

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:P&SI:4-PLR-115893-99

Date:

April 4, 2000

Legend:

Decedent -  
Spouse -  
Child A -  
Child B -  
Spouse's Trust -

Decedent's Trust -

Dear :

This is in reply to your letter dated September 10, 1999, requesting a ruling concerning the gift tax treatment of the payment of a portion of a federal estate tax liability by two beneficiaries of the decedent's estate.

The facts and representations submitted are as follows:

Decedent, a resident of Missouri, died testate in 1998 survived by two children, Child A and Child B, four grandchildren and two great-grandchildren. Decedent's spouse (Spouse), who had predeceased Decedent, had established a revocable trust (Spouse's Trust). On Spouse's death, Spouse's Trust provided for the establishment of two marital trusts for Decedent's benefit (Marital Trust 1 and Marital Trust 2). Both marital trusts were included in Decedent's gross estate for Federal estate tax purposes. Decedent's gross estate also included probate property, the corpus of a revocable trust established by Decedent (Decedent's Trust), an individual retirement account (IRA), and a deferred income settlement option plan account (DISO). Both the IRA and the DISO are payable directly to Child A and Child B in equal shares.

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The Decedent's will, Decedent's Trust, and Spouse's Trust each include provisions addressing payment of the Federal estate tax. The applicable provisions are as follows:

ARTICLE TWO of Decedent's will states that:

By instrument entitled "Trust Agreement" dated [date Decedent's Trust was established], I established a revocable trust. In my trust agreement I authorized the Trustees therein appointed to pay out of the assets subject to the provisions thereof, in accordance with the instructions therein contained, such portion, if any, of . . . my death taxes as my Personal Representatives shall deem advisable, in their absolute discretion, taking into account the condition of my probate estate and any other assets which I may own at the time of my death. In addition, two marital trusts (the "Marital Trusts") have been established for my benefit under my deceased husband's Trust Agreement dated [date Spouse's Trust was established], under which my Personal representatives may direct that a portion of my death taxes be paid out of the Marital Trusts. My Personal Representatives are hereby authorized to consult with said Trustees [of the Revocable Trust](and said Trustee(s) of the Marital Trusts) in determining whether such . . . taxes are to be paid entirely out of the assets of my estate or entirely out of the assets subject to my Trust Agreement, from the assets of the Marital Trusts, or either of them (with respect to a certain portion of my death taxes only), or in part out of each, to the end that all of the same shall be duly paid, either from the assets subject to my Trust Agreement, the Marital Trusts, or either of them, or, to the extent not so paid, by my Personal Representatives out of the assets of my estate . . . Any death taxes paid by my Personal Representatives or said Trustee shall be charged against the property used to pay such death taxes alone (without contribution by, or reimbursement from, any person.

ARTICLE TWO of Decedent's Trust provides that:

[T]he trustees may, in their absolute discretion, and shall, to the extent so directed by the Personal Representative of [Decedent's] estate, pay out of the assets of the trust any . . . death taxes payable by reason of [Decedent's] death. Any such death taxes paid by the Trustees shall be charged against the property used to pay such death taxes alone (without contribution by, or reimbursement from, any person) . . . In exercising the

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discretion herein granted, the Trustees may take into consideration the assets of [Decedent's] probate estate and any other assets owned by [Decedent] at the time of her death.

ARTICLE FIVE, Section C, of Spouse's Trust provides that, upon Decedent's death, the trustees shall pay Decedent's Personal Representative the portion of any death taxes due as a result of inclusion of Marital Trust 1 and Marital Trust 2 in Decedent's gross estate. This provision acknowledges that Decedent may, by will, provide (either directly or by decision of Decedent's Personal Representative) for payment of a greater or lesser amount of the death taxes from the marital trusts.

You request a ruling that the payment by Child A and Child B of a pro rata share of the federal estate tax attributable to the inclusion of the IRA and the DISO in Decedent's gross estate will not constitute gifts by Child A and Child B for Federal gift tax purposes.

Section 2001(a) of the Internal Revenue Code imposes an estate tax on the transfer of the taxable estate of every decedent who is a citizen of the United States or resident. Section 2002 states that the estate tax shall be paid by the executor.

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during the calendar year by any individual, resident or nonresident.

Section 2511 states that the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-1(c)(1) the Gift Tax Regulations states that the gift tax applies to gifts indirectly made and, thus, any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax.

Section 25.2511-1(g)(1) states that donative intent on the part of the transferor is not an essential element of the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor.

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The law of the appropriate jurisdiction determines how the tax burden will be distributed among those who share in the taxable estate. Riggs v. Del Drago, 317 U.S. 95, 98 (1942). Missouri has no statutory rules for determining the ultimate burden of Federal estate tax, where the governing instrument is otherwise silent. Under applicable Missouri case law, absent a clearly expressed intent on the part of the testator to the contrary, the doctrine of equitable apportionment applies in fixing the ultimate burden of the federal estate tax. Carpenter v. Carpenter, 267 S.W.2d 632, 642 (Sup. Ct. Mo. 1954); Estate of Wahlin v. Bell, 505 S.W.2d 99, 103 (Mo. App. 1973). The doctrine of equitable apportionment places the burden of the federal estate tax on the property that generates the tax and exonerates from the burden the property that does not generate the tax. See Estate of Boder v. Albrecht Art Museum, 850 S.W.2d 76, 78 (Sup. Ct. Mo. 1993).

Decedent's will directs her Personal Representative to consult with the trustees of Marital Trusts 1 and 2 and the trustees of the Decedent's Trust in determining whether the estate taxes are to be paid entirely, partially, or not at all out of assets of the trusts or out of "the assets of my estate." The phrase "assets of my estate" could be interpreted as referring only to the probate estate or to Decedent's gross estate, thus including the probate estate and the IRA and DISO. Since the will does not express a clear intent as to which assets should bear the ultimate burden of the estate tax attributable to the IRA and DISO, under the law of State X, the estate tax attributable to the IRA and DISO are properly apportioned against those assets. See Carpenter v. Carpenter, *supra*; Estate of Gangloff v. Borgers, 743 S.W.2d 498, 502 (Mo. App. 1987); Estate of Wahlin v. Bell, *supra*.

Pursuant to the application of the doctrine of equitable apportionment in State X, the estate tax attributable to those assets must be paid from those assets. Accordingly, the payment by Child A and Child B of a pro rata share of the federal estate tax attributable to the inclusion of the IRA and the DISO in Decedent's gross estate will not constitute gifts by Child A and Child B for Federal gift tax purposes.

A copy of this letter should be attached to any income, gift, estate, or generation-skipping transfer tax returns that you may file relating to these matters.

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 the 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.

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Except as specifically set forth above, no opinion is expressed concerning the Federal tax consequences of the facts described above under the cited provisions or any other provision of the Code.

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

Sincerely,

Assistant Chief Counsel  
(Passthroughs and Special  
Industries)

By \_\_\_\_\_  
George Masnik  
Chief, Branch 4

Enclosure  
Copy for 6110 purposes