

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4-PLR-105410-02

Date:
APRIL 23, 2002

Re:

Legend:

Decedent =

Spouse =

Trust =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Month =

Year =

Dear :

This is in response to your submission of January 9, 2002, on behalf of Decedent's estate, in which you request 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 under § 2652(a)(3) of the Internal Revenue Code.

On Date 1, Decedent and Spouse, as Trustors and Trustees, executed Trust. Trust was funded with community property of Decedent and Spouse. Decedent died testate on Date 2, survived by Spouse and three adult children. At Decedent's death, no property of the estate passed under Decedent's will.

Section 4.1 of Trust provides that upon the death of Decedent, Trustee is to divide Trust into a "Survivor's Trust", a "Marital Trust", and a "Decedent's Trust". The Survivor's

Trust is to be funded with all of surviving Trustor's separate property and cash or other property equal in value to surviving Trustor's interest in the community property held or received by Trust. The Marital Trust is to be funded with a pecuniary amount which is the minimum dollar amount (if any) necessary as a marital deduction to eliminate (or to reduce to the extent possible) any federal estate tax at the death of the deceased Trustor. The "Decedent's Trust" is to consist of the remaining share of Trust not allocated to Survivor's Trust or Marital Trust.

Section 4.2.1 of Trust provides that, Trustee is to distribute the entire net income of the Survivor's Trust to or for the benefit of the surviving Trustor for his or her lifetime in quarterly or more frequent installments, and so much of the principal of Survivor's Trust as the surviving Trustor requests in writing. Section 4.2.3 provides that the surviving Trustor is to have the unlimited power to determine the manner in which the principal and any undistributed income of the Survivor's Trust is to be distributed at his or her death.

Under section 4.3, Trustee is to distribute the entire net income of the Marital Trust to or for the benefit of the Surviving Trustor for his or her life in quarterly or more frequent installments and so much of principal as Trustee deems necessary needed for the Surviving Trustor's health or support in his or her accustomed manner of living. On the death of the Surviving Trustor, the corpus of the Marital Trust is to be distributed, as directed in section 5 of Trust, to or for the benefit of the Trustors' issue.

Section 4.3.3 of Trust provides that if the property of Decedent's Trust is insufficient to fully utilize deceased Trustor's GST exemption remaining unallocated at the date of death of the deceased Trustor and if the property of Marital Trust is more than sufficient to fully utilize the deceased Trustor's remaining GST exemption after any allocation to Decedent's Trust, Marital Trust is to be divided and established as two trusts (in accordance with Section 10.5) to permit the GST "reverse" QTIP election to be made with respect to one of these trusts (the "Exempt Marital Trust"). The Exempt Marital Trust is to be funded with the amount equivalent to the remaining GST exemption of the deceased Trustor. Trustee is to have the discretion to select the assets to be allocated between the two trusts, but such assets as are selected shall be considered to satisfy the necessary amounts on the basis of their net fair market value on the date or dates of such allocation.

Section 10.5 of Trust provides that after making any division into separate shares required by Trust, Trustee is to divide any trust created by Trust into two further shares, an Exempt Trust and a Non-Exempt Trust. The Exempt Trust is to consist of all property that is exempt from the application of the federal generation-skipping transfer tax by reason of allocation of generation-skipping transfer exemption (i.e., property that has a zero "inclusion ratio"). The Non-Exempt Trust is to consist of the balance of the property allocable to that trust.

The executor of Decedent's estate engaged the services of a certified public accountant to prepare Form 706. After obtaining an extension of six (6) months, the executor timely filed Form 706 on Date 3. On Schedule M of Form 706, the executor

made an election under § 2056(b)(7) to treat the entire value of Marital Trust as qualified terminable interest property (QTIP). Schedule R of Form 706 was not filed with the return. An Estate Tax Closing letter was received by the executor on Date 4. In Month of Year, in connection with the allocation of assets to Marital Trust and Survivor's Trust, it was noticed by Trustee's attorneys and accountants, that Schedule R had not been filed with the return.

It is represented that because of lifetime gifts of Decedent, under the funding formula contained in Trust, Decedent's Trust was not funded. It is further represented that Decedent's unused GST exemption at the time of her death totaled \$1,030,000, and the amount passing to the Marital Trust under section 4.1 exceeded that amount. Accordingly, under section 4.3.3, the Marital Trust was divided into an "Exempt Marital Trust" and a "Non-Exempt" Marital Trust.

Trustee requests an extension of time under §§ 301.9100-1 and 301.9100-3 to make a "reverse" QTIP election under § 2652(a)(3) with respect to the Exempt Marital Trust.

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.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, such 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.

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)(v) provides that an election under § 2056(b)(7) with respect to any property is to be made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Under § 2044, any property in which the decedent possessed a qualifying income interest for life and for which a deduction is allowed under § 2056(b)(7) is includible in the decedent's gross estate.

Section 2601 imposes a tax on every generation-skipping transfer (GST) (within the meaning of subchapter B). A GST is defined under § 2611(a) as: (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.

Under § 2642(a)(1), the inclusion ratio with any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction". The applicable fraction, as defined in § 2642(a)(2) is a fraction, the numerator of which is the amount of GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the direct skip.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,030,000 (adjusted for inflation under § 2631(c)) 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 § 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 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 the of 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 2652(a)(1) provides that, for GST purposes, the "transferor" of property is the decedent in whose gross estate the property is included. Thus, in the case of property subject to a QTIP election that is subsequently includible in the surviving spouse's gross estate under § 2044, the surviving spouse would become the transferor

of the property for GST purposes. However, § 2652(a)(3) provides 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 the trust, for purposes of the GST tax, as if the election to be treated as qualified terminable interest property 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 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 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 6 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). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin.

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 in this case, we conclude that the standards of §§ 301-9100-1 and 301.9100-3 have been satisfied. Consequently, an extension of time for filing a supplemental Form 706 to make a "reverse" QTIP election under § 2652(a)(3) with respect to the Exempt Marital Trust is granted until 60 days after the date of this letter.

In this case, under the facts presented, where the automatic allocation rules will result in a zero inclusion ratio with respect the Exempt Marital Trust, the reverse QTIP election will result in a deemed allocation of Decedent's unused GST exemption under § 2632(e). The allocation will be effective as of the date of Decedent's death. Provided the estate tax value of the property passing to the trust equals Decedent's unused GST exemption, the Exempt Marital Trust will have an inclusion ratio of zero.

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 provisions of the Code.

A copy of this letter should be forwarded to the Cincinnati Service Center. A copy is included for that purpose.

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.

Sincerely yours,
Paul F. Kugler
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure

Copy of letter

Copy for section 6110 purposes

cc: