

Internal Revenue Service

Department of the Treasury

Number: **200241032**

Washington, DC 20224

Release Date: 10/11/2002

Index Numbers: 2056.00-00; 2652.01-02
9100.00-00

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:9-PLR-105716-02

Date:

July 8, 2002

Re:

LEGEND:

Decedent =
Spouse =
Trust =

Bypass Trust =
Marital GST Trust =

Survivor's Trust =
Date 1 =
Date 2 =
Date 3 =
Personal Representative =

Dear :

This responds to your letter dated December 11, 2001, and subsequent correspondence, requesting an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make, on behalf of Decedent's estate, a "reverse" qualified terminable interest property (QTIP) election under section 2652(a)(3) of the Internal Revenue Code.

The facts are represented to be as follows: Decedent died on Date 1, survived by Spouse and three children. Decedent executed his will on Date 2. On the same day, Decedent and Spouse executed a revocable trust agreement (Trust or Trust Agreement), with Spouse as trustee. In his will, Decedent bequeathed all of his tangible personal property to Spouse and the residue of his estate to the Trust.

Paragraph 1.02 of the Trust Agreement provides that property contributed to the Trust shall retain its character as community property during the grantors' joint lifetimes.

PLR-105716-02

Paragraph 8.01 of the Trust Agreement provides that on the death of the first grantor to die, the trustee shall pay from the portion of the Trust estate attributable to the deceased grantor all expenses incurred in connection with the administration of the deceased grantor's estate, including funeral costs, expenses of last illness, costs of administering the probate estate, and interest and penalties concerning all taxes. The trustee shall also pay any estate and inheritance taxes imposed by reason of the deceased grantor's death and attributable to the Trust estate.

Paragraph 4.01 of the Trust Agreement provides that, after the payment of the expenses listed in Paragraph 8.01, the trustee shall divide all Trust assets, including any additions made to the Trust by reason of the deceased grantor's death, into three separate trusts designated the Bypass Trust, the Marital GST Trust, and the Survivor's Trust, and the portion of the Trust estate attributable to the deceased grantor shall be allocated among these three trusts.

Under the terms of the Trust Agreement, the Bypass Trust is to be funded with the deceased grantor's portion of the Trust estate equal to the deceased grantor's unified credit amount. The deceased grantor's available GST exemption is to be allocated, first, to the Bypass Trust. The Marital GST Trust is to be funded with an amount equal to the deceased grantor's remaining GST exemption, and the remaining amount of the exemption is to be allocated to that trust. The Survivor's Trust is to be funded with that portion of the Trust estate attributable to the surviving grantor and the remainder of the Trust estate attributable to the deceased grantor.

The Trust Agreement provides that the surviving grantor is to receive the income of the Bypass Trust during the surviving grantor's lifetime as the trustee deems necessary or advisable for the surviving grantor's health, education, support or maintenance. Income not distributed to the surviving grantor is to be added to principal. The surviving grantor and the grantors' children may receive as much of the trust principal as the trustee deems necessary or advisable for their health, support or maintenance and, in the case of the children, for their education. Upon death, the surviving grantor has a testamentary limited power of appointment over the principal and any undistributed income of this trust. Any part of the trust not effectively appointed shall be distributed to GST tax exempt trusts to be established upon the surviving grantor's death for the benefit of the grantors' issue.

With respect to the Marital GST Trust, the Trust Agreement provides that the surviving grantor is to receive all of the trust's net income at least quarterly and so much of the principal as the trustee deems necessary or advisable for the surviving grantor's health, support, or maintenance. Upon the death of the surviving grantor, the trust principal is to be used to pay any increase in estate and inheritance taxes on the surviving grantor's estate resulting from the inclusion of the trust's assets in the surviving grantor's estate. The surviving grantor has a testamentary limited power of appointment over the remaining principal. Any part of the trust not effectively appointed

PLR-105716-02

shall be distributed to GST tax exempt trusts to be established upon the surviving grantor's death for the benefit of the grantors' issue. The Trust Agreement authorizes Decedent's personal representative to elect to treat all or part of the Marital GST Trust as qualified terminable interest property (QTIP) and the make the reverse QTIP election with respect to the trust.

Under the terms of the Trust Agreement, Spouse is the sole income and principal beneficiary of the Survivor's Trust and has a testamentary general power of appointment over the trust.

Pursuant to Paragraphs 12.06(1) and (2) of the Trust Agreement, Spouse is the trustee of the Trust, the Survivor's Trust, the Bypass Trust, and the Marital GST Trust. Pursuant to Paragraph 10.10(1) of Trust Agreement, if a beneficiary of a trust is also that trust's trustee, the beneficiary, as trustee, is not permitted to make payments of trust income or principal: (1) to any person whom the beneficiary is legally obligated to support; or (2) to himself or herself, unless the payment is made pursuant to a power limited by an "ascertainable standard," as that term is defined in section 2041.

Decedent and Spouse owned certain assets in joint tenancy with right of survivorship. Within 9 months of Decedent's death, at the advice of her attorney, Spouse filed with the local court a disclaimer of the one-half interest in these assets which passed to her as the surviving joint tenant. Also within 9 months of Decedent's death, Spouse filed a disclaimer of her testamentary limited powers of appointment over the Marital GST Trust and the Bypass Trust.

Spouse retained a certified public accountant (CPA) to prepare the United States Estate (and Generation-Skipping Transfer) Tax Return, Form 706, for Decedent's estate. The Form 706 was timely filed on extension on Date 3. The Form 706, as filed, reported the full value of all assets owned by Decedent and Spouse, rather than the value of Decedent's one-half interest. Additionally, all of the assets were listed at their full value on Schedule M attached to the Form 706. Schedule M did not reflect the transfer of the assets to the Trust and the subsequent transfer of the assets to the Bypass Trust, the Marital GST Trust, and the Survivor's Trust, pursuant to the terms of Decedent's will and the Trust Agreement. Finally, a Schedule R was not attached to the Form 706. Therefore, the reverse QTIP election was not made and Decedent's GST exemption was not allocated to either the Bypass Trust or to the Marital GST Trust. Shortly after the Form 706 was filed, a copy of the return was provided to Spouse's attorney, who discovered the errors made by the CPA.

You have requested an extension of time under sections 301.9100-1 and 301.9100-3 to make a reverse QTIP election under section 2652(a)(3) with respect to the Marital GST Trust.

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent

PLR-105716-02

who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by section 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, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides the general rule that 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, no deduction shall be allowed under section 2056(a) with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse.

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

Section 2056(b)(7)(B)(i) provides that the term "qualified terminable interest property" means 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 section 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides that the term "qualifying income interest for life" means: (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals; 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 section 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that the QTIP election is made on the return of tax imposed by section 2001. For this purpose, the

PLR-105716-02

term "return of tax imposed by section 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.

Section 20.2056(b)-7(b)(4)(ii) provides that the election, once made, is irrevocable, provided that an election may be revoked or modified on a subsequent return filed on or before the due date of the return, including extensions actually granted.

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

Section 2044(c) provides that for purposes of the estate tax and the generation-skipping transfer tax, property includible in the gross estate of the decedent under section 2044 shall be treated as property passing from the decedent.

Section 2601 imposes a tax on every generation-skipping transfer (GST) made after October 22, 1986.

Section 2611(a) provides that the term "generation-skipping transfer" means: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines "applicable rate" as the product of the maximum Federal estate tax rate and the inclusion ratio with respect to the transfer. Section 2642(a) provides the method for determining the inclusion ratio.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under section 2631(c)) which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Under section 2631(b), any allocation under section 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 section 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 2632(e)(1) provides that, in general, any portion of an individual's GST exemption which has not been allocated within the time prescribed by section 2632(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.

PLR-105716-02

Section 26.2632-1(d)(2) of the Generation-Skipping Transfer Tax Regulations 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 on the basis of the value of the property as finally determined for purposes of the estate tax, first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata on the basis of the estate tax 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. 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)(1) provides that for purposes of the generation-skipping transfer tax, the term "transferor" means the decedent in the case of any property subject to the estate tax. 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 to the decedent under section 2056(b)(7), the estate of the decedent may elect to treat all of the property in such trust for purposes of the generation-skipping transfer tax as if the election to be treated as qualified terminable interest property had not been made.

Section 26.2652-2(b) provides that the reverse QTIP election under section 2652(a)(3) is made on the return on which the QTIP election is made.

Under section 301.9100-1(c) of the Procedure and Administration Regulations the Commissioner may grant a reasonable extension of time under the rules set forth in sections 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 Code except subtitles E, G, H, and I.

Section 301.9100-2 provides an automatic extension of time for making certain elections.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements of section 301.9100-2 must be made under the rules of section 301.9100-3. Requests for relief subject to section 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.

PLR-105716-02

Section 301.9100-3(b)(1) provides that, except as provided in section 301.9100-3(b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer: (i) requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) 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; (iv) reasonably relied on the written advice of the Internal Revenue Service; or (v) 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.

Schedule M of Form 706 states that if property meets the requirements of qualified terminable interest property under section 2056(b)(7), and the property is listed on Schedule M, and the value of the property is entered in whole or in part as a deduction on Schedule M, then unless the executor specifically identifies the property to be excluded from the election, the executor shall be deemed to have made an election to have such property treated as qualified terminable interest property under section 2056(b)(7).

In this case, the CPA who prepared Decedent's estate tax return listed all assets owned by Decedent and Spouse at their full value on Schedule M, rather than the value of Decedent's one-half interest. In addition, he listed all assets owned by Decedent and Spouse irrespective of the proper recipient of these assets under Decedent's will and the terms of the Trust Agreement.

Pursuant to his will, Decedent's one-half interest in certain items of tangible personal property passed outright to Spouse. The value of Decedent's one-half interest in this property qualifies for the marital deduction under section 2056(a) and does not qualify as QTIP property under section 2056(b)(7).

Pursuant to the terms of the Trust Agreement, Decedent's one-half interest in several of the assets listed on Schedule M passed to the Bypass Trust. The value of Decedent's one-half interest in these assets does not qualify as QTIP property under section 2056(b)(7), because under the terms of the Bypass Trust, Spouse does not have a qualifying income interest for life in the trust.

Pursuant to the terms of the Trust Agreement, Decedent's one-half interest in several other assets listed on Schedule M passed to the Survivor's Trust. The value of Decedent's one-half interest in these assets qualifies for the marital deduction under section 2056(b)(5), because Spouse is entitled to all of the income of the trust for life, and she has a testamentary general power of appointment over the trust assets. Because the property which passed to the Survivor's Trust qualifies for the marital deduction under section 2056(b)(5), the property does not qualify as QTIP property

PLR-105716-02

under section 2056(b)(7).

Finally, under the terms of the Trust Agreement, Decedent's one-half interest in other assets listed on Schedule M passed to the Marital GST Trust. The value of Decedent's one-half interest in these assets qualifies for the marital deduction under section 2056(b)(7), because the terms of the Marital GST Trust satisfy the requirements for QTIP. Since these assets were listed and deducted on Schedule M, the QTIP election was made with respect to the assets passing to the Marital GST Trust to the extent of the value of Decedent's one-half interest.

Since the Marital GST Trust is a QTIP trust, the assets in that trust will be includible in Spouse's gross estate upon her death under section 2044. Since Spouse has a testamentary general power of appointment over the Survivor's Trust, the assets in that trust will be includible in Spouse's gross estate upon her death under section 2041. Therefore, pursuant to section 2652(a)(1)(A), Spouse is deemed to be the transferor of the Marital GST Trust and the Survivor's Trust for GST tax purposes.

Decedent is deemed to be the transferor of the Bypass Trust for GST tax purposes. Since no allocation of Decedent's GST tax exemption was made when the Form 706 was filed, the automatic allocation rules in sections 2632(e)(1) and 26.2632-1(d)(2) automatically allocated a portion of Decedent's GST exemption to the Bypass Trust. Since Decedent is not the transferor of the Survivor's Trust and the Marital GST Trust, none of Decedent's remaining GST tax exemption was allocated to these trusts. However, if a reverse QTIP election under section 2652(a)(3) is made for the Marital GST Trust, Decedent will be treated as the transferor of the Marital GST Trust and the automatic allocation rules of sections 2632(e)(1) and 26.2632-1(d)(2) will apply to allocate Decedent's remaining GST exemption to the property in the Marital GST Trust.

Based on the facts submitted and the representations made, we conclude that the requirements of section 301.9100-3 have been satisfied. Accordingly, an extension of time of 60 days from the date of this letter is granted to make a reverse QTIP election for the Marital GST Trust. The election should be made on a supplemental Form 706 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for that purpose.

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

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.

The ruling contained in this letter is based upon information and representations

PLR-105716-02

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 ruling, 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.

Sincerely,

William P. O'Shea

William P. O'Shea
Acting Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures - Copy for section 6110 purposes
Copy of letter cc: