

**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-134885-02

Date:

AUGUST 20, 2003

Re:

LEGEND:

- Decedent -
- Spouse -
- Shelter Trust -
- Marital Trust -
- Date 1 -
- Date 2 -
- \$x dollars -
- \$y dollars -

Dear :

This responds to your letter dated May 31, 2002, as modified by your letter dated June 4, 2003, requesting extensions 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, and to make allocations of generation-skipping transfer (GST) tax exemption.

Decedent died testate on Date 1, survived by Spouse and three children. Spouse is the executor of Decedent's estate and the trustee of the trusts created pursuant to the terms of Decedent's will.

Article III of Decedent's will provides for the creation of Shelter Trust, consisting of the largest amount that can pass to the trust without increasing the Decedent's federal estate tax using final estate tax values.

Section 3.1 of Article III provides that the trustee may distribute income and corpus to or for the benefit of Spouse and any of one or more of the other beneficiaries, consisting of Decedent's descendants, as the trustee deems necessary for Spouse's support or the other beneficiaries' best interests. Spouse has an inter vivos and testamentary power to appoint all or any part of the trust estate to, or for the benefit of, any one or more of Decedent's descendants. Upon Spouse's death, any trust corpus not appointed by Spouse will be divided

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into shares, per stirpes, among Decedent's then-living descendants (the principal beneficiaries) and each share will be retained in a separate trust for the principal beneficiary and that beneficiary's descendants. Distributions will be made from income and corpus as the trustee deems necessary for the principal beneficiary's support or the best interests of other beneficiaries. The principal beneficiary has the limited power to appoint any part of the trust estate to, or for the benefit of, any one or more of Decedent's descendants or a charitable organization. Upon the principal beneficiary's death, the trust estate will be divided, per stirpes, into shares for the principal beneficiary's then-living descendants and retained in trust with similar dispositive provisions.

Article IV of Decedent's will provides for the disposition of the residuary estate. Section 4.1(a) of Article IV provides that, in the event that Decedent predeceases Spouse, the residuary estate passes in a separate trust (Marital Trust) for the benefit of Spouse as set forth in Section 4.4.

Section 4.4(a) of Article IV provides for the distribution, at least quarterly, of all the net income of the Marital Trust to Spouse, during her lifetime. Section 4.4(b) provides that the trustee of Marital Trust shall distribute so much of the corpus of such trust as the trustee deems to be necessary for Spouse's support and, in addition, may distribute trust corpus to Spouse as the trustee deems to be in her best interests. Spouse also has the noncumulative right to withdraw the greater of \$5,000 or 5 percent of the value of the corpus each year. Upon Spouse's death, Spouse may appoint all or any part of the corpus to one or more of Decedent's descendants, their spouses, or charitable organizations. Any trust corpus not appointed by Spouse, will be divided into shares and distributed, under the dispositive terms of the Shelter Trust, to or for the benefit of Decedent's then-living descendants, per stirpes.

Section 4.4(f) of Article IV authorizes the trustee to take any action necessary to have all or any part of the property in the Marital Trust treated as qualified terminable interest property and therefore qualify for the federal estate tax marital deduction.

Section 8.1(u) of Article VIII authorizes the trustee, in part, to:

. . . divide any separate trust into two or more equal or nonequal separate trusts, either before or after the trust is funded, to be held by the trustee under the identical terms and for the identical beneficiaries and remaindermen as said trust shall have been held before such division to enable GST exemption to be separately allocated to one of the trusts, or to enable the election under Section 2652(a)(3) of the Code to be made separately over one of them, or to otherwise make possible a separate trust with a zero inclusion ratio, or because the trusts have different transferors for GST purposes, or for any other purpose, and any such division shall be a division into fractional shares with each share participating *pro rata* in income, appreciation, and depreciation to the time of division . . .

Decedent had made gifts in previous years and had reported those gifts on United States Gift (and Generation-Skipping Transfer) Tax Returns, Form 709, filed for those years. Decedent had allocated \$x dollars of GST exemption on those gift tax returns filed in previous years.

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The United States Estate (and Generation-Skipping Transfer) Tax Return, Form 706, was filed on Date 2. A QTIP election was made on the Form 706 with respect to the assets passing to the Marital Trust. However, the Form 706, as filed, did not include a Schedule R reflecting a "reverse" QTIP election and an allocation of Decedent's GST tax exemption, as contemplated by the terms of Decedent's will, set forth above, to either the Shelter Trust or a GST Exempt Trust. The Shelter Trust was funded with \$y dollars. You have represented that, because the value of the assets passing to the Marital Trust exceeded Decedent's unused GST exemption at the time of Decedent's death, the representatives of Decedent's estate expected to divide the Marital trust into two trusts; a GST Exempt Trust and a GST Non-exempt Trust. The GST Exempt Trust would have been funded with assets equal to the value of Decedent's unused GST exemption and the GST Non-exempt Trust would have been funded with the balance of the Marital Trust. However, no division has yet been made.

Accordingly, you propose to divide the Marital Trust on a fractional basis into two subtrusts, one subtrust (the GST Exempt Trust) will be funded with an amount equal to the Decedent's unused GST exemption (less \$y dollars to be allocated, as discussed below, to the Shelter Trust). The other subtrust (the GST Non-exempt Trust) will be funded with the balance of the Marital Trust.

You request an extension of time under § 301.9100-3 to make the reverse QTIP election pursuant to § 2652(a)(3) for the GST Exempt Trust. You also request an extension of time to make an allocation of GST tax exemption to the Shelter Trust in the amount of \$y dollars, the amount that funded that trust, and an extension of time to make an allocation of Decedent's remaining unused GST exemption, after taking into account the allocation of GST tax exemption to the Shelter Trust, to the GST exempt subtrust of the Marital Trust.

#### 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, in pertinent part, that no deduction shall be allowed under § 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 § 2056(a), and no part of such property shall be treated as passing to any person other than the surviving spouse for purposes of § 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 § 2056(b)(7)(B)(v) applies.

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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.

Under § 2044, any property in which the decedent had 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 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 2601 imposes a tax on every generation-skipping transfer which, under § 2611(a), is defined as a taxable distribution, a taxable termination, and a direct skip.

Section 2602 provides that the amount of tax imposed by § 2601 is the "taxable amount" multiplied by the "applicable rate." Section 2641(a) provides that for purposes of chapter 13, the term "applicable rate" means, with respect to any generation-skipping 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 respect to 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 tax exemption of \$1,000,000 (adjusted for inflation as provided in § 2631(c)), which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Under § 2631(b), any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of his GST tax 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 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 chapter 13, 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 tax exemption may be allocated to the QTIP trust. Section 26.2652-2(a) of the Generation-Skipping Transfer Tax Regulations provides that the election must be made with respect to all property held in a QTIP trust. Section 26.2652-2(b) of the regulations provides that a "reverse" QTIP election is made on the return on which the QTIP election is made.

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Section 2642(a)(3)(A) provides, generally, that if a trust is severed in a qualified severance, the trusts resulting from such severance shall be treated as separate trusts thereafter for GST tax purposes.

Section 2642(a)(3)(B)(i) provides, generally, that for purposes of § 2642(a)(3)(A), the term "qualified severance" means the division of a single trust and the creation (by any means available under the governing instrument or under local law) of two or more trusts if the single trust was divided on a fractional basis, and the terms of the new trusts, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust.

Section 2642(a)(3)(B)(ii) provides that if a trust has an inclusion ratio of greater than zero and less than 1, a severance is a qualified severance only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before the severance. In such case, the trust receiving such fractional share shall have an inclusion ratio of zero and the other trust shall have an inclusion ratio of 1. Section 2642(a)(3)(B)(iii) provides that the term "qualified severance" includes any other severance permitted under regulations prescribed by the Secretary.

Section 2642(a)(3)(C) provides that a severance pursuant to this paragraph may be made at any time. The Secretary shall prescribe by forms or regulations the manner in which the qualified severance shall be reported to the IRS.

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 301.9100-2 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 § 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 in part 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.

Section 301.9100-3(b)(2) provides that a taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not (i) competent to render advice on the regulatory election; or (ii) aware of all relevant facts.

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In the instant case, pursuant to the authority under section 8.1(u) of Article VIII of Decedent's will, the trustee of the Marital Trust proposes to divide the Marital Trust into the GST Exempt Trust and the GST Non-exempt Trust. The terms of the new trusts will provide for the same succession of interests of beneficiaries as are provided in the Marital Trust. Assuming the Marital Trust is severed on a fractional basis, we conclude that the severance will be a qualified severance under § 2642(a)(3). Therefore, the severed trusts will be treated as separate trusts for GST tax purposes.

Furthermore, based on the facts and representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, we rule that an extension of time to make a "reverse" QTIP election with respect the GST Exempt Trust is granted until 60 days from the date of this letter. The election should be made on a supplemental Form 706 (United States Estate (and Generation-skipping Transfer) Tax Return) and filed with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for that purpose.

In addition, the executor of Decedent's estate is also granted an extension of time until 60 days after the date of this letter to allocate Decedent's available GST exemption to the Shelter Trust and, after such allocation, to allocate Decedent's remaining available GST exemption to the GST Exempt Trust. Such allocations will be effective as of Date 1, the date of Decedent's death. Assuming the Shelter Trust, the GST Exempt Trust and the GST Non-exempt Trust are funded as described above, the Shelter Trust and the GST Exempt Trust will have an inclusion ratio of zero.

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.

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.

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.

Sincerely,

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

Enclosure  
Copy for § 6110 purposes