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Person To Contact:

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Telephone Number:

Refer Reply To:

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Date:

July 09, 2004

In. Re:

Legend:

Decedent	=
Spouse	=
Date 1	=
Date 2	=
A	=
B	=
C	=

Dear :

This is in response to your letter dated January 23, 2004, and subsequent correspondence, requesting 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 with respect to a trust.

The facts submitted and the representations made are summarized as follows. On Date 1, Decedent died survived by his spouse (Spouse) and children. The relevant provisions of Decedent's will provide as follows.

Article V of Decedent's will provides that the Marital Trust is to be funded with assets equal to the maximum marital deduction allowable for Decedent's estate reduced by the amount required to increase the taxable estate to the maximum amount that, considering the unified credit and the state death tax credit, will result in no federal estate tax payable. The Marital Trust is to be divided into two trusts, QTIP Trust A and QTIP Trust B. QTIP Trust A is to be funded with that portion of

the assets equal to Decedent's available generation-skipping transfer (GST) exemption after taking into account all prior transfers and all other provisions of Decedent's will. QTIP Trust B is to be funded with the remaining assets.

Article VI.B provides that during Spouse's lifetime, Spouse is to receive all of QTIP Trust A's and B's net income at least annually. Net income not distributed at Spouse's death is to be paid to Spouse's estate. In addition, trustees have the discretion to pay QTIP Trust A's and B's principal to Spouse to provide for her health, education, support, and maintenance. The trustees are directed to make principal distributions to Spouse first from QTIP Trust B and then from QTIP Trust A.

Article VI.C provides that upon Spouse's death, QTIP Trust A's remaining principal is to be distributed to Grandchildren's Trust the terms of which are set forth in Article IX of Decedent's will.

Article VI.D provides that upon Spouse's death, QTIP Trust B's remaining principal is to be distributed to Residuary Trust the terms of which are set forth in Article X of Decedent's will.

Article IX provides that the Grandchildren's Trust is to be funded with an amount equal to Decedent's maximum available GST exemption but not greater than the greater of either (1) the amount required to make Decedent's taxable estate the maximum amount that will result in no federal estate tax payable, considering the unified credit and the state death tax credit allowable, or (2) the residue of Decedent's estate.

Article IX.A provides that Grandchildren's Trust is to be divided into one equal share for each of Decedent's children. Article IX.A.1 provides that during Spouse's lifetime, trustees are to pay to any member of the family group consisting of Spouse, the child for whom the share was established, and the child's descendants, income and principal to provide for their health, education, support, and maintenance. There is no requirement to equalize distributions among beneficiaries. Income not distributed is to be added to principal.

Article IX.A.2 provides that, at Spouse's death, each child is to receive the income from his or her share and principal to provide for his or her health, education, support, and maintenance. When the child dies, his or her share is to be divided into equal shares to provide one share for each of the child's children (grandchildren).

Article IX.A.3 provides that with respect to each share established for a grandchild, the trustee is to pay any member of the group consisting of the grandchild and his or her descendants income and principal to provide for their health, care, maintenance, education, and support. There is no requirement to equalize distributions among beneficiaries. Income not distributed is to be added to

principal. If a grandchild dies before receiving full distribution of his or her share, the remainder of the share is to be distributed, per stirpes, to his or her descendants, if any; if none, to the then living descendants of the nearest lineal ancestor of the deceased descendant who is also a descendant of Decedent and who has then living descendants, per stirpes.

Article X provides that Residuary Trust is to be funded with the residue of Decedent's estate not effectively disposed of by previous provisions of Decedent's will.

Article X.A provides that the Residuary Trust is to be divided into one equal share for each of Decedent's children. Article X.A.1 provides that during Spouse's lifetime, trustees are to pay to any member of the family group consisting of Spouse, the child for whom the share was established, and the child's descendants, income and principal to provide for their health, education, support, and maintenance. There is no requirement to equalize distributions among beneficiaries. Income not distributed is to be added to principal.

Article X.A.2 provides that upon Spouse's death, each living child is to receive the balance of his or her share, free of trust. With respect to a collective share allocated to a deceased child's living descendants, the trustee is to distribute that share, per stirpes, to the living descendants, free of trust.

The executors retained an attorney to prepare the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for Decedent's estate. The estate tax return was timely filed on Date 2. The estate tax return reported that Grandchildren's Trust was to be funded with \$ A. In addition, the attorney, in preparing the estate tax return, erroneously reported that there was only one marital trust to be funded with assets equaling the total of \$ B and \$ C, instead of two marital trusts (QTIP Trust A and QTIP Trust B) to be funded with \$ B and \$ C, respectively, as required by Decedent's will. The QTIP election was made for the marital trust reported on the estate tax return.

The attorney also inadvertently failed to attach a Schedule R to the return. Consequently, a reverse QTIP election was not made under § 2652(a)(3) for QTIP Trust A and Decedent's GST exemption was not allocated to QTIP Trust A. It has been represented that all of Decedent's GST exemption was available for allocation at his death.

The executors are requesting an extension of time under § 301.9100-3 to make the reverse QTIP election under § 2653(a)(3) for QTIP Trust A.

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 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 and (A) an interest in such property passes or has passed (for less than adequate and full consideration in money or money's worth) from the decedent to any person other than the 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)(5) provides that, in the case of an interest in property passing from the decedent, if the surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse – (A) the interest or such portion thereof so passing shall, for purposes of § 2056(a), be considered as passing to the surviving spouse, and (B) no part of the interest so passing shall, for purposes of § 2056(b)(1)(A), be considered as passing to any person other than the surviving spouse. This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

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

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)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides, in part, 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. The election, once made, is irrevocable.

Section 2044(a) provides that the value of the gross estate shall include the value of any property to which § 2044 applies in which the decedent had a qualifying income interest for life.

Section 2044(b) provides that § 2044 applies to any property if a deduction was allowed with respect to the transfer of such property to the decedent under § 2056(b)(7) or § 2523(f), and § 2519 (relating to dispositions of certain life estates) did not apply with respect to a disposition by the decedent of part or all of such property.

Section 2601 imposes a tax on every generation-skipping transfer.

Section 2602 provides that the amount of 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 § 2631(c)) 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 once an allocation of GST exemption is made, it is irrevocable.

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

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 the individual's death, and (B) second, to trusts with respect to which the individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after the 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 Form 706 to the extent not otherwise allocated by the decedent's executor on or before that date. The regulation also supplies the method for the automatic allocation of any unused GST exemption. First, the exemption is allocated pro rata to direct skips on the basis of their values for estate tax purposes. The balance is then allocated pro rata, on the basis of estate tax values, to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. No automatic allocation 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 2652(a)(3) provides that in the case of any trust with respect to which a deduction is allowed to the decedent's estate 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 QTIP 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 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.

Under § 301.9100-1(c), the Commissioner may 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 Code except subtitles E, G, H, and I.

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 a regulatory election.

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

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

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.

In this case, it has been represented that all of Decedent's GST exemption was available for allocation at his death. Although no allocation of Decedent's GST exemption was made on Decedent's estate tax return as filed, pursuant to §§ 2632(e) and 26.2632-1(d)(2), \$ A of Decedent's GST exemption was automatically allocated to Grandchildren's Trust, leaving \$ B of Decedent's GST exemption unused.

In addition, because a QTIP election was made on the estate tax return for the single marital trust and this trust was reported to be funded with all of the assets that are to fund QTIP Trust A and QTIP Trust B under the terms of Decedent's will, both QTIP Trust A and QTIP Trust B are includible in Spouse's gross estate under § 2044. Consequently, Spouse is considered the transferor of these trusts for GST tax purposes. Therefore, Decedent's remaining GST exemption of \$ B may not be allocated to either QTIP Trust A or QTIP Trust B. However, if a reverse QTIP election under § 2652(a)(3) is made for QTIP Trust A, Decedent will be treated as the transferor of QTIP Trust A, and the automatic allocation rules of § 2632(e) will apply Decedent's remaining GST exemption to the property in that trust.

Based on the information submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, an extension of time of 60 days is granted to file a supplemental Form 706 with the Service to make the reverse QTIP election with respect to QTIP Trust A. Further, on the supplemental Form 706, it should be clarified that the QTIP election was made for QTIP Trust A and QTIP Trust B.

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 remaining GST exemption to QTIP Trust A.

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. Specifically, no opinion is expressed or implied concerning the value of the assets to fund Grandchildren's Trust, QTIP Trust A, and QTIP Trust B for federal estate tax purposes.

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

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

Enclosure: Copy for § 6110 purposes
Copy of letter

cc: