL 05, 2004

In Re:

Legend:

Decedent =

Date 1 =

Will =

Bank =

Spouse =

Codicil =

Stock =

Individual =

Attorney 1 =

Bank's Auditor =

Date 2 =

Attorney 2 =

Date 3 =

Estate Tax Attorney =

Date 4 =

Dear           :

This is in response to a letter dated July 2, 2003, and subsequent correspondence, requesting an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make a qualified terminable interest (QTIP) election under §2056(b)(7) of the Internal Revenue Code.

### Facts

The facts submitted and representations made are as follows. Decedent died on Date 1, survived by Spouse.

Decedent's Will provides for a pre-residuary bequest of \$           to a specified individual. The residuary estate (which includes Decedent's residence) passes to a residuary trust with Bank as trustee (Trust). The terms of Trust provide as follows:

In the event that [Spouse] should survive me by 120 days, my Trustee is directed to pay to him for so long as he shall live, so much of the current income of the trust as he shall from time to time request. Said income may not be assigned nor encumbered in any manner. He is also to have full use of the residence, including the entire           for so long as he shall live and desire to remain there.

The trustee has sole discretion to pay Spouse any amount of principal as it deems necessary for "extraordinary or emergency medical care."

At Spouse's death, the trustee is to retain the remaining principal as a perpetual trust and to distribute net income in specified amounts to specified charities.

The Codicil to Decedent's Will provides as follows:

I direct that my Executor, or Trustee of my testamentary Trust, following the later death of myself or my Husband, shall sell all those shares of [Stock] which I received from the [estate of Decedent's mother] including any and all stock splits, to [Individual]. I direct that the shares be sold at 1.5 times the book value as shown on the [Bank's] last financial statement issued prior to the date of the last of myself or my Husband to pass away. The net proceeds after payment of expenses and any taxes shall then be added to my testamentary trust for the purposes set forth therein.

Most of the value in Decedent's gross estate is attributable to Stock.

Bank hired Attorney 1 to represent Bank in its capacity as the executor of Decedent's estate. Attorney 1 had been the attorney for Decedent and Spouse for

seven years and for Bank for over a decade. Attorney 1 prepared the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for Decedent's estate. Attorney 1 believed that Trust did not qualify for the federal estate tax marital deduction but that Trust did qualify for the federal estate tax charitable deduction. Thus, on the federal estate tax return (Form 706), filed for the estate, Attorney 1 listed Trust on the Schedule O – Charitable, Public, and Similar Gifts and Bequests, and claimed an estate tax charitable deduction for the reported value of Trust. The estate did not claim a federal estate tax marital deduction for the value of Trust.

On Date 2, Bank asked Attorney 2 to review Decedent's Will and the federal estate tax return filed for Decedent's estate. Within a month, Attorney 2 advised Bank that Decedent's estate did not qualify for the federal estate tax charitable deduction and that it should have made a QTIP election under § 2056(b)(7) with respect to Trust.

On Date 3, Attorney 2 was informed by the IRS that Decedent's estate was under examination and that the bequest to Trust did not qualify for the federal estate tax charitable deduction in Decedent's estate. Attorney 2 stated that he was aware of the problem and was in the process of preparing a ruling request requesting an extension of time to make a qualified terminable interest property (QTIP) election under § 2056(b)(7) with respect to trust. He was also preparing a supplemental Form 706 on which a QTIP election under § 2056(b)(7) would be made on Schedule M with respect to Trust.

On Date 4, the estate filed the supplemental Form 706. On the attached Schedule M, the estate listed Trust and made a QTIP election for the value of Trust.

Decedent's estate has requested an extension of time under §§ 301.9100-1 and 301.9100-3 to make a qualified terminable interest property (QTIP) election under § 2056(b)(7).

### Law and Analysis

Section 2056(a) provides that the value of the taxable estate is, except as limited by § 2056(b), determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes from the decedent to the surviving spouse.

Under § 2056(b)(1), if an interest passing to the surviving spouse will terminate, no deduction is allowed with respect to the interest if, after termination of the spouse's interest, an interest in the property passes or has passed from the decedent to any person other than the surviving spouse (or the estate of the spouse).

Section 2056(b)(7) provides an exception to the "terminable interest" rule contained in § 2056(b)(1). Under § 2056(b)(7), qualified terminable interest property is treated as passing to the surviving spouse 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 that passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election described in § 2056(b)(7)(B)(v) applies. Under § 2056(b)(7)(B)(ii), the surviving spouse has a qualifying income interest for life if (I) the surviving spouse is entitled for life 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.

Under § 2056(b)(7)(B)(v) and § 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations, the election to treat property as QTIP is to be made by the executor on the return of tax imposed by § 2001 which is defined as the last estate tax return filed before the due date of the return, including extensions, or if a timely return is not filed, the first return filed after the due date.

Section 301.9100-1(c) provides that 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 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.

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 that granting 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.

We have determined that relief under §§ 301.9100-1 should be granted. Consequently, under §§ 301.9100-1 and 301.9100-3, an extension of time is granted until Date 4 for Decedent's estate to make a QTIP election under § 2056(b)(7) for the value of the assets in Trust as of Decedent's date of death.

We express no opinion on whether Trust qualifies as qualified terminable interest property under § 2056(b)(7). That issue is currently within the jurisdiction of the Area Office.

A copy of this letter should be filed with the Cincinnati Service Center -- Stop 82, Internal Revenue Service, Cincinnati, OH 45999.

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.

This 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,

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

Enclosure

Copy for section 6110 purposes  
Copy of this letter

cc: