

Internal Revenue Service

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Person To Contact:

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Telephone Number:

Refer Reply To:

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Date:

February 20, 2004

Decedent =

Date 1 =

Spouse =

Date 2 =

Dear :

This is in response to a letter from your authorized representative, dated June 27, 2003, requesting an extension of time under § 301.9100-1 of the Procedure and Administration regulations to change a qualified terminable interest property ("QTIP") election under § 2056(b)(7) of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: Decedent died on Date 1, survived by Spouse.

Article Third of Decedent's will provided for a marital trust funded with an interest in real property owned by Decedent at the time of her death. Decedent directed the trustee to pay to or apply for the benefit of Spouse the net income of the trust, monthly or more often, during Spouse's lifetime. Decedent also directed the trustee to pay to or apply for the benefit of Spouse such amounts from the principal of the trust as the trustee in the exercise of absolute discretion shall from time to time deem advisable.

Article Third, paragraph (c) of Decedent's will provides that the personal representative shall in his absolute discretion determine whether to elect under § 2056(b)(7) to qualify all or any fraction of this trust for the federal estate tax marital deduction. The will further provides that Decedent anticipates that the personal representative will elect to minimize the estate tax payable by Spouse's estate upon his death, especially if he should die prior to the time the election is made.

Article Third, paragraph (d) provides that the personal representative or trustee shall convert unproductive property into productive property within a reasonable time following acceptance of a written request from Spouse to make unproductive property productive.

Upon the death of Spouse, the trustee shall transfer, convey and pay over the principal of the trust to Decedent's children in equal shares, per stirpes.

Decedent's estate tax return was filed on Date 2. On Schedule M of the estate tax return, an election was made under § 2056(b)(7) to treat the entire marital trust established under Article Third of Decedent's will as qualified terminable interest property. As a result, only a portion of Decedent's unified credit against estate taxes was utilized.

Decedent's estate has requested the following rulings:

1. Decedent's estate requests relief under § 301.9100-3 to make a partial QTIP election with respect to the marital trust established under Article Third of Decedent's will.
2. The QTIP election with respect to trust property representing the difference between the full and partial QTIP be disregarded and treated as null and void for purposes of § 2044(a) and § 2056(b)(7).

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 shall, except as limited by § 2056(b), 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, but only to the extent that the interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides that a deduction is not 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, and (a) an interest in the property passes from the decedent to any person other than the surviving spouse (or the estate of such spouse), and (b) by reason of such passing the person (or his heirs or assigns) may possess or enjoy any

part of the property after the termination or failure of the interest passing to the surviving spouse.

Section 2056(b)(7) provides an exception to the terminable interest rule contained in § 2056(b)(1). Section 2056(b)(7)(A) provides, generally, that in the case of qualified terminable interest property, for purposes of § 2056(a), the property shall be treated as passing to the surviving spouse and for purposes of § 2056(b)(1)(A), no part of the property shall be treated as passing to any person other than the surviving spouse.

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 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.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that the election referred to in § 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001 (or § 2101, if applicable). For purposes of § 20.2056(b)-7(b)(4)(i), the term “return of tax imposed by § 2001” means the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Section 2044(a) provides, generally, that the value of the gross estate shall include the value of any property to which § 2044 applies in which the decedent had a qualifying income interest for life.

Section 301.9100-1(c) of the Procedure and Administration Regulations provides that 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 Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-2 and 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make the election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Requests for relief under §301.9100-3 will be granted when the taxpayer provides the evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

In the instant case, the taxpayer is not seeking an extension of time to make the QTIP election. Rather, the taxpayer is in effect seeking to partially revoke a QTIP election previously made, that, pursuant to § 2056(b)(7)(B)(v) is irrevocable. See Estate of Cavanaugh v. Commissioner, 100 T.C. 407 at 421 (1993). Accordingly, § 301.9100 is not applicable in this case.

Furthermore, the situation presented is not within the purview of Rev. Proc. 2001-38, 2001-1 C.B. 1335. Pursuant to this revenue procedure, under certain circumstances, the Service will treat a QTIP election as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a) and 2652. Rev. Proc. 2001-38 applies where the election was not necessary to reduce the estate tax liability to zero, based on values as finally determined for federal estate tax purposes. The revenue procedure does not apply in situations where a partial QTIP election was required with respect to a trust to reduce the estate tax liability and the executor made the election with respect to more trust property than was necessary to reduce the estate tax liability to zero.

In this case, a QTIP election was required with respect to the marital trust to reduce Decedent's estate tax liability to zero. However, the election was made for more marital trust property than was necessary in order to reduce Decedent's estate tax liability to zero. This situation is specifically excluded from the purview of Rev. Proc. 2001-38. Accordingly, the QTIP election with respect to the entire marital trust is valid and effective for estate tax purposes. Therefore, 100 percent of the value of the marital trust on the applicable valuation date will be includible in Spouse's gross estate under § 2044.

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.

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

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

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,

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