

Internal Revenue Service

Number: **200519004**

Release Date: 5/13/2005

Index Number: 2632.00-00, 2652.01-00,
2652.01-02, 9100.00-00

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:B04

PLR-104449-04

Date: DECEMBER 28, 2004

LEGEND:

Decedent =

Spouse =

Estate =

Trust =

Marital Trust =

Family Trust =

Attorney =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

\$x =

\$y =

GST Exempt Marital Trust =

GST Nonexempt Marital Trust =

Dear :

This is in response to your letter of January 6, 2004, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to sever the Marital Trust into the GST Exempt Marital Trust and the GST Nonexempt Marital Trust under § 26.2654-1(b)(1) of the Generation-Skipping Transfer Tax (GST) 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 GST Exempt Marital Share.

The facts and representations are as follows: On Date 1, Decedent and her spouse, Spouse, executed the Trust agreement, which was revocable by Decedent until

her death. The Trust agreement was amended on Date 2. Decedent died on Date 3. She was survived by Spouse. Pursuant to Decedent's will, her residuary estate passed to the Trust. Spouse is the trustee. Spouse is also the executor of Decedent's Estate ("the Estate").

Under Article 1.02 of the Trust, Decedent's property is to be divided into two shares: the Marital Trust and the Family Trust. Under Article 1.03, the Marital Trust is determined by a fraction, the numerator of which is the smallest amount which, if allowed as a federal estate tax marital deduction, would result in the least federal estate tax payable by the Estate (taking into account the applicable credit amount and all credits and exclusions except that the federal state death tax credit is to be considered only to the extent it does create or increase a state death tax). The denominator is based on the value of Decedent's property in the Trust, without reduction by any payments required for estate taxes and other expenses. The balance of the property is distributable to the Family Trust.

Under Article 2.01(a) and (b), the income of the Marital Trust is to be distributed to Spouse at least quarter annually. The trustee may distribute principal for Spouse's health, maintenance, and support. With the unanimous written consent of Decedent's and Spouse's children, the trustee may distribute principal of the Marital Trust for Spouse's general welfare.

Under Article 2.01(d), on Spouse's death, the Marital Trust property will be distributed to such one or more of Decedent's and Spouse's issue ("the issue") and organizations to which transfers are deductible under §§ 170(c) and 2055 as Spouse appoints. Any part of the Marital Trust not so appointed is to be distributed to charitable organizations (20%) and the Family Trust (80%).

The provisions governing the Family Trust are set forth in Article 2.02. Under Article 2.02, the trustee is to pay the Family Trust income to Spouse. Principal is to be paid for Spouse's health, education, maintenance, and support. On his death, the Family Trust property is to be distributed to such of the issue as he appoints. Any part of the Family Trust not so appointed is to be divided into equal shares for the benefit of Decedent's and Spouse's children and the children's issue per stirpes. Income and principal of a share allocated to a child is to be paid to that child or, if the child is not living, to the child's issue.

Under Article 6.09, the executor may elect to treat all or part of the Marital Trust as qualified terminable interest property (QTIP). In addition, the executor may elect to treat Decedent as the transferor for GST tax purposes as to all or part of the Marital Trust for which a QTIP election is made under § 2056(b)(7). If Decedent is treated as GST transferor as to only a part of the Marital Trust, the trustee is to divide the Marital Trust into two separate parts, each to be administered as provided for the Marital Trust.

The executor may elect to treat Decedent as GST transferor as to all of one such part and as to none of the other.

The federal estate tax return (Form 706) for the Estate was filed on Date 4. On Schedule M (Marital Deduction) of the return, the executor elected to treat all (\$x) of the Marital Trust as qualified terminable interest property under § 2056(b)(7), and a marital deduction in the amount of \$x was claimed with respect to the Marital Trust. On Schedule R of the estate tax return, a GST exemption of \$y was allocated to the Family Trust. However, the trustee did not make the “reverse” QTIP election under § 2652(a)(3) with respect to the Marital Trust or a portion of the Marital Trust.

It is represented that the federal estate tax return was prepared by Attorney. He initially advised the executor of the availability and advisability of making a reverse QTIP election. However, when the federal estate tax return was prepared, through an oversight by Attorney, the election was not made. As a result, the Marital Trust was not severed. It is represented that the trustee acted reasonably and in good faith by relying on a qualified tax professional, and the tax professional failed to make the election.

The executor requests an extension of time under § 301.9100-1 and 3 of the Procedure and Administration Regulations to sever the Marital Trust into two separate trusts, a GST Exempt Marital Trust and a GST Nonexempt Marital Trust in accordance with § 26.2654-1(b)(1); and to make a “reverse” QTIP election under § 2652(a)(3) with respect to the GST Exempt Trust.

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 the value of the taxable estate shall be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes from the decedent to the surviving spouse.

Section 2056(b)(1) provides, in pertinent part, that where, on the occurrence of an event, an interest passing to the surviving spouse will terminate, no deduction shall be allowed if an interest in the property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than the spouse, and if, by reason of such passing, such person may possess or enjoy any part of the property after termination of the interest passing to the surviving spouse

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, the property shall be 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) 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, the value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life and for which a deduction is allowed under § 2056(b)(7). Section 2044(c) provides that, for purposes of chapter 11 and chapter 13, property includible in the gross estate of the decedent under § 2044(a) shall be treated as property passing from the decedent.

Section 2601 imposes a tax on every generation-skipping transfer.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate.

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 exemption which may be allocated by the individual (or his executor) to any property with respect to which the individual is the transferor. Section 2631(b) provides that any allocation, once made, shall be irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of GST 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 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 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 26.2632-1(d)(2) provides that a decedent's unused GST exemption is automatically allocated on the due date for filing the Form 706, or Form 706NA, to the extent not otherwise allocated by the decedent's executor on or before that date.

Unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)), on the basis of the value of the property as finally determined for purposes of chapter 11 (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)) on the basis of the chapter 11 value of the nonexempt portion of the trust property to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made.

Section 2641(a) provides that the term "applicable rate" means, with respect to any GST, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction." The applicable fraction, as defined in § 2642(a)(2) is a fraction, the numerator of which is the amount of the GST exemption allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust or involved in the direct skip.

Section 2652(a)(1) provides 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 26.2652-2(b) provides that an election under § 2652(a)(3) 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 the trust is severed pursuant to direction in the governing instrument providing that the trust is to be divided upon the death of the transferor.

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 301.9100-3(a) provides, in part, that 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) provides, in part, except as provided in § 301.9100-3(b)(3)(i) through (iii), 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.

Section 301.9100-3(c)(1) provides, in part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

As a result of the QTIP election made on the Form 706, the property of the Marital Trust is includible in Spouse's gross estate under § 2044. Spouse, accordingly, is considered the transferor of the property for GST tax purposes. Therefore, Decedent's remaining GST exemption may not be allocated to the Marital Trust assets. However, if the Marital Trust is severed into two portions on a fractional share basis and a "reverse" QTIP election under § 2652(a)(3) is made for one of the severed portions (referred to as the GST Exempt Marital Trust), Decedent will be treated as the transferor of the GST Exempt Marital Trust assets, and the automatic allocation rules of § 2632(e) will apply Decedent's remaining GST tax exemption to the GST Exempt Marital Trust.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, an extension of time of 60 days from the date of this letter is granted to sever the Marital Trust into a GST Exempt Marital Trust and a GST Nonexempt Marital Trust and to file a supplemental Form 706 making the "reverse" QTIP election with respect to the GST Exempt Marital Trust. Thereupon, the automatic allocation rules of § 2632(e) will apply Decedent's remaining GST tax exemption to the GST Exempt Marital Trust. 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 form. A copy is enclosed for this purpose.

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.

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.

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

Sincerely,

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

Enclosures

Copy of Letter

Copy for 6110 purposes