

## Internal Revenue Service

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Department of the Treasury  
Washington, DC 20224

[Third Party Communication:  
Date of Communication: Month DD, YYYY]

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B09

PLR-134221-04

Date:

April 28, 2005

In Re:

Legend:

Decedent	=
Spouse	=
Trust	=
State	=
Date 1	=
Date 2	=
Date 3	=

Dear :

This is in response to your letter dated June 16, 2004 and subsequent correspondence, in which you requested 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 for a trust under § 2056(b)(7) of the Internal Revenue Code, to sever the trust into an exempt and non-exempt trust for purposes of the Generation-Skipping Transfer (GST) tax, and to make a reverse QTIP election under § 2652(a)(3) for the exempt trust.

The facts and representations submitted are summarized as follows. Decedent executed Trust on Date 1. Upon her death, after the payment of specific bequests, Trust is to be the Marital Trust for Spouse. Marital Trust has GST potential.

Decedent died testate on Date 2 survived by Spouse, a corporate attorney. Spouse, as executor of Decedent's estate, prepared the Form 706, United States Estate and (Generation-Skipping Transfer) Tax Return, for Decedent's estate. Spouse failed to make the QTIP election for Marital Trust, failed to sever Marital Trust into a GST exempt and non-exempt marital trust, and failed to make the reverse QTIP election for the GST

exempt marital trust. It has been represented that all of Decedent's GST exemption is available for allocation.

Spouse died on Date 3. Spouse's failure to make the QTIP election, sever Marital Trust, and to make the reverse QTIP election was discovered shortly after Spouse's death.

The trustees of the Marital Trust filed a petition with State court requesting that the trust be severed into a exempt and non-exempt marital trust in a manner consistent with § 26.2654-1(b) of the Generation-Skipping Transfer Tax Regulations. The trustees are requesting an extension of time under §§ 301.9100-1 and 3: (1) to make the QTIP election for Trust; (2) to sever Trust into a GST exempt marital trust and a GST non-exempt marital trust under § 26.2654-1(b)(1); and (3) to make a reverse QTIP election under § 2652(a)(3) for the GST exempt marital 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.

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

Section 2044(c) provides that for purposes of chapter 11 and chapter 13, property includible in the decedent's gross estate under § 2044(a) shall be treated as property passing from the decedent.

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 shall be 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, such property shall be treated as passing to the surviving spouse, and for purposes of § 2056(a), 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 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) applies.

Section 2056(b)(7)(B)(ii) provides that the 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 is to be made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Section 20.2056(b)-7(b)(4) of the Estate Tax Regulations provides, generally, that the QTIP election is made on the last filed estate tax return 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 after the due date.

Section 2601 imposes a tax on every generation-skipping transfer made by a "transferor" to a skip person. In general, under § 26.2652-1(a)(1) the transferor for GST tax purposes is the individual with respect to whom the property was most recently subject to Federal estate and gift tax.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a generation-skipping transfer tax exemption of \$ 1,000,000 which may be allocated by such individual (or by his or her 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.

Under § 2632(a), the allocation may be made at any time on or before the date prescribed for filing the estate tax return (including extensions).

Section 2632(e)(1) provides that any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2032(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) provides 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. The automatic allocation occurs whether or not a return is actually required to be filed. Unused GST 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 purposes of chapter 11 (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 non-exempt portion of the trust property (or in

the case of trusts that are not included in the gross estate, on the basis of the date of death value of the trust) to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. The automatic allocation of GST exemption is irrevocable, and an allocation made by the executor after the automatic allocation is made is ineffective. 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)(3) provides that in the case of any trust with respect to which a deduction is allowed to the decedent under § 2056(b)(7), the estate of the decedent may elect to treat all of the property in the trust, for purposes of the GST tax, as if the election to be treated as qualified terminable interest property 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 tax exemption may be allocated to the QTIP trust.

Section 26.2652-2(b) provides that the reverse QTIP election is to be made on the return on which the QTIP election is made.

Section 26.2654-1(b)(1) provides 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 –

- (i) The trust is severed pursuant to a direction in the governing instrument providing that the trust is to be divided upon the death of the transferor; or
- (ii) 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 trusts provide in the aggregate for the same succession of interests and beneficiaries as are 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) Either –
    - (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; or

(2) If the severance is required (by the terms of the governing instrument) to be made on the basis of a pecuniary amount, the pecuniary payment is satisfied in a manner that would meet the requirements of paragraph (a)(1)(ii) of this section if it were paid to an individual.

Under 301.9100-1(c), the Commissioner may grant a reasonable extension of the time 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, if the taxpayer demonstrates to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith, and granting the relief will not prejudice the interests of the Government.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 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 to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the Government. Section 301.9100-3(a).

Section 301.9100-3(b)(1)(iii) provides that taxpayer is deemed to have acted reasonably and in good faith if the taxpayer failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. The trustees of Marital Trust are granted sixty (60) days from the date of the issuance of the State court order severing Marital Trust into a GST exempt marital trust and a GST non-exempt marital trust, to make the QTIP election for Marital Trust under § 2056(b)(7), sever Marital Trust into a GST exempt and non-exempt marital trust under § 26.2654-1, and make the reverse QTIP election for the GST exempt marital trust under § 2652(a)(3).

The QTIP and reverse QTIP elections should be made on a supplemental Form 706 for Decedent's estate. The supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of the State court order severing Marital Trust and a copy of this letter should be attached to the return. A copy is enclosed for this purpose.

An extension of time to make the reverse QTIP election under § 2652(a)(3) does not extend the time to make an allocation of any remaining GST exemption. Once the reverse QTIP election is made §§ 2632(e) and 26.2632-1(d)(2) will operate to allocate Decedent's GST exemption to the GST exempt marital trust.

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) 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.

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,

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

Enclosures

Copy of this letter  
Copy for 6110 purposes