Internal Revenue Service

Number: **200430002**
Release Date: 7/23/04
Index Number: 2056.07-00

Department of the Treasury
Washington, DC 20224

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B04 – PLR-102202-04
Date: APRIL 07, 2004

Legend

Deceased =
Spouse =
Trust =
Date 1 =
Date 2 =
Date 3 =
Amount 1 =
Amount 2 =
Amount 3 =
Amount 4 =
Amount 5 =
Amount 6 =
Amount 7 =

Dear :

This is in response to a letter from your authorized representative dated January 6, 2004, on your behalf in which you request rulings under § 2056 of the Internal Revenue Code.

You represent the facts to be as follows. Decedent died testate on Date 1. Decedent had created a revocable trust, Trust, and executed his will on Date 2. Section 2 of Decedent's will provides for the payment of all debts, taxes and administration expenses. Section 3 provides:

> I give the remainder of my estate to the Trustee then acting under a Trust executed by me today, to be administered and distributed upon the terms of that Agreement as it now exists or is later amended.

Section 4, paragraph 3. of Decedent's will gives the personal representative of Decedent's estate the following power:

> To make tax elections appropriate for my estate planning objectives and to reduce taxes including, but not limited to . . . (b) electing to have all or a portion of any transfer for my wife's benefit qualify for the marital deduction, ….

Section 8, paragraph B. of Trust provides as follows:

> After my death, this trust shall continue for the benefit of my wife, if she survives me, and my children as provided in the Family Trust (Paragraph D). However, if my estate exceeds the amount which would be exempt from federal estate tax, and if my wife survives me and some marital deduction is needed to eliminate the federal estate tax or reduce it to the lowest possible amount, then this trust shall divide into a Marital Trust (Paragraph C) and the Family Trust. I intend that the Family Trust be the amount that is exempt from federal estate tax and the remaining assets be allocated to the Marital Trust to use the marital deduction to eliminate or minimize the federal estate tax. Therefore, if my wife survives me, the Trustee shall allocate to the Family Trust the largest pecuniary amount possible which will not increase the federal estate tax, taking into consideration the credit for state death taxes only if this does not increase the state death taxes. This amount may be satisfied in cash or in specific assets, shall have a value on the date or dates of distribution equal to the amount determined by this paragraph, and shall include all assets which do not qualify for the marital deduction. The remaining assets shall be allocated to the Marital Trust.

The executor for Decedent's estate filed Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return on Date 3. Decedent's lifetime taxable gifts exceeded the estate tax exemption equivalent and thus no Family Trust was created. On Schedule M of Decedent's Form 706, the executor made a qualified terminal interest property (QTIP) election by listing the following:

Schedule A	Amount 1
Schedule B	Amount 2
Schedule C	Amount 3
Schedule D	Amount 4
Schedule E	Amount 5
Schedule F	Amount 6
Schedule I	Amount 7

The assets listed on Schedule M comprise, with the exception of Schedule E for jointly-owned property, 100% of the gross value of the assets listed on these schedules.

Subsequent to the filing of Decedent's Form 706, additional assets were discovered. The additional assets should have been reported on Schedule B of the Form 706. In addition, subsequent to the audit of Decedent's estate tax return, an adjustment was made that increased the value of assets reported on Schedules B and F.

You have requested the following rulings:

1. Whether under § 2056(b)(7), executor made a timely qualified terminable interest property election for 100% of the value of the assets reported on Schedules B and F of Decedent's estate tax return.

2. Whether the 100% qualified terminable interest property election fraction applies to all assets reported on Schedule B and Schedule F of Decedent's estate tax return regardless of whether the assets were originally reported on Decedent's estate tax return or whether the amount or value of the assets on Schedules B and F were subsequently increased as a result of an audit.

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, except as limited by § 2056(b), 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 souse, but only to the extent that such interest is included in determining the value of the gross estate. Section 2056(b)(1) denies a marital deduction for an interest passing to the surviving spouse that is a "terminable interest." An interest is a terminable interest if the interest passing to the surviving spouse will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur and, on termination, an interest in the property passes to someone other than the surviving spouse.

Section 2056(b)(7) provides an exception to this terminable interest rule in the case of qualified terminable interest property. For purposes of § 2056(a), qualified terminable interest property is treated as passing to the surviving souse and for purposes of § 2056(b)(1)(A), no part of such property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), qualified terminable interest property is property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(v) provides that the election to treat property as QTIP under § 2056(b)(7) is 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)(i) of the Estate Tax Regulations provides that the 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 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. If an executor appointed under local laws has made an election on the return of tax imposed by § 2001 with respect to one or more properties, no subsequent election may be made with respect to other properties included in the gross estate after the return of tax imposed by § 2001 is filed.

In the instant case, the trust instrument directed that, if Spouse survived Decedent, Trust was to be divided based on a formula into the Family Trust and the Marital Trust. As discussed above, based on this formula, under the terms of Trust all of the assets in Decedent's gross estate (other than jointly-owned property) passed to the Martial Trust. Consistent with Decedent's intent as set forth in Decedent's will and the trust instrument, the executor made a QTIP election under § 2056(b)(7)(B)(v) on Decedent's timely filed estate tax return. The assets for which the election was made were described by listing, on Schedule M the following: Schedule A with Amount 1, Schedule B with Amount 2, Schedule C with Amount 3, Schedule D with Amount 4, Schedule E with Amount 5, Schedule F with Amount 6, and Schedule I with Amount 7. With the exception of Schedule E for jointly-owned property, Schedule M reflected 100% of the gross value of the assets listed on these schedules and 100% of the projected marital trust value at the time the Form 706 was filed. The QTIP election was therefore made with respect to 100% of the amount passing to the Marital Trust under the terms of the trust instrument. Neither the omission of an asset nor the increase in the value of the gross estate pursuant to an audit affects the portion with respect to which the QTIP election is made, in this case, 100%. Instead, these changes affect the amount, but not the percentage election on the original estate tax return.

Therefore, based on the facts submitted and the representations made, we conclude that the executor of Decedent's estate made a timely QTIP election with respect to 100% of the value of the assets reported on Schedules B and F of Decedent's estate tax return and the QTIP election applies to all assets reported on Schedule B and Schedule F of Decedent's estate tax return including those assets not originally reported on Decedent's estate tax return and including the amount or value of the assets on Schedules B and F which were subsequently increased as a result of the audit of Decedent's estate tax return.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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

Sincerely,

Lorraine Gardner
Senior Counsel, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy for 6110 purposes

cc: