

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:9-PLR-119011-00

Date:

February 5, 2001

Legend:

Decedent =

Spouse =

Daughter =

Date 1 =

Estate =

Tax Practitioner =

Trustee =

Trust =

Family Trust =

Marital Deduction Trust =

Dear Trustee:

This responds to a letter dated September 28, 2000 and subsequent correspondence that you submitted on behalf of the Estate, requesting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations to make a "reverse" qualified terminable interest property ("QTIP") election under section 2652(a)(3) of the Internal Revenue Code ("Code") with respect to the assets of the Marital Deduction Trust.

Decedent died on Date 1. He was survived by Spouse and Daughter. The Fifth Article of Decedent's will provided that, except for minor bequests provided for in

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subparagraph B of the Fourth Article of Decedent's will, the bulk of his estate was to be distributed to a revocable inter vivos Trust that he created during his life. Article IV of the trust agreement for this Trust provided that, upon Decedent's death, the Trust's assets and any assets distributable to the Trust by Decedent's will or otherwise, were to be disposed of in accordance with the remaining provisions of Article IV.

Article IV(A) provided that, in the event the Decedent's probate estate was insufficient, certain Trust assets could be used to pay taxes, expenses, claims, and devises of the Estate. Article IV(B)(1) provided that Trust assets that qualify for the marital deduction under section 2056, the value of which exceeded the unified credit amount applicable to the Estate, were to be used to fund the Marital Deduction Trust. Article IV(B)(2) provided that the remaining Trust assets were to be used to fund the Family Trust.

Article IV(C) of the Trust established the terms of the Marital Deduction Trust. Article IV(C)(1) of the Trust provided that Spouse was to receive all of the net income from the Marital Deduction Trust at least quarterly for her life. Article IV(C)(1) further provided that, at Spouse's death, accrued and undistributed income was to be paid to her estate. Article IV(C)(2) provided that Spouse was to receive distributions of principal from the Marital Deduction Trust at the trustees' discretion. Article IV(C)(3) provided that upon Spouse's death, the Marital Deduction Trust's assets were to be used to pay any additional estate, inheritance, or other death taxes imposed upon Spouse's estate as a result of the inclusion of said assets in Spouse's estate and that the remaining principal of the Marital Deduction Trust was to be added to and become a part of the Family Trust, subject to payment of expenses and taxes for which Spouse's estate is liable in the event Spouse's probate estate is insufficient to pay such expenses and taxes.

Article IV(D) of the Trust established the terms of the Family Trust. Article IV(D)(1) provided that the Spouse was to receive the net income from the Family Trust at least quarterly for her life and distributions of principal subject to an ascertainable standard. Article IV(D)(1) further provided that, at Spouse's death, the trustees were to pay or apply some or all of the net income and principal to or for the use and benefit of Daughter and her children and grandchildren subject to an ascertainable standard. Undistributed income was to be accumulated and added to principal. Article IV(D)(2) provided that, upon Daughter's death, the Family Trust is to be divided and distributed in equal shares to Daughter's children, per stirpes.

Daughter, as executor of Decedent's Estate, timely filed a Form 706, Estate Tax Return ("Form 706"), which was prepared by Tax Practitioner. On the Form 706, a QTIP election under section 2056(b)(7) was made for the entire value of the assets in the Marital Deduction Trust. On the Form 706, a small portion of Decedent's Generation-Skipping Transfer Tax ("GST") exemption was allocated to three specific bequests. An additional portion of Decedent's GST exemption was allocated to the assets passing to the Family Trust under the automatic allocation rule of section 2632(c). Although a portion of Decedent's GST exemption was still available, the executor failed to make

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the “reverse” QTIP election under section 2652(a)(3) with respect to the Marital Deduction Trust’s assets. As a result, those assets are currently not exempt from the GST tax. The Internal Revenue Service (“Service”) accepted the Estate’s Form 706 and issued an Estate Tax Closing Letter approximately one year after Decedent’s death.

Spouse died approximately three years after Decedent. The executor of Spouse’s estate allocated a substantial portion of Spouse’s \$1,000,000 GST exemption to bequests to Spouse’s grandchildren and to assets passing to an inter vivos trust. Spouse’s remaining GST exemption is insufficient to exempt the assets of the Marital Deduction Trust from GST tax. The Service accepted the Form 706 and amended Form 706 filed for Spouse’s estate and issued an Estate Tax Closing Letter for Spouse’s estate approximately one year after her death.

Article IV(C)(3) of the Trust provided that, upon Spouse’s death, the entire remaining principal of the Marital Deduction Trust was to be added to the Family Trust. You have informed us that the Marital Deduction Trust’s assets have not yet been added to the Family Trust.

Daughter died approximately two years after Spouse. Article IV(D)(2) of Decedent’s Trust provided that, upon Daughter’s death, the Family Trust (anticipated to include the assets of the Marital Deduction Trust) is to terminate and its assets are to be distributed in equal shares to Daughter’s children, per stirpes. You have informed us that the assets of both trusts have not yet been distributed to Daughter’s children.

After Daughter’s death, Tax Practitioner discovered that the “reverse” QTIP election had not been made on the Form 706 for Decedent’s Estate. Tax Practitioner contacted a representative of the Service. As a result, a Form 706-GS(T) was filed disclosing the error and resulting tax liability. No GST tax was paid with the Form 706-GS(T) and the failure to pay caused the Service to issue a section 6331(d) notice of intent to levy to the Marital Deduction Trust. The Estate is closed and all named personal representatives for the Estate are deceased.

You have informed us that Spouse’s remaining unused GST exemption is not sufficient to exempt all of the Marital Deduction Trust’s assets from GST tax. However, if allocated to the Marital Deduction Trust, you have informed us that Decedent’s unused GST exemption would be sufficient to exempt all of the Marital Deduction Trust’s assets from GST tax. You have requested an extension of time under section 301.9100-3 to make a “reverse” QTIP election under section 2652(a)(3) on behalf of the Estate, which would enable the Estate to allocate Decedent’s remaining GST exemption to the assets of the Marital Deduction Trust.

LAW and ANALYSIS:

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Section 2001(a) of the Code 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 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.

Section 2056(b)(1) provides, in pertinent part, that no deduction shall be allowed under section 2056(a) 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.

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 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)(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.

Under section 2044, any property in which the decedent had a qualifying income interest for life and for which a deduction is allowed under section 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 gross estate of the decedent under section 2044(a) 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 2612(a)(1) provides that the term "taxable termination" means the termination (by death, lapse of time, release of power, or otherwise) of an interest in property held in a trust unless: (A) immediately after such termination, a non-skip person has an

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interest in such property; or (B) at no time after such termination may a distribution (including distributions on termination) be made from such trust to a skip person.

Section 2613(a) provides that the term "skip person" means: (1) a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor; or (2) a trust-- (A) if all interests in such trust are held by skip persons, or (B) if-- (i) there is no person holding an interest in such trust, and (ii) at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a non-skip person.

Section 2613(b) provides that the term "non-skip person" means any person who is not a skip person.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2631(b) provides that any allocation under section 2631(a), once made, shall be irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of his 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(c)(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.

Section 2652(a)(1) provides, in pertinent part, 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 that in the case of-- (A) any trust with respect to which a deduction is allowed to the decedent under section 2056 by reason of subsection (b)(7) thereof, and (B) any trust with respect to which a deduction to the donor spouse is allowed under section 2523 by reason of subsection (f) thereof, the estate of the decedent or the donor spouse, as the case may be, may elect to treat all of the property

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in such trust for purposes of this chapter as if the election to be treated as qualified terminable interest property had not been made.

Section 26.2632-1(d)(2) of the Generation-Skipping Transfer Tax Regulations provides, in pertinent part, that 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 26.2652-2(b) provides that an 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 section 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, in pertinent part, 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.

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.

Section 301.9100-3(c)(1) provides in pertinent part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

In this case, as a result of the QTIP election made on the Decedent's Form 706, the

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property in the Marital Deduction Trust is includible in Spouse's gross estate pursuant to section 2044. Spouse, accordingly, is considered the transferor of the property for GST purposes and therefore, Decedent's unused GST exemption may not be allocated to the Marital Deduction Trust's assets. However, if the Trustee on behalf of the Estate makes the "reverse" QTIP election under section 2652(a)(3), Decedent will be treated as the "transferor" of the Marital Deduction Trust's assets and the automatic allocation rules of section 2632(c) will apply Decedent's unused GST exemption to this property.

Based on the facts submitted and representations made with your request, we have determined that the requirements of section 301.9100-3 have been satisfied. Therefore, an extension of time of 30 days from the date of this letter is granted in which the Trustee of the Marital Deduction Trust on behalf of the Estate may file an amended Form 706 and make the "reverse" QTIP election.

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 provision of the Code.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code 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,
By: Paul F. Kugler
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy for section 6110 purposes