

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201131011**

Release Date: 8/5/2011

Index Number: 2056.00-00, 2056.01-00,
2044.00-00

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI
PLR-143690-10
Date: APRIL 20, 2011

Legend

Decedent =
Spouse =
Son =
Trust =

Marital Trust =

Family Trust =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
State =
Accountant =

Dear :

This letter responds to your letter dated October 13, 2010, requesting rulings that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the Internal Revenue Service (Service) will treat as null and void for purposes of Internal Revenue Code §§ 2044(a), 2056(b)(7), 2519(a), and 2652 the qualified terminable interest property election made on Schedule M of Decedent's federal estate tax return for property passing to Marital Trust and that the property in Marital Trust will not be included in Spouse's estate under § 2044.

The facts and representations submitted are summarized as follows:

Decedent created a revocable trust (Trust) on Date 1 and amended and restated Trust on Date 2. On Date 3, Decedent executed a will and further amended Article 6 in its entirety as well as portions of Articles 2 and 7 of Trust. Decedent died on Date 4 survived by Spouse and Son.

Under the provisions of Decedent's will, Decedent bequeathed all tangible personal property outright to Spouse and the residue of her estate to Trust. The will authorizes the executor to determine whether and to what extent to elect to qualify any eligible property for the federal or state marital deduction. Son is the executor of Decedent's estate and trustee of Trust.

Under the provisions of Article 6 of Trust, as amended, upon Decedent's death if Spouse survives her, the trustee is directed to use the assets of Trust to fund formula bequests to Marital Trust and Family Trust. The trustee must fund Marital Trust with so much of the assets of Trust (as determined after payment of transfer taxes, expenses, other preresiduary gifts, and all available subtractions and credits against federal estate tax) that constitute the greater of (a) the minimum amount necessary as the federal estate tax marital deduction in the trustor's estate to reduce the federal estate tax due by reason of the trustor's death to the lowest possible amount, and (b) the minimum amount necessary as the estate tax marital deduction in the trustor's estate under the death tax laws of State to reduce State death taxes due by reason of her death to the lowest possible amount. Once Marital Trust is funded, the trustee is then directed to use any remaining assets of Trust to fund Family Trust. The trustee funded Marital Trust with Trust assets equal to the amount determined under (b) because the aggregate value of Decedent's gross estate, adjusted taxable gifts, and specific exemption was less than the federal applicable exclusion amount for Decedent's year of death.

Article 6.5 of Trust directs the trustee to distribute at least annually the net income of Marital Trust to Spouse and also authorizes the trustee to distribute principal to Spouse for his proper support, maintenance, or assistance. Article 6.6 grants Spouse a testamentary power to appoint the assets in Marital Trust to trustor's descendants or a spouse of trustor's descendants. Article 6.8 of Trust grants Spouse the authority to compel the trustee to convert unproductive property held in Marital Trust to income-producing property. Upon Spouse's death, Marital Trust will be added to the principal of Family Trust. Family Trust is also held for the benefit of the descendants of Decedent, and for the benefit of Son's spouse.

Decedent's executor timely filed a Form 706, United States Estate (and Generation Skipping-Transfer) Tax Return. On Form 706, Accountant listed the Marital Trust and the total fair market value of the assets in such trust on Schedule M in the

area marked "QTIP property," thereby electing to treat all such property as qualified terminable interest property under § 2056(b)(7).

Son represents that Decedent's estate received a closing letter from the Internal Revenue Service pertaining to the Decedent's Form 706.

Law and Analysis

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, 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 that a 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)(A) provides an exception to the 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. Thus, the value of such property is deductible from the value of the gross estate under § 2056(a) and is not treated as a terminable interest. 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.

A QTIP election has transfer tax consequences for the surviving spouse. Section 2044(a) and (b) provides, in part, 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) provides 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, 2001-1 C.B. 1335, 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. Rev. Proc. 2001-38 does not apply in situations where a partial QTIP election was required with respect to a trust to reduce the estate tax liability to zero, nor does it apply to elections that are stated in terms of a formula designed to reduce the estate tax to zero. See Rev. Proc. 2001-38, § 3.

In this case, the election under § 2056(b)(7) to treat the assets of Marital Trust as QTIP was not necessary to reduce the estate tax to zero because no estate tax would have been imposed on the assets in Marital Trust whether or not the election was made. If relief under Rev. Proc. 2001-38 is granted, the estate’s federal estate tax liability will remain at zero after applying Decedent’s remaining unified credit amount under § 2010.

Because the QTIP election in this case was not necessary to reduce the estate tax liability to zero, Rev. Proc. 2001-38 applies and the Service will disregard the QTIP election with respect to Marital Trust and treat it as null and void for purposes of §§ 2044, 2056(b)(7), 2519(a), and 2652. Accordingly, the property for which the election is disregarded will not be includible in the Spouse’s gross estate under § 2044(a).

Furthermore, 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) of the Code 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.

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.

Sincerely,

Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosure: Copy for § 6110 purposes