



into three separate trusts, the Survivor's Trust, the Marital Trust, and the Exemption Trust.

Under Section 2 of Article III of Family Trust, Survivor's Trust is to be funded with Spouse's interest in Decedent and Spouse's community property, and Spouse's separate estate, if any, included in or added to Family Trust, including any undistributed or accrued income from the separate estate. Under Section 3, Marital Trust is to consist of the minimum dollar amount necessary as a marital deduction to eliminate (or to reduce to the extent possible) any federal estate tax at the death of Decedent. Under Section 4, Exemption Trust is to consist of all of the interest in each and every asset held by the trustee of Family Trust, not allocated to the principal of Survivor's Trust or Marital Trust.

Under Section 2 of Article X of Family Trust, after the death of Decedent, Spouse has the power to amend or revoke the Survivor's Trust. However, the Marital Trust and the Exemption Trust are irrevocable and not subject to amendment or modification in any manner. In general, all net income from the Marital Trust and the Exemption Trust are payable to Spouse. Further, the trustee has the discretion to pay to or apply to Spouse such amounts of corpus from the Marital Trust and Exemption Trust, as the trustee deemed necessary based on a specified ascertainable standard. On Spouse's death, the remaining corpus held in Marital Trust and Exemption Trust are to be combined and held in further trust for the benefit of Decedent and Spouse's descendants.

After Decedent's death, Marital Trust was funded with assets valued at x. Exemption Trust was funded with assets valued at y.

Decedent's United States Estate (and Generation-Skipping Transfer) Tax Return, Form 706, was timely filed. On Schedule M of the Form 706, a QTIP election under § 2056(b)(7) was made with respect to the value of all property passing to the Marital Trust and the Exemption Trust. No non-probate property passed to any person other than Spouse. No estate tax liability was due. It was subsequently discovered that the value of the property for which the QTIP election was made included the value of the property passing to the Exemption Trust. The QTIP election with respect to the Exemption Trust was not necessary to reduce the estate tax liability to zero.

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 spouse, but only to the extent that such interest is included in determining the value of the gross estate. Under § 2056(b)(1) provides

the general rule that a marital deduction is not allowed 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 (QTIP). For purposes of § 2056(a), qualified terminable interest property is treated as passing to the surviving spouse, and no part of the 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 2044(a) and (b) provides generally that the value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under § 2056(b)(7).

Section 2519(a) and (b) provide that any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest. Section 2652(a) provides that, in the case of property subject to an election under § 2056(b)(7), the surviving spouse will be treated as the transferor of the property for generation-skipping transfer tax purposes in the absence of a "reverse QTIP" election under § 2652(a)(3).

In general, under Rev. Proc. 2001-38, a QTIP election under § 2056(b)(7) will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, where the election was not necessary to reduce the estate tax liability to zero, based on values as finally determined for federal estate tax purposes. The revenue procedure provides an example where the decedent's will provides for a "credit shelter trust" to be funded with an amount equal to the applicable exclusion amount under § 2010(c), with the balance of the estate passing to a marital trust intended to qualify under § 2056(b)(7). The estate makes QTIP elections with respect to both the credit shelter trust and the marital trust. The QTIP election for the credit shelter trust was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made for that trust. See Rev. Proc. 2001-38, § 2.

In this case, the QTIP election with respect to the value of the property passing to the Exemption Trust was not necessary to reduce the estate tax liability to zero. That is, the estate tax liability would have been zero whether or not the election was made with respect to the trust. Accordingly, we rule that the QTIP election with respect to the value of property passing to the Exemption Trust is null and void for purposes of §§ 2044, 2056(b)(7), 2519 and 2652. The property held in Exemption Trust will not be includible in the gross estate of Spouse under § 2044, and Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to that property. Further, Spouse will not be treated as the transferor of the property in Exemption Trust for generation-skipping transfer tax purposes under § 2652.

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. In addition, we express or imply no opinion regarding the value of the property transferred to the trusts.

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.

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 ruling contained in this letter is 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 ruling, it is subject to verification on examination.

Sincerely,

George L. Masnik  
Chief, Branch 4  
(Passthroughs & Special Industries)

Enclosures

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