

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B09 / PLR 147886-01
Date:
January 10, 2002

Re:

Legend

- Decedent =
- Spouse =
- Trust =
- Date 1 =
- Date 2 =
- Date 3 =
- Child 1 =
- Child 2 =
- Grandchildren =

- \$x =
- Date 4 =
- Accountant =
- \$y =
- Date 5 =
- Court =
- Date 6 =

Dear :

This responds to your letter dated January 3, 2002, and prior correspondence, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to sever a trust pursuant to § 26.2654-1(b)(1) of the Generation-Skipping Transfer Tax (“GSTT”) Regulations, and to make a “reverse”

qualified terminable interest property ("QTIP") election under § 2652(a)(3) of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: Decedent and Spouse created a revocable living trust ("Trust") on Date 1. Decedent and Spouse amended and restated Trust in its entirety on Date 2. Decedent died on Date 3, survived by Spouse, Child 1, Child 2 and Grandchildren.

Trust provides that at Decedent's death, Trust is to be divided into three subtrusts: a Survivor's Trust, a Tax Credit Trust and a QTIP Trust. The terms governing these subtrusts are described below.

Article III(B)(1) provides that the trustee shall distribute Spouse's one-half share of community and quasi-community property held by Trust, including Spouse's tangible personal property, to the Survivor's Trust.

Article III(B)(2) provides that the trustee shall distribute an amount equal to the value of Decedent's available unified credit to the Tax Credit Trust. This distribution is directed to be made from the assets not distributed to the Survivor's Trust. Taxpayer represents that a Tax Credit Trust was never established because Decedent had exhausted his unified credit on lifetime gifts.

Article IV provides that the trustee shall distribute all the rest and residue of the Trust assets to the QTIP Trust.

Article V provides that during Spouse's lifetime, the trustee shall distribute to Spouse all of the net income of the Survivor's Trust in quarter-annual or more frequent installments. In addition, Spouse is given the power to appoint any or all of the principal as Spouse shall designate. If at any time Spouse shall have insufficient means for her happiness, care, comfort, support, maintenance or emergency need, the trustee may invade the principal of the Survivor's Trust for such purpose. Upon Spouse's death, the remaining trust assets will be distributed in such manner as Spouse designates by inter vivos or testamentary instrument. If Spouse fails to exercise such power of appointment, the remaining trust assets will be added to the QTIP Trust and distributed as a part thereof.

Article VI provides that during her lifetime, Spouse is to receive all of the net income of the QTIP Trust in quarter-annual or more frequent installments. In addition, Spouse may receive so much of the principal of the QTIP Trust as the trustee, in the trustee's discretion, deems necessary for Spouse's support, maintenance, care or health. At Spouse's death, the assets of the QTIP Trust will be distributed as follows: (i) \$x outright to Child 1; (ii) \$x outright to Child 2; and (iii) the balance in equal shares to Grandchildren, with each such share being held in trust for each grandchild for a period of twenty-five years after Spouse's death.

On Date 4, Decedent's estate timely filed a Form 706, Estate (and Generation-Skipping Transfer) Tax Return prepared by Accountant. On Schedule M of Decedent's Form 706, Accountant made an election under § 2056(b)(7) with respect to the entire value of the QTIP Trust and claimed a deduction for this amount. However, Accountant failed to make a "reverse" QTIP election under § 2652(a)(3) with respect to any portion of the QTIP Trust and did not make an effective allocation of Decedent's remaining \$y of GSTT exemption.

Accountant represents in an affidavit that it was not until Spouse died on Date 5 that Accountant discovered his failure to make the "reverse" QTIP election on Decedent's Form 706.

Because Decedent's remaining unused GSTT exemption is insufficient to exempt all of the assets of the QTIP Trust from the GSTT, Decedent's estate filed a petition in Court to divide the QTIP Trust into a GSTT exempt trust and a GSTT nonexempt trust. Court issued an order on Date 6 under which Court directed that the QTIP Trust be divided into a GSTT exempt trust, consisting of assets equal to the value of Decedent's unused GSTT exemption, and a GSTT nonexempt trust, consisting of the balance of trust property qualifying for the marital deduction.

Decedent's estate now requests an extension of time to sever the QTIP Trust into GSTT exempt and nonexempt trusts and to make a "reverse" QTIP election with respect to the GSTT exempt trust.

Section 2001(a) of the Code imposes a tax on the transfer of the taxable estate of every decedent who is a 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 is 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.

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 decedent's gross estate under § 2044 (a) shall be treated as property passing from the decedent.

Section 2601 imposes a tax on every generation-skipping transfer made after October 22, 1986.

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 2612(a)(1) provides that the term "taxable termination" means the termination (by death, lapse of time, release of power, or otherwise) of an interest in property held in a trust unless: (A) immediately after such termination, a non-skip person has an interest in such property; or (B) at no time after such termination may a distribution (including distributions on termination) be made from such trust to a skip person.

Section 2613(a) provides that the term "skip person" means: (1) a natural person assigned to a generation which is 2 or more generations below the generation assignment of the transferor; or (2) a trust – (A) if all interests in such trust are held by skip persons, or (B) if – (i) there is no person holding an interest in such trust, and (ii) at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a non-skip person.

Section 2613(b) provides that the term "non-skip person" means any person who is not a skip person.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GSTT exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2632(a)(1) provides that any allocation by an individual of his GSTT 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 GSTT 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 2652(a)(1) provides, in pertinent part, 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 that in the case of— (A) any trust with respect to which a deduction is allowed to the decedent under § 2056 by reason of subsection (b)(7) thereof, and (B) any trust with respect to which a deduction to the donor spouse is allowed under § 2523 by reason of subsection (f) thereof, the estate of the decedent or the donor spouse, as the case may be, 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.

Section 26.2632-1(d)(2) of the Generation-Skipping Transfer Tax Regulations provides, in pertinent part, that no automatic allocation of GSTT exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GSTT with respect to the new trust.

Section 26.2652-2(b) provides that a "reverse" QTIP election is made on the return on which the QTIP election is made.

Section 26.2654-1(b)(1) 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 - (i) 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; or (ii) the governing instrument does not require or otherwise direct severance but the trust is severed pursuant to discretionary authority granted either under the governing instrument or under local law; and (A) the terms of the new trust provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust; (B) the severance occurs (or a reformation proceeding, if required, is commenced) prior to the date prescribed for filing the Federal estate tax return (including extensions actually granted) for the estate of the transferor; and (C) either - (1) the new trusts are severed on a fractional basis. If severed on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the undivided trust. The trusts may be funded on a nonpro rata basis provided funding is based on either the fair market value on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding; or (2) if the severance is

required (by the terms of the governing instrument) to be made on the basis of a pecuniary amount, the pecuniary payment is satisfied in a manner that would meet the requirements of § 26.2654-1(a)(ii) if it were paid to an individual.

Under § 301.9100-1(c) of the Procedure and Administration Regulations 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 that, in general, 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 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.

In this case, because Decedent's estate made a QTIP election on Decedent's Form 706, the assets of the QTIP Trust are currently includible in Spouse's gross estate pursuant to § 2044 of the Code. In addition, Spouse is considered the transferor of such property for GSTT purposes thereby precluding the allocation of Decedent's unused GSTT exemption to the QTIP trust. However, if the estate is allowed to make a "reverse" QTIP election under § 2652(a)(3), Decedent will be treated as the transferor of the assets of the QTIP Trust and the automatic allocation rules set forth in §§ 2632 and 26.2632-1(d)(2) will apply to Decedent's remaining GSTT exemption.

Based on the facts submitted and the representations made, we conclude that the requirements of §§ 26.2654-1 and 301.9100-3 have been satisfied. We rule that an extension of time is granted for the severance of the QTIP Trust into a GSTT exempt trust and a GSTT non-exempt trust such that the court-approved severance will be recognized for GSTT purposes. An extension of time is also granted until 60 days from the date of this letter for making a "reverse" QTIP election under § 2652(a)(3) with respect to the GSTT exempt trust. The election should be made on a supplemental Form 706 filed with the Cincinnati Service Center. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for that purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item

discussed or referenced in this letter. We note, however, that an extension of time to make the “reverse” QTIP election under § 2652(a)(3) does not extend the time to allocate any remaining GSTT exemption. In the instant case, no allocation of GSTT exemption was made on Decedent’s estate tax return. Accordingly, in view of the “reverse” QTIP election, Decedent’s remaining \$y of GSTT exemption is allocated in accordance with the rules of §§ 2632(e) and 26.2632-1(d)(2).

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,
Paul F. Kugler
Associate Chief Counsel
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure

Copy of letter
Copy for 6110 purposes