

Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B09

PLR-136891-04

Date:

August 11, 2004

LEGEND:

Decedent =

Spouse =

Trust =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Attorney =

Dear :

This is in response to your letter dated May 5, 2004, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to sever a trust into an exempt trust and non-exempt trust under § 26.2654-1(b)(1) of the Generation-Skipping Transfer (GST) Tax Regulations and to make a "reverse" qualified terminable interest property (QTIP) election under § 2652(a)(3) of the Internal Revenue Code with respect to the exempt trust.

On Date 1, Decedent and Spouse created Trust, a revocable trust. Decedent died on Date 2, survived by Spouse, who died on Date 4.

Section 5.3 of Trust provides that upon the death of the first trustor to die, the trust estate is to be divided into three trusts: a marital trust (Trust A), a QTIP trust (Trust C), and a bypass trust (Trust B). Trust A is to be funded with the surviving spouse's separate property and such spouse's share of the couple's community property. Trust C is to receive a fractional share of the community property and separate property of the first trustor to die. In determining the fractional share, the numerator of the fraction equals the smallest amount which, if allowed as a marital deduction, would result in the least possible federal estate tax being payable, taking into account the unified credit and state death taxes. Trust B is to be funded with the balance of the trust estate.

Article Six provides the provisions of Trust A. Pursuant to section 6.1, the surviving spouse is to receive all of the net income of Trust A. Pursuant to section 6.2, the trustee shall distribute so much or all of the corpus to or for the benefit of the surviving spouse as deemed necessary or appropriate for her general welfare. Section 6.3 provides the surviving spouse with a testamentary general power of appointment over the income and corpus of Trust A.

Article Seven provides the provisions of Trust C. Section 7.1 provides that the trustee is authorized to divide Trust C, at any time, into two separate trusts, each such trust having identical provisions to Trust C, so that the federal GST tax inclusion ratio for each trust shall be either zero or one. Section 7.2 provides that the trustee shall distribute all of the net income, at least quarterly, to or for the benefit of the surviving spouse as long as she lives. Section 7.3 provides that the trustee may distribute so much or all of the corpus of Trust C to or for the benefit of the surviving spouse as the trustee determines to be appropriate for the health, maintenance, education, and support of such spouse. Trust C shall terminate upon the death of the surviving spouse and the remaining assets shall be added to the corpus of Trust B. If Trust C has been divided into two trusts, the trustee may determine that the trust with an inclusion ratio of 1 shall be held and administered as a separate trust with provisions identical to Trust B.

Article Eight provides the provisions of Trust B. Section 8.1 provides that the trustee may distribute for the benefit of surviving spouse, so much or all of the net income as the trustee determines to be appropriate for the health, maintenance, education, and support of such spouse. The trustee may also distribute to or for the benefit of Decedent and Spouse's children so much or all of the net income of the trust at such times and in such amounts as the trustee may determine to be appropriate for their health, maintenance, education, and support. Section 8.2 provides that the trustee may distribute so much or all of the corpus of this trust to or for the benefit of the surviving spouse as the trustee determines to be necessary for the health, maintenance, education, and support of such spouse. The trustee may also distribute so much or all of the corpus to or for the benefit of Decedent and Spouse's children as the trustee determines to be necessary for their health, education, maintenance, and support. Upon the death of the surviving spouse, the trustee shall divide the remaining

assets and undistributed income of Trust B into separate irrevocable trusts for the benefit of Decedent and Spouse's descendants.

Section 9.24 provides that the trustee may divide any trust, at any time, into two or more separate trusts so that the federal generation-skipping transfer tax inclusion ratio shall be either zero or one.

Section 9.25 authorizes the executor or, alternatively, the trustee, to make any and all tax elections available to the trustee including the election under § 2652(a)(3) to treat Decedent as the transferor of any QTIP property with respect to which the Decedent's estate was allowed a deduction by reason of § 2056(b)(7).

Attorney was engaged to assist in the administration of Decedent's estate, including the filing of all required state and federal estate and inheritance tax returns. Attorney requested and received an extension of time to file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for Decedent's estate. Attorney timely filed Decedent's Form 706 on Date 3.

It has been represented that Attorney did not make or advise Decedent's estate to make any allocation of Decedent's GST exemption, did not sever or advise Decedent's estate to sever Trust C into a GST exempt and non-exempt trust, and did not make or advise Decedent's estate to make the reverse QTIP election under §2652(a)(3) with respect to the GST exempt trust.

Pursuant to §§ 301.9100-1 and 3, the successor trustee of Trust C requests an extension of time to sever Trust C into two separate trusts, a GST exempt QTIP trust and a GST non-exempt QTIP trust, under § 26.2654-1(b)(1), and to make a "reverse" QTIP election under § 2652(a)(3) with respect to the GST exempt QTIP trust, thereby causing Decedent's GST exemption to be allocated to Trust B and the GST exempt QTIP trust pursuant to the automatic allocation rules of § 2632(c).

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 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, the entire 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 for purposes of § 2056(b)(1)(A).

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 2601 imposes a tax on every generation-skipping transfer.

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

Under § 2632(a), the allocation of the GST exemption may be made at any time on or before the date prescribed for filing the individual's estate tax return (including extensions). Under § 2632(c), any portion of an individual's GST exemption not allocated within the time prescribed in § 2632(a), is allocated automatically.

Section 2631(e)(1) (designated as § 2632(c)(1) at the time of Decedent's death) 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 the individual's death, and (B) second, to trusts with respect to which the individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after the individual's death.

Section 26.2632-1(d)(2) supplies the method for the automatic allocation of any unused GST exemption. First, the exemption is allocated pro rata to direct skips on the basis of the value of property as finally determined for purposes of Chapter 11. The balance is then allocated pro rata, on the basis of value, to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. In the case of trusts that are not included in the gross estate, the GST exemption is allocated on the basis of the date of death value of the trust. No automatic allocation is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the trust. The automatic allocation is irrevocable.

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 the GST tax,

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 exemption may be allocated to the QTIP 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, in part, 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 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 trusts 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 non pro rata basis provided funding is based on either the fair market value of the assts 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 paragraph (a)(1)(ii) of this section if it were paid to an individual.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time 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.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. § 301.9100-1(a).

Section 301.9100-2 provides automatic extensions 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 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(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Although no allocations of Decedent's GST exemption were made on Decedent's estate tax return, a portion of Decedent's GST exemption was automatically allocated to Trust B pursuant to the automatic allocation rules of §§ 2632(e) and 26.2632-1(d)(2).

As a result of the QTIP election made on Decedent's estate tax return, Trust C's assets are includible in Spouse's gross estate pursuant to § 2044. Spouse, accordingly, is considered the transferor of Trust C's assets for GST purposes. Therefore, Decedent's remaining GST exemption could not be allocated to Trust C's assets. However, if Trust C is severed into two trusts, a GST exempt QTIP trust and a GST non-exempt QTIP trust, and a "reverse" QTIP election under § 2652(a)(3) is made with respect to the GST exempt QTIP trust, Decedent will be treated as the transferor of the GST exempt QTIP trust's assets.

Based on the facts submitted and the representations made, the requirements of §§ 301.9100-1 and 301.9100-3 have been met. Consequently, we grant an extension of 60 days from the date of this letter to sever Trust C into a GST exempt QTIP trust and a GST non-exempt QTIP trust. Thereupon, the automatic allocation rules under §2632(e) will apply Decedent's remaining GST tax exemption to the GST exempt QTIP trust.

The election should be made on a supplemental Form 706. The supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the return. A copy is enclosed for this purpose.

An extension of time to make the “reverse” QTIP election under § 2652(a)(3) does not extend the time to make an allocation of any remaining GST exemption. Once the “reverse” QTIP election is made §§ 2632(e) and 26.2632-1(d)(2) will operate to allocate Decedent’s remaining GST exemption to the GST exempt QTIP trust.

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.

This ruling is directed only to the taxpayers 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 representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers 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 certification on examination.

Sincerely,

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

Enclosure: Copy for section 6110 purposes
Copy of this letter