

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:04 – PLR-114847-04

Date: MARCH 22, 2005

In Re:

Legend

Decedent =

Spouse =

Trust =

Trustee =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Law Firm 1 =

Law Firm 2 =

a =

b =

c =

Dear :

This is in response to your letter, dated March 8, 2004, submitted on behalf of Decedent's estate, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make a "reverse" qualified terminable interest property (QTIP) election and to allocate Decedent's generation-skipping transfer (GST) exemption.

FACTS

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On Date 1, Decedent created Trust, a revocable trust. Decedent died on Date 2, survived by Spouse. The current trustee of Trust is Trustee.

Under the terms of Trust, upon Decedent's death, Trust is to be divided into separate trusts as follows: (1) a generation-skipping qualified marital deduction trust (GST Trust) consisting of that amount of property, if any, that had a value equal to Decedent's available GST tax exemption; (2) a family qualified marital deduction trust (Family Trust) consisting of the balance of the trust estate, and (3) in the event Decedent's estate made a partial election under § 2056(b)(7), a separate trust consisting of all property for which no QTIP election was made (Non-QTIP Trust). Assets totaling \$a were transferred to the Family Trust; assets totaling \$b were transferred to the GST Trust; and assets totaling \$c were transferred to the Non-QTIP Trust.

The terms of Trust provide that the GST Trust and the Family Trust are to pay income to Spouse during Spouse's life. Upon Spouse's death, any accumulated but undistributed income from the GST Trust is to be distributed to Spouse's estate, and the balance of the GST Trust is to be divided into equal shares for Decedent's grandchildren and held in further trust until the grandchildren reach specified ages. Upon the death of Decedent's Spouse, any accumulated but undistributed income from the Family Trust is to be distributed to Spouse's estate, and the remainder of the Family Trust is to be divided into equal shares for Decedent's children, with the issue of a deceased child taking their parent's share. The Non-QTIP Trust is to pay income to Spouse during Spouse's lifetime. Upon Spouse's death, any property remaining in the Non-QTIP Trust is to be distributed in accordance with, and as if it were a part of, the Family Trust.

Article III of Decedent's will specifically authorized the personal representative to make any election under § 2056(b)(7). You represent that the GST Trust and the Family Trust both satisfy the requirements for a marital deduction as QTIP under § 2056(b)(7).

Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for Decedent's estate was timely filed on Date 3. On Schedule M of the Form 706, Decedent's personal representative made an election under § 2056(b)(7) to treat both the Family Trust and the GST Trust as QTIP trusts for purposes of the estate tax marital deduction. No Schedule R was filed with Decedent's Form 706 and therefore Decedent's GST tax exemption was not allocated and no reverse QTIP election was made with respect to any of the trusts. Decedent's personal representative relied on Law Firm 1 for advice and to prepare Decedent's Form 706.

Spouse died on Date 4. During the preparation of the Form 706 for Spouse, Law Firm 2 discovered that the reverse QTIP election had not been made on Decedent's

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Form 706 with respect to the GST Trust and that Decedent's GST exemption had not been allocated to the GST Trust.

You are requesting the following rulings:

- 1 An extension of time in which to make a reverse QTIP election with respect to the GST Trust.
- 2 In view of the grant of the extension of time to make the reverse QTIP election for the GST Trust, the Decedent is treated as the transferor of the GST Trust for GST tax purposes under §§ 2652(a)(1) and 2652(A)(3).
- 3 An extension of time to allocate Decedent's GST tax exemption to the GST Trust. Thus, an amount equal to \$b of Decedent's GST exemption may be allocated to the GST Trust pursuant to § 2632(a).
- 4 The Family Trust, for which a marital deduction was allowed under § 2056(b)(7) and for which no reverse QTIP election was or will be made, will be included in the gross estate of Spouse under § 2044. Therefore, pursuant to § 2652(a)(1), Spouse will be treated as the transferor of the Family Trust for GST tax purposes.

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 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) disallows this deduction 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, 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)

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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 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, in relevant part, 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).

Section 2044(c) provides that for purposes of chapter 11 and chapter 13, property includible in the gross estate of the decedent under § 2044(a) shall be treated as property passing from the decedent.

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 purposes of this chapter 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.

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Section 26.2654-1(b)(1)(i) provides 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.

Section 26.2654-1(b)(3) provides that an individual's GST exemption under § 2632 may be allocated to the separate trusts created pursuant to this section at the discretion of the executor or trustee.

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) defines the term "applicable rate" with respect to any GST as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2642(a)(1) provides that, generally, the inclusion ratio with respect to any property transferred in a GST is the excess (if any) of 1 over the "applicable fraction." Section 2642(a)(2) provides, in part, that 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.

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)) that 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 § 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 § 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 26.2632-1(d)(1) provides, in part, that except as otherwise provided in § 26.2632-1(d), an allocation of a decedent's unused GST exemption by the executor of the decedent's estate is made on the appropriate United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706 or Form 706NA) filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions actually granted

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(the due date)). An allocation of GST exemption with respect to property included in the gross estate of a decedent is effective as of the date of death.

Section 2642(b)(2)(A) provides that if property is transferred as a result of the death of the transferor, the value of such property for purposes of § 2642(a) shall be its value as finally determined for purposes of chapter 11; except that, if the requirements prescribed by the Secretary respecting allocation of post-death changes in value are not met, the value of such property shall be determined as of the time of the distribution concerned. Section 2642(b)(2)(B) provides that any allocation to property transferred as a result of the death of the transferor shall be effective on and after the date of the death of the transferor.

Section 2642(g)(1)(A) provides, generally, that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2), and an election under § 2632(b)(3) or (c)(5). Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of § 2642(g)(1), which was enacted into law on June 7, 2001.

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-34 I.R.B. 189, provides that under § 2642(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a GST trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

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. Section 301.9100-1(b) provides that a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin.

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

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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) provides, in part, except as provided in § 301.9100-3(b)(3)(i) through (iii), 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.

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 the present situation, the terms of Trust directed that the trust be divided at Decedent's death into the GST Trust, the Family Trust, and the Non-QTIP Trust. As a result of the QTIP elections made on Decedent's Form 706, Decedent's entire GST exemption was allocated under the automatic allocation rules of § 2632(e)(1) to the Non-QTIP Trust. The assets in the GST Trust and the Family Trust would be includible in Spouse's gross estate pursuant to § 2044. If Decedent's estate is allowed to make a reverse QTIP election under § 2652(a)(3) with respect to the assets of the GST Trust, Decedent will be treated as the transferor of those assets for GST tax purposes. Spouse, however, would continue to be treated as the transferor of the Family Trust for GST tax purposes.

Based on the facts submitted and the representations made, we conclude that the requirements of § 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 with respect to the GST Trust. In addition, Decedent's estate is granted an extension of time to allocate Decedent's GST exemption to the GST Trust. Because the allocation of all of Decedent's available GST exemption to the GST Trust will precede in time the automatic allocation to the Non-QTIP Trust, the deemed allocation rules under § 2632(e)(1) will not apply to allocate any of Decedent's GST tax exemption to the Non-QTIP Trust. Provided that the amount of GST exemption allocated to the GST Trust equals the value of the GST Trust for federal estate tax purposes, the GST Trust will have an inclusion ratio of zero.

The reverse QTIP election and the GST exemption allocations should be made on a Supplemental Form 706 filed with the Internal Revenue Service Center, Cincinnati,

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Ohio 45999. A copy of this letter should be attached to the form. A copy is enclosed for this purpose.

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. 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.

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.

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

Sincerely,

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

Enclosures

Copy for section 6110 purposes

Copy of this letter

cc: