

Internal Revenue Service

Department of the Treasury

Number: **200226041**

Washington, DC 20224

Release Date: 6/28/2002

Index Number: 2652.01-02, 9100.00-00

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B09-PLR-153598-01

Date:

March 29, 2002

In Re:

Legend

Decedent =

Spouse =

Trust =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Attorney =

\$x =

Dear :

This responds to your letter dated September 19, 2001 requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations 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 on Date 2, and further amended Trust on Date 3 and Date 4.

Article Third, Section I, Subsection A, of Trust provides that, as long as both spouses are living, the trustee shall pay to both spouses as community property as much of the net income and principal of the community estate as either spouse may

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request from time to time. Any undistributed income shall be accumulated and added to principal.

Article Third, Section II, provides that after the death of the predeceased spouse, the trustee shall divide the Trust estate, including any additions under the will of the predeceased spouse or otherwise, into shares as follows:

Under Article Third, Section II, Subsection A, the survivors trust shall consist of: (1) the surviving spouse's one-half interest in the community estate; (2) the surviving spouse's separate estate, if any, included in the trust estate; (3) the predeceased spouse's interest in any residential property.

Under Article Third, Section II, Subsection B, the marital deduction trust shall consist of the smallest amount necessary to reduce to zero the federal estate tax payable as a result of the predeceased spouse's death, or, if that is not possible, to reduce the federal estate tax to the smallest possible amount.

Under Article Third, Section II, Subsection C, the bypass trust shall consist of the balance of the Trust estate.

Article Third, Section IV, Subsection A, provides that the marital deduction trust shall be divided into two trusts: the exempt marital trust and the non-exempt marital trust. The exempt marital trust shall consist of an amount equal to the predeceased spouse's generation skipping transfer (GST) tax exemption, reduced by the aggregate amount of the predeceased spouse's GST tax exemption that has been allocated to other transfers of property. The non-exempt marital trust shall consist of the balance of the marital deduction trust.

Article Third, Section IV, Subsection B(1), provides that the trustee shall pay to or apply for the benefit of the surviving spouse the net income of the marital trusts, quarter-annually or at more frequent intervals.

Article Third, Section IV, Subsection B(2), provides that the trustee shall pay to or apply for the benefit of the surviving spouse from time to time as much of the principal of the marital trusts as the trustee deems reasonably necessary for the proper health, maintenance and support of the surviving spouse in his or her accustomed manner of living. To the extent practicable, all discretionary invasions of principal for the benefit of the surviving spouse shall be made from the non-exempt marital trust.

Article Third, Section IV, Subsection B(3), provides that in addition to other payments that the surviving spouse may receive, the trustee shall pay to the surviving spouse from the principal of the non-exempt marital trust such amounts as the surviving spouse may request from time to time in writing, not exceeding in any calendar year the greater of the following amounts: five-thousand dollars or five-percent of the value of the principal of the non-exempt marital trust determined at the end of the calendar year. This right of withdrawal is noncumulative.

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Article Third, Section IV, Subsection B(4), provides that after the death of the surviving spouse, the trustee shall distribute all or any part of the balance of the Marital Trusts to or for the benefit of such one or more persons and entities as the surviving spouse may appoint by a will or codicil thereto specifically referring to and exercising this limited testamentary power of appointment; provided, however, that in no event may the surviving spouse exercise this power of appointment in favor of the surviving spouse, the estate of the surviving spouse, the creditors of surviving spouse, or the creditors of the estate of the surviving spouse.

Decedent died on Date 5, survived by Spouse. A portion of Decedent's estate was allocated to the marital deduction trust, which was further divided, pursuant to Article Third, Section IV, Subsection A of the Trust, into exempt and non-exempt trusts.

Spouse, as executor of Decedent's estate, timely filed a form 706, Estate (and Generation-Skipping Transfer) Tax Return, which was prepared by Attorney, an attorney experienced in the area of estate planning. On Schedule M of the Form 706, a QTIP election was made under § 2056(b)(7) for both the exempt marital trust and the non-exempt marital trust. Although Attorney allocated Decedent's GST exemption of \$x to the exempt marital trust by listing the exempt marital trust on Schedule R of the Form 706, Attorney failed to check the box on Schedule R to make the "reverse" QTIP election.

Spouse died on Date 6. While assisting executor in the preparation of Form 706 for Spouse's estate, Attorney reviewed the Form 706 filed for Decedent's estate and discovered that the "reverse" QTIP election had not been made for the exempt marital trust.

Decedent's estate now requests an extension of time under § 301.9100-3 to make a "reverse" QTIP election under § 2652(a)(3) of the Internal Revenue Code, with respect to the assets of the exempt marital trust.

Section 2001(a) 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

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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 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST tax exemption of \$1,000,000 (adjusted for inflation under § 2631(c)(1)) that 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 that 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

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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.

Under § 301.9100-1(c) 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.

Based on the facts submitted and the representations made, we conclude that the requirements of section 301.9100-3 have been satisfied. Therefore, an extension of time is granted until 60 days from the date of this letter, for making a reverse QTIP election under § 2652(a)(3) with respect to the exempt marital 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.

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An extension of time to make the reverse QTIP election under § 2652 does not extend the time to make an allocation of any remaining GST exemption. On the Form 706, Schedule R, as originally filed, \$x of Decedent's GST exemption was allocated to the exempt marital trust. Under § 2631(b), this allocation is irrevocable.

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

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

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

Enclosures

Copy for section 6110 purposes

Copy of this letter