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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:B4

PLR-132793-18

Date:

April 29, 2019

Re:

### Legend

Decedent =

Spouse =

Trust =

Date 1 =

Date 2 =

Accountant =

Dear :

This letter responds to your authorized representative's letter dated October 9, 2018. In that letter, your authorized representative requested an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to make a reverse qualified terminable interest property (QTIP) election under § 2652(a)(3) of the Internal Revenue Code and to make an election to treat a marital trust as two separate trusts under § 26.2652-2(c) of the Generation-Skipping Transfer Tax Regulations.

The facts and representations submitted are summarized as follows. On Date 1, Decedent and Spouse created a revocable trust, Trust. Decedent died on Date 2, survived by Spouse.

Article 7(A)(1) of Trust provides that upon the death of the first to die of Decedent or Spouse, the trustee shall divide Trust into a surviving trustor's share and a decedent's

share. Article 7(A)(1) further directs that the decedent's share shall consist of the decedent's separate property, his one-half interest in community property, and his one-half interest in quasi-community property.

Article 7(A)(3) directs the trustee to retain the surviving trustor's share in a separate trust (the Surviving Trustor's Trust).

Article 7(A)(3) directs the trustee to further divide the property in the decedent's share into three parts: the tangible personal property share, the marital deduction share, and the by-pass share. Article 7(A)(3)(a) directs the trustee to distribute the tangible personal property share to the Surviving Trustor's Trust. Article 7(A)(3)(b) defines the marital deduction share, directs the trustee to distribute the marital deduction share between a marital trust (the QTIP Trust), and the Surviving Trustor's Trust in the amounts described in Article 7(A)(3)(b). Article 7(A)(3)(c) directs the trustee to distribute to a by-pass trust (the By-pass Trust) the property remaining in the decedent's share after distribution of the tangible personal property share and marital deduction share.

Article 9 provides the terms of the QTIP Trust. Article 9 directs the trustee to pay to or apply for the benefit of the surviving spouse all of the net income quarter-annually or at more frequently intervals. The trustee shall also pay to or apply for the benefit of the surviving spouse so much of the principal of the QTIP Trust for the survivor's health, maintenance, support and education. In addition, the surviving spouse has the right to occupy without payment of rent any real property in the QTIP Trust. Moreover, the surviving spouse has a testamentary special power of appointment over the QTIP Trust.

Article 5(G) directs the trustee to divide any trust with a GST transfer tax inclusion ratio other than zero or one into exempt and nonexempt portions to be held as separate trusts. In addition, Article 14(A)(6)(c) provides that the trustee may divide any trust into two or more separate trusts and, as an example, provides that the trustee may divide any trust into two separate trusts in order that the GST transfer tax inclusion ratio for each such trust shall be either zero or one.

Article 4(C) provides, in part, that upon the death of the first to die of Decedent and Spouse, the survivor may amend or revoke the Surviving Trustor's Trust in whole or in part, but any and all other trusts created under Trust shall be irrevocable.

Spouse acted as executor of Decedent's estate and trustee of Trust. Spouse relied on Accountant to prepare and provide advice regarding Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. Spouse made an election to have the QTIP Trust treated as qualified terminable interest property under

§ 2056(b)(7). However, Accountant failed to attach a Schedule R to Decedent's Form 706 and failed to advise Spouse to divide the QTIP Trust into a GST exempt QTIP trust and a GST nonexempt QTIP Trust. Thus, Decedent's estate did not make a reverse QTIP election and did not affirmatively allocate Decedent's GST tax exemption. The successor trustee of Trust discovered these errors upon review of Spouse's Form 706. It is represented that Decedent has sufficient GST exemption to allocate to the GST exempt QTIP trust.

You have requested:

1. An extension of time under § 301.9100-1 and 301.9100-3 to sever the QTIP Trust into a GST exempt QTIP trust and a GST nonexempt QTIP trust pursuant to § 26.2654-1(b) of the GST Tax Regulations.
2. An extension of time under § 301.9100-1 and 301.9100-3 to make a "reverse" QTIP election under § 2652(a)(3).

#### 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 2044 provides, in part, that the value of the gross estate shall include the value of any property for which a deduction was allowed with respect to the transfer of such property to the decedent under § 2056(b)(7) in which the decedent had a qualifying income interest for life.

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 which 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 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 this section 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; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B)) -- (C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

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

Section 2056(b)(7)(B)(i) defines the term “qualified terminable interest property” as 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 § 2056(b)(7) 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.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that, in general, the election referred to in § 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001 (or § 2101). For purposes of this paragraph, the term “return of tax imposed by § 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 2601 imposes a tax on every generation-skipping transfer. 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 GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term

“applicable rate” means, with respect to any GST transfer, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2631(a), as in effect on Decedent's date of death, provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 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, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 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 § 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.

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 the Form 706, or Form 706NA, to the extent not otherwise allocated by the decedent's executor on or before that date. 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 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. 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. The automatic allocation is irrevocable.

Section 2642(a)(1) provides that, generally, the inclusion ratio with respect to any property transferred in a GST is the excess of one over the applicable fraction determined for the trust. Section 2642(a)(2) provides that, in general, the applicable fraction is a fraction the numerator of which is the amount of the GST exemption

allocated to the trust and the denominator of which is the value of the property transferred to the trust, reduced by the sum of any federal estate tax or state death tax actually recovered from the trust attributable to such property, and any charitable deduction allowed under § 2055 or 2522 with respect to such property.

Section 2652(a)(1) provides that for purposes of chapter 13, the term “transferor” means: (A) in the case of any property subject to the tax imposed by chapter 11, the decedent; and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides, in pertinent part, 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 such trust for GST tax purposes as if the election to be treated as qualified terminable interest property had not been made (“reverse” QTIP election).

Section 26.2652-2(a) provides, in part, 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 26.2652-2(b) provides that an election under § 2652(a)(3) is made on the return on which the QTIP election is made.

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 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 and the terms of the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original instrument and the severance occurs prior to the date prescribed for filing the federal estate tax return (including extensions actually granted) for the estate of the transferor and the new trusts are severed on a fractional basis.

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 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).

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.

Based on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 are satisfied. Therefore, Decedent's estate is granted an extension of time of 120 days from the date of this letter to sever the QTIP Trust into a GST exempt QTIP trust and a GST nonexempt QTIP trust and to make a reverse QTIP election with respect to the GST exempt QTIP trust. Further, the automatic allocation rules of § 2632(e) apply to 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. The Form 706 should be filed with the Cincinnati Service Center at the following address: Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for this purpose.

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.

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.

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.

In accordance with the Power of Attorney on file with this office, we have sent a copy of this letter to your authorized representatives.

Sincerely,

Associate Chief Counsel  
(Passthroughs & Special Industries)

By: Lorraine E. Gardner  
Lorraine E. Gardner  
Senior Counsel, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2)

Copy of this letter  
Copy for § 6110 purposes

cc: