

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:

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Telephone Number:

Refer Reply To:

CC:PSI:04

PLR-118711-05

Date: SEPTEMBER 30, 2005

Legend:

Decedent	=
Spouse	=
Trust	=
Year 1	=
Year 2	=
Year 3	=
Date 1	=
Date 2	=

Dear :

This letter is in response to a letter dated March 21, 2005 from your authorized representative requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the qualified terminable interest property (QTIP) election made with respect to a credit shelter trust established under the terms of Trust is a nullity for federal estate, gift, and generation-skipping transfer tax purposes.

The facts and representations submitted are summarized as follows:

Decedent created Trust, a revocable inter vivos trust, in Year 1. Trust was amended in Year 2 and Year 3.

Decedent died on Date 1 survived by Spouse and four children. Under the provisions of Trust, upon Decedent's death, Trust is to set aside a sum which is equal to the largest amount that can pass free of federal estate tax by reason of the unified

credit against the estate and gift tax, the Credit Shelter Trust, and the remainder is to be distributed outright to Spouse.

The trustee of the Credit Shelter Trust is to distribute the net income of the trust to Spouse, during Spouse's lifetime, in convenient installments at least quarterly. The trustee may also pay to Spouse all or so much of the principal of the trust as, in the trustee's sole discretion, is necessary for Spouse's medical care, maintenance and support, taking into consideration other assets available to Spouse. Spouse, during Spouse's lifetime, may invade the principal of the trust in favor of Spouse in an amount not to exceed in the aggregate during any calendar year the greater of Five Thousand Dollars (\$5,000) or five percent (5%) of the principal of the trust. Upon the death of Spouse, the trustee is to divide the trust into equal shares to provide one share for each living child of Decedent, and one share for the then living lineal descendants of each deceased child of Decedent.

Decedent's United States Estate (and Generation-Skipping Transfer) Tax Return, Form 706, was timely filed. On Schedule M of the Form 706, a QTIP election under § 2056(b)(7) was made with respect to the value of all property passing to the Credit Shelter Trust. No estate tax liability was due. Spouse received an estate tax closing letter on Date 2. It was subsequently discovered that the value of the property for which the QTIP election was made included the value of the property passing to the Credit Shelter Trust. The QTIP election with respect to the Credit Shelter Trust was not necessary to reduce the estate tax liability to zero.

Spouse requests the following rulings:

1. The assets constituting the Credit Shelter Trust under Trust will not be includable in the gross estate of Spouse upon Spouse's death under § 2044.
2. Spouse will not be treated as making a gift of the property under § 2519 if Spouse disposes of Spouse's income interest with respect to the property in the Credit Shelter Trust.
3. Spouse will not be considered the transferor of the property in the Credit Shelter Trust for generation-skipping transfer tax purposes in § 2652(a).

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, except as limited by § 2056(b), 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, but only to the extent that such interest is included in determining the value of the gross estate. Section 2056(b)(1) provides the general rule that a marital deduction is not allowed for an interest passing to the

surviving spouse that is a "terminable interest." An interest is a terminable interest if the interest passing to the surviving spouse will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur and, on termination, an interest in the property passes to someone other than the surviving spouse.

Section 2056(b)(7) provides an exception to this terminable interest rule in the case of qualified terminable interest property (QTIP). For purposes of § 2056(a), qualified terminable interest property is treated as passing to the surviving spouse, and no part of the property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), qualified terminable interest property is property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(v) provides that the election to treat property as QTIP under § 2056(b)(7) is made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Section 2044(a) and (b) provide generally that the value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under § 2056(b)(7).

Section 2519(a) and (b) provide that any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest. Section 2652(a) provides that, in the case of property subject to an election under § 2056(b)(7), the surviving spouse will be treated as the transferor of the property for generation-skipping transfer tax purposes in the absence of a "reverse QTIP" election under § 2652(a)(3).

In general, under Rev. Proc. 2001-38, a QTIP election under § 2056(b)(7) will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, 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 provides an example where the decedent's will provides for a "credit shelter trust" to be funded with an amount equal to the applicable exclusion amount under § 2010(c), with the balance of the estate passing to a marital trust intended to qualify under § 2056(b)(7). The estate makes QTIP elections with respect to both the credit shelter trust and the marital trust. The QTIP election for the credit shelter trust was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made for that trust. See Rev. Proc. 2001-38, § 2.

In this case, the QTIP election with respect to the value of the property passing to the Credit Shelter Trust was not necessary to reduce the estate tax liability to zero. That is, the estate tax liability would have been zero whether or not the election was made with respect to the trust. Accordingly, we rule that the QTIP election with respect to the value of property passing to the Credit Shelter Trust is null and void for purposes of §§ 2044, 2056(b)(7), 2519 and 2652. The property held in the Credit Shelter Trust will not be includible in the gross estate of Spouse under § 2044, and Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to that property. Further, Spouse will not be treated as the transferor of the property in the Credit Shelter Trust for generation-skipping transfer tax purposes under § 2652(a).

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. In addition, we express or imply no opinion regarding the value of the property transferred to the trusts.

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.

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

Each 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,

Lorraine E. Gardner
Senior Counsel, Branch 4
(Passthroughs & Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter