

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:9-PLR-132987-01
Date:
December 13, 2001

LEGEND

Agreement =
Child =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Decedent =
Spouse =
Trust =

Dear :

This is in response to your letter dated June 8, 2001, and subsequent correspondence, in which you requested an extension of time under section 301.9100-1 of the Procedure and Administration Regulations to make a qualified domestic trust ("QDOT") election pursuant to section 2056A(d) of the Internal Revenue Code.

The facts and representations submitted are summarized as follows. Decedent, a resident alien, died on Date 1 survived by Spouse, who is also a resident alien. Prior to Decedent's death, Decedent executed a will and Decedent and Spouse executed a Trust. Decedent's will bequeaths and devises the residue of Decedent's estate to the Trust.

Section 6.1 of the Trust provides for the creation of two trusts upon the death of the first to die of Decedent and Spouse, the survivor's trust and the exemption trust. These two trusts are to be funded as follows. Section 6.3 of the Trust provides that the survivor's trust shall consist of the surviving spouse's separate property that is part of the trust estate, the surviving spouse's interest in the couple's community property included in or added to the trust estate, and the marital deduction share from the deceased spouse's estate, calculated pursuant to Section 6.4 of the Trust. Section 6.4 of the Trust provides that the marital deduction share of the deceased spouse's estate shall consist of the minimum pecuniary amount necessary to entirely eliminate or reduce to the maximum extent possible any federal estate tax on the deceased spouse's estate.

PLR-132987-01

Section 6.4 further provides that the exemption trust shall consist of the balance of the trust estate.

The terms of the survivor's trust are as follows. Section 6.5 of the Trust provides that the survivor's trust is intended to qualify for the marital deduction under section 2056. In keeping therewith, Section 6.6 of the Trust provides that the surviving spouse is to receive the net income of the survivor's trust in quarter-annual or more frequent installments. If the trustee considers the net income of the survivor's trust to be insufficient, the surviving spouse shall receive so much of the principal of the survivor's trust deemed necessary, in the trustee's discretion, for the surviving spouse's proper health, support, comfort, enjoyment, and welfare. In addition, the trustee shall pay the surviving spouse as much of the principal of the survivor's trust as the surviving spouse shall request.

Section 10.4 of the Trust provides, in pertinent part, that the surviving spouse may amend, revoke, or terminate the survivor's trust upon the deceased spouse's death. Upon revocation or termination of the survivor's trust, all assets of the trust shall be delivered to the surviving spouse. Section 6.8 of the Trust provides the surviving spouse with a testamentary general power of appointment over the principal and interest of the survivor's trust. If the surviving spouse does not effectively dispose of the remaining assets of the survivor's trust pursuant to this testamentary power of appointment, these assets shall be distributed to and become a part of the exemption trust. The terms of the survivor's trust do not contain any QDOT provisions and, accordingly, the survivor's trust does not comply with the provisions of section 2056(d)(2).

Upon Decedent's death, a tax professional was retained to prepare the Federal Estate (and Generation-Skipping Transfer) Tax Return, Form 706, for Decedent's estate. The tax professional failed to review the terms of the Trust and failed to ascertain that Spouse was not a United States citizen. On Date 2, Spouse, as executor of Decedent's estate, timely filed a Form 706 for Decedent's estate that claimed a marital deduction for Decedent's entire gross estate, less expenses, but did not make a QDOT election for any of the property for which a marital deduction was claimed. Pursuant to an approved Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes, Form 4768, the Form 706 was due on Date 5.

Within one year of Date 3 the following events occurred. Spouse retained counsel. Spouse established a QDOT described in section 2056A(a). On Date 4, Spouse, as executor, filed an amended Form 706 that reflected the funding of the exemption trust and made a QDOT election under section 2056A(d) for the marital deduction share of Decedent's estate. Also on Date 4, pursuant to Spouse's withdrawal power in Section 6.6 of the Trust, Spouse executed an Agreement in which Spouse irrevocably assigned and pledged to contribute to the QDOT the marital deduction share of Decedent's estate calculated pursuant to Section 6.4 of the Trust.

PLR-132987-01

You have requested an extension of time to make the QDOT election under section 2056A(d) to Date 4, the date the amended Form 706 was filed, an extension of time to assign the marital deduction share of Decedent's estate to the QDOT to Date 4, the date the Agreement was executed, and an extension of time to convey the marital deduction share of Decedent's estate to the QDOT.

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 section 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 to the extent such interest is included in determining the value of the gross estate.

Sections 2056(d)(1)(A) and 2056(d)(2)(A) provide that if the decedent's surviving spouse is not a United States citizen, the marital deduction is not allowed under section 2056(a), unless the property passes to the surviving spouse in a QDOT.

Section 2056(d)(2)(B) provides that if any property passes from the decedent to the decedent's surviving spouse, for purposes of section 2056(d)(1)(A), such property shall be treated as passing to such spouse in a QDOT if: (i) such property is transferred to such a trust before the date on which the return of the tax imposed by this chapter is made; or (ii) such property is irrevocably assigned to such a trust under an irrevocable assignment made on or before such date which is enforceable under local law.

Under section 2056A(a), a QDOT is any trust in which: (1) the trust instrument requires that at least one trustee of the trust be an individual citizen of the United States or a domestic corporation and provides that no distribution (other than income) may be made from the trust unless a United States trustee has the right to withhold from such distribution the tax imposed on the distribution; (2) the trust meets the requirements as the Secretary may by regulations prescribe to ensure collection of the tax imposed by section 2056A(b); and (3) an election is made by the executor of the decedent with respect to the trust.

Section 2056A(d) provides that an election under section 2056A with respect to any trust is to be made by the executor on the return of tax imposed by section 2001. Such an election, once made is irrevocable. No election may be made under section 2056A on any return if such return is filed more than one year after the time prescribed by law (including extensions) for filing such return.

Section 20.2056A-3(a) of the Estate Tax Regulations provides that the election to treat a trust as a QDOT must be made on the last federal estate tax return filed before the due date (including extensions of time to file actually granted) or, if a timely return is not filed, on the first federal estate tax return filed after the due date. The election, once made, is irrevocable.

PLR-132987-01

Section 20.2056A-4(b)(1) provides that under section 2056(d)(2)(B), if an interest in property passes outright from a decedent to a noncitizen surviving spouse either by testamentary bequest or devise, by operation of law, or pursuant to an annuity or other similar plan or arrangement, and such property interest otherwise qualifies for a marital deduction except that it does not pass in a QDOT, solely for purposes of section 2056(d)(2)(A), the property is treated as passing to the surviving spouse in a QDOT if the property interest is assigned to a QDOT under an enforceable and irrevocable written assignment made on or before the date on which the return is filed and on or before the last date prescribed by law that the QDOT election may be made.

Section 20.2056A-4(b)(2) provides that a transfer or assignment of property to a QDOT must be in writing and otherwise be in accordance with all local law requirements for such assignment or transfer. The transfer or assignment may be of a specific asset or a group of assets, or a fractional share of either, or may be of a pecuniary amount. In the case of an assignment, a copy of the assignment must be submitted with the decedent's estate tax return.

Section 20.2056A-4(b)(3) provides that only assets included in the decedent's gross estate and passing from the decedent to the spouse (or the proceeds from the sale, exchange, or conversion of such assets) may be transferred or assigned to the QDOT. The noncitizen surviving spouse may not transfer or assign to the QDOT property owned by the surviving spouse at the time of the decedent's death in lieu of property included in the decedent's gross estate that passes to the spouse (or in lieu of the proceeds from the sale, exchange, or conversion of such includible assets).

Section 20.2056A-4(b)(4) provides that if the assignment is expressed in the form of a pecuniary amount (such as a fixed dollar amount or a formula designed to reduce the decedent's estate tax to zero), the assignment must specify that assets actually transferred to the QDOT in satisfaction of the assignment have an aggregate fair market value on the date of actual transfer to the QDOT amounting to no less than the amount of the pecuniary transfer or assignment.

Section 20.2056A-4(b)(6) provides that property irrevocably assigned but not actually transferred to the QDOT before the estate tax return is filed must be conveyed and transferred to the QDOT under applicable local law before the administration of the decedent's estate is completed. If there is no administration of the decedent's estate, the conveyance must be made on or before the date that is one year after the due date (including extensions) for filing the decedent's estate tax return. If an actual transfer to the QDOT is not timely made, the marital deduction is not allowed. Section 20.2056A-4(b)(6) further provides that an extension of time for completing the conveyance, or a waiver of the actual conveyance, may be requested by the decedent's estate under specified circumstances under section 301.9100-1(a).

Under section 301.9100-1(c) the Commissioner may grant a reasonable extension of time under the rules set forth in sections 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

PLR-132987-01

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 requests for extensions of time for regulatory elections that do not meet the requirements of section 301.9100-2 must be made under the rules of section 301.9100-3. Requests for relief subject to section 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) provides that except as provided in section 301.9100-3(b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer: (i) requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Internal Revenue Service; or (v) 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.

Based on the information submitted and the representations made, the requirements of sections 301.9100-1 and 301.9100-3 have been met. Accordingly, an extension of time is granted to make the QDOT election under section 2056A(d) to Date 4, the date the amended Form 706 was filed, an extension of time to assign the marital deduction share of Decedent's estate to the QDOT to Date 4, the date the Agreement was executed, and an extension of time to convey the marital deduction share of Decedent's estate to the QDOT to Date 3, one year after the due date of Decedent's Form 706.

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 taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent. Specifically, no opinion is expressed or implied concerning the qualifications of the QDOT established herein or the accuracy of the amended form 706.

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.

In accordance with the Power of Attorney on file with this office, a copy of this letter is

PLR-132987-01

being sent to the taxpayer's representative.

Sincerely,
Paul F. Kugler
Associate Chief Counsel
Passthroughs and Special Industries

Enclosure: Copy for section 6110 purposes

cc: