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Person To Contact:
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Telephone Number:

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Date:
November 9, 2013

LEGEND

Taxpayer =

Spouse =

Year =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Antenuptial Agreement =

Revocable Trust =

Marital Trust =

LLC =

Operating Agreement =

State 1 =

State 2 =

A =

B =

W =

x =
y =
z =

Dear :

This letter responds to your authorized representative's letter dated April 23, 2013, requesting rulings under § 2056 of the Internal Revenue Code (Code).

FACTS

Antenuptial Agreement

Taxpayer and Spouse executed Antenuptial Agreement in anticipation of their marriage in Year. Under Article Third of Antenuptial Agreement, Taxpayer and Spouse each waived their respective right of election to take against the will or other instrument of disposition. Article Eighth provides that upon Taxpayer's death, if Spouse survives Taxpayer and if Taxpayer and Spouse are married and living together at the time of Taxpayer's death, Spouse will receive a sum of \$w outright. Such amount will be free and net of any and all estate, transfer and income taxes. In Article Ninth Taxpayer agrees that in the event of Taxpayer's death (i) while Taxpayer and Spouse are married and living together and (ii) at least 10 years have elapsed since the parties' marriage in Year, Taxpayer will fund a marital trust, the principal sum of which will be not less than x percent of Taxpayer's taxable estate prior to the deduction of any amounts due for Federal estate tax purposes under Antenuptial Agreement. Such amount will be held in trust as a separate trust, with all of the income to be paid to Spouse at least annually for as long as she lives.

Revocable Trust

Taxpayer established Revocable Trust under an agreement dated Date 1 pursuant to the laws of State 1. Such agreement has been amended and restated several times, most recently on Date 2. Currently, Taxpayer is the sole trustee. Section 3A(7) of Revocable Trust provides that, if Spouse survives Taxpayer and if Taxpayer and Spouse are married and living together at the time of Taxpayer's death, the trustee will allocate and make distributions to Spouse as provided in Section 3A(7)(a). However, if Spouse makes a timely election as provided in Section 3A(7)(b), then the trustee will allocate and make distributions to Spouse as provided in that section (Elective Marital Portion).

Section 3A(7)(a) provides that Spouse will take under the terms of Antenuptial Agreement, and that the trustee will make any distributions to Marital Trust, to be added to the principal of Marital Trust, and to be held and distributed as may be required by the Antenuptial Agreement. The terms of Revocable Trust specify that the trustee has

the discretion to satisfy any distribution to Marital Trust under the Antenuptial Agreement with LLC preferred units (Preferred Units).

Section 3A(7)(b) provides that if, within 180 days following Taxpayer's death, Spouse elects pursuant to Section 3A(7)(b) to receive the Elective Marital Portion in lieu and instead of any distributions under Antenuptial Agreement, the trustee will distribute to Spouse outright the sum of \$w and will distribute those property interests specified in Section 3(A)(7)(b), to be added to the principal of Marital Trust, and to be held and distributed as may be required by the Marital Trust agreement. If Spouse elects to receive the Elective Marital Portion Marital Trust will still be funded in part with Preferred Units.

Marital Trust

Taxpayer established Marital Trust under an agreement dated Date 3 pursuant to the laws of State 1. Such agreement has been amended and restated several times, most recently on Date 4. Taxpayer is the sole trustee. Taxpayer intends that Marital Trust will become irrevocable at his death and qualify as a qualified terminable interest property (QTIP) trust under § 2056(b)(7). Marital Trust will terminate upon the death of the survivor of Taxpayer and Spouse.

Section 3B(2) of Marital Trust provides that the net income of Marital Trust will be distributed to Spouse in at least quarter-annual installments during the lifetime of Spouse. No distributions of principal will be made.

Section 3B(3) provides that distributions to Marital Trust must be eligible to qualify for the marital deduction for purposes of Taxpayer's federal estate tax and any state estate or inheritance tax imposed upon Taxpayer's estate. Further, the trustee will administer Marital Trust so as to accord to Spouse that degree of beneficial enjoyment of the trust assets which the principles of the law of trusts accord to a person unqualifiedly designated as the life beneficiary of a trust, including, at the written request of Spouse, making unproductive or underproductive assets productive.

Section 6A provides that except as otherwise specifically provided in Marital Trust (including without limitation, any provision specifically applicable to any distribution to Spouse), the trustee will hold, manage, administer, invest, reinvest and otherwise deal with the trust estate and will have the specific powers and authority as provided in Section 6B (Specific Powers).

Section 6B(1)(a) of Marital Trust provides that the trustee has the power to accept and retain in the form received and for such time as the trustee deems advisable all property or undivided interests in property received or acquired as part of the trust estate (including, without limitation, the trustee's own securities), without regard to lack

of diversification, or nonproductivity (subject to the provisions of Section 3B(3) (Unproductive Property)).

Section 6E(1) provides, in relevant part, that the trustee is prohibited from exercising any right, power, authority or discretion granted by this Section 6 or any other provision of Marital Trust, or by any statute or rule of law that would be inconsistent with the qualification of Marital Trust for the marital deduction for purposes of Taxpayer's federal estate tax or any state estate or inheritance tax.

Section 7A provides, in relevant part, that in no event will the amount of the income from the Preferred Units which is required to be distributed to Spouse from Marital Trust pursuant to Section 3B(2) be less than the amount required in order to allow Marital Trust to qualify for the marital deduction.

Marital Trust does not contain a provision that gives any person a power to appoint any interest in Trust property to any person other than the surviving spouse.

LLC and LLC's Operating Agreement

LLC is a limited liability company organized and operated under the laws of State 1. The capital structure of LLC includes voting Common Units, non-voting Common Units, and Preferred Units (non-voting). LLC's primary asset is a y percent limited partnership interest in A, a State 2 limited partnership generally engaged in the ownership, management, development, and financing of shopping centers. Taxpayer, in his capacity as Trustee of Revocable Trust, holds voting and non-voting Common Units of LLC and all of the Preferred Units, and as such is a Preferred Member of LLC.

LLC receives monthly distributions from A pursuant to A's operating agreement which requires the distribution of all of its income to its partners. LLC also holds z shares in B, a State 1 corporation. B is the managing general partner of A and operates as a publicly traded real estate investment trust (REIT). LLC receives quarterly dividends from B in order to preserve the tax benefit of REIT status for purposes of § 857(a).

Section 4.1 of LLC's Operating Agreement generally provides that profits and losses will be determined after considering the effect of any items that are specially allocated pursuant to Section 4.1.4.

Section 4.1.4(1) provides for a gross income allocation to the Preferred Members in proportion to the Priority Return distributed to them pursuant to Section 4.2.1(1) and Section 4.2.2(1).

Section 4.2.1(1) provides that available cash will be distributed to the LLC members as set forth in a written payment schedule and, as a first priority, provides for the payment to the Preferred Members of any Outstanding Priority Return (that is, the aggregate amount of the Priority Return payable to the Preferred Members for all preceding fiscal years which has not yet been paid to the Preferred Members). The term “Priority Return” is defined as the right of a Preferred Member to receive annually, with respect to the Preferred Units owned by him, priority cash distributions equal to a fixed rate of eight (8) percent per Preferred Unit.

Section 4.2.1(1) also provides for distributions to Common Members if, and to the extent that there will be available cash in excess of the amount necessary to satisfy any Outstanding Priority Return and to pay all of the Priority Payments paid to Preferred Members during the fiscal year.

Section 4.2.1(3) provides that no payments will be made to the Common Members with respect to their Common Units at any time that there is an Outstanding Priority Return.

Section 4.2.2 provides, in relevant part, that any distribution to a Preferred Member with respect to a Preferred Unit in excess of the Full Priority Return will not exceed the greater of Face Value or Preferred Redemption Value (i.e., fair market value as determined by an independent appraiser or appraisers selected by a Majority in Interest).

Section 6.2 of Operating Agreement provides that a Preferred Member of LLC may transfer all or any portion of his Preferred Units to (i) another member, (ii) a Qualified Institutional Transferee,¹ (iii) Taxpayer, Taxpayer’s children, and/or any affiliate of the same, in each case without obtaining the prior written consent of a Majority in Interest (member(s) holding in excess of 50 percent of the outstanding voting Common Units). Notwithstanding the foregoing, no transfer will be permitted if it would violate applicable federal securities law. Further, no transfer will be permitted without the consent of a Majority in Interest if it would (i) violate any agreement to which LLC (or any entity in which LLC has a direct or indirect interest or a right to acquire a direct or indirect interest) is a party, or (ii) jeopardize the status of B as a REIT.

Section 7.3 of Operating Agreement provides that LLC may redeem at any time all or a portion of the Preferred Units on a pro rata basis without the consent of Preferred Members. The redemption price of LLC Preferred Units is the greater of their Face Value or fair market value as determined by an independent appraiser. See Section 4.2.2 of Operating Agreement (discussed above).

¹ A Qualified Institutional Transferee (“QIT”) is generally defined as a pension fund, profit sharing fund, pooled fund for Keogh plan, individual retirement plan, insurance company, bank, mutual fund, or registered investment company.

Section 8.1.1 provides that notwithstanding anything in Operating Agreement to the contrary, if at any time there is an Outstanding Priority Return, then LLC will make no distributions to the Common Members, and will not initiate the redemption or purchase of, or otherwise acquire for consideration, any Units, and will not pay any monies into a sinking fund for the redemption of Units. Section 8.1.2 provides that notwithstanding anything in Operating Agreement to the contrary, so long as any Preferred Units are outstanding, there will not be any change in the distributions payable to any Common Members so as to entitle the Common members to receive distributions or liquidation proceeds at a higher level of priority currently provided. Further, without the affirmative vote or consent of all of the Preferred Members the voting Common Members cannot amend, restate, alter or repeal the Operating Agreement whether by merger, consolidation or otherwise so as to directly materially and adversely affect any right or preference of the Preferred Units or Preferred Unit holders.

Taxpayer has demonstrated that a substantial number of Qualified Institutional Investors currently own interests in B and that they are common purchasers of REITs.

Rulings Requested

1. Spouse's right to elect under Section 3A(7)(a) and Section 3A(7)(b) of Revocable Trust is not a "contingency" within the meaning of § 2056(b)(1). The Revocable Trust property actually distributed outright to Spouse and to Marital Trust (if it otherwise satisfies the requirements of § 2056(b)(7)) will be property "passing from the decedent to his surviving spouse" for purposes of § 2056(a).
2. A marital deduction will be allowed under § 2056 for LLC Preferred Units distributed at Taxpayer's death to Marital Trust provided Taxpayer's executor timely makes the appropriate election under § 2056(b)(7).

Ruling 1

Section 2001 of the Code imposes a tax upon 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 is determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his 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 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 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 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 20.2056(c)-1(a)(5) of the Estate Tax Regulations provides that any property interest transferred during life, bequeathed or devised by the decedent, or inherited from the decedent, is considered as having passed to the person to whom he transferred, bequeathed, or devised the interest, or to the person who inherited the interest from him.

Section 20.2056(c)-2(a) generally provides that the definition stated in § 20.2056(c)-1 with respect to a property interest which passes from the decedent to his surviving spouse is qualified by a special rule in the case of an election by the surviving spouse. See § 20.2056(c)-2(a)(5). Section 20.2056(c)-2(c) provides that the surviving spouse may elect between a property interest offered to her under the decedent's will or other instrument and a property interest to which she is otherwise entitled (such as dower, a right in the decedent's estate, or her interest under community property laws) of which adverse disposition was attempted by the decedent under the will or other instrument. If the surviving spouse elects to take against the will or other instrument, then the property interest offered under the instrument is not considered as having passed from the decedent to his surviving spouse and the dower or other property interest retained by her is considered as having so passed (if it otherwise so qualifies). If the surviving spouse elects to take under the will or other instrument, then the dower or other property interest relinquished by her is not considered as having passed from the decedent to his surviving spouse and the interest taken under the will or other instrument is considered as having so passed (if it otherwise so qualifies).

In Rev. Rul. 54-446, 1954-2 C.B. 303, a decedent and his wife were parties to an antenuptial agreement in which the wife relinquished any marital rights she might acquire in the decedent's property or estate by reason of their marriage. The decedent's will bequeathed property to his wife that was different from and of a greater value than the amount due to her under the antenuptial agreement. The will specifically provided that the bequests to wife were in lieu of any rights she might have under the antenuptial agreement. The revenue ruling determined that the amount bequeathed to the wife under the will "passed from the decedent to his surviving spouse" and therefore qualified for the estate tax marital deduction.

In Rev. Rul. 68-271, 1968-1 C.B. 409, a decedent and his wife entered into an antenuptial agreement pursuant to which wife renounced and relinquished any marital rights she might acquire in his property or estate by reason of their marriage, in return for a stated sum from his estate, provided she survived him. Following the decedent's

death, the estate paid the required sum to the widow pursuant to a claim filed by her. Decedent's will did not mention wife, and there was no will contest. The revenue ruling determined that the value of the interest transferred to the surviving spouse pursuant to the antenuptial agreement "passed from the decedent to his surviving spouse" and therefore qualified for the estate tax marital deduction.

In Estate of Tompkins v. Commissioner, 68 T.C. 912 (1977), acq., 1982-1 C.B. 1, a decedent gave his surviving spouse a life estate in trust; by codicil he provided that she could elect to take an outright cash bequest in lieu of the life estate. To elect the cash bequest, the surviving spouse was required to file an election with the executor of the decedent's estate within sixty days after his qualification as executor. The spouse elected the cash bequest and the estate deducted the amount paid to the spouse. The court noted that it "has never considered the mere procedural requirement of a personal election by the surviving spouse to be a contingency for purposes of § 2056(b)(1)." It went on to state that "it is well established that the mere presence of a right of election against a will is not a disqualification so long as the interest which passes to the surviving spouse is nonterminable." It further stated that "the result is the same whether the right of election is encompassed by will or by statute." The court held that the cash bequest was a nonterminable interest because the requirement of a written election is a mere procedural formality.

Rev. Rul. 82-184, 1982-2 C.B. 215, considers a situation similar to that of Tompkins. There the decedent bequeathed to his spouse a life income interest in a trust and granted her an election to take an outright bequest of \$50,000 in lieu of the life income interest. The revenue ruling held that a cash bequest in lieu of a life estate payable unconditionally at the election of the surviving spouse within a reasonable time after the decedent's death qualifies for the estate tax marital deduction under § 2056.

In the instant case, Spouse will receive certain property interests under the terms of the Antenuptial Agreement pursuant to Section 3A(7)(a) of Revocable Trust unless, within 180 days following Taxpayer's death, Spouse elects pursuant to Section 3A(7)(b) of Revocable Trust to receive certain other property interests (Elective Marital Portion). In each event, Spouse will have an absolute right to any property passing outright to her as well as an absolute right to the income from any property passing to Marital Trust. Therefore, the property interest passing outright to Spouse will be a nonterminable interest and the property interest passing to Marital Trust will be treated as a nonterminable interest if it otherwise satisfies the requirements of § 2056(b)(7). The requirement that Spouse make a timely election is "a mere procedural formality" Tompkins, 68 T.C. at 917, and is not a contingency within the meaning of § 2056(b)(1).

Consequently, based on the facts submitted and the representations made, we conclude that Spouse's right to elect under section 3A(7) of Revocable Trust is not a "contingency" within the meaning of § 2056(b)(1). The Revocable Trust property

actually distributed outright to Spouse and to Marital Trust (if it otherwise satisfies the requirements of § 2056(b)(7)) will be “property which passes from the decedent to his surviving spouse,” for purposes of § 2056(a).

Ruling 2

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 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 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)(A) provides that, in the case of qualified terminable interest property, the property will be treated as passing to the surviving spouse for purposes of § 2056(a), and no part of the property will 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) 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)(ii) provides that the surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, and no person has a power to appoint any part of the property to any person other than the surviving spouse.

Section 20.2056(b)-7(d)(2) provides that the principles of § 20.2056(b)-5(f), relating to whether the spouse is entitled for life to all of the income from the entire interest or a specific portion of the entire interest, apply in determining whether the surviving spouse is entitled for life to all of the income from the property regardless of whether the interest passing to the spouse is in trust.

Section 20.2056(b)-5(f)(1) provides, in part, that if an interest is transferred in trust, the surviving spouse is entitled for life to all of the income from the entire interest or a specific portion of the entire interest, if the effect of the trust is to give her substantially that degree of beneficial enjoyment of the trust property during her life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust. Such degree of enjoyment is given only if it was the decedent’s intention, as manifested by the terms of the trust instrument and the

surrounding circumstances, that the trust should produce for the surviving spouse during her life such an income, or that the spouse should have such use of the trust property as is consistent with the value of the trust corpus and with its preservation. The designation of the spouse as sole income beneficiary for life of the entire interest or a specific portion of the entire interest will be sufficient to qualify the trust unless the terms of the trust and the surrounding circumstances considered as a whole evidence an intention to deprive the spouse of the requisite degree of enjoyment.

Section 20.2056(b)-5(f)(4) provides, in part, that provisions granting administrative powers to the trustee will not have the effect of disqualifying an interest passing in trust unless the grant of powers evidences the intention to deprive the surviving spouse of the beneficial enjoyment required by the statute. For example, the power to retain trust assets which consist substantially of unproductive property will not disqualify the interest if the applicable rules for the administration of the trust require, or permit the spouse to require, that the trustee either make the property productive or convert it within a reasonable time.

Section 20.2056(b)-5(f)(7) provides, in part, that an interest passing in trust fails to satisfy the condition that the spouse be entitled to all the income to the extent that the income is required to be accumulated in whole or in part or may be accumulated in the discretion of any person other than the surviving spouse; to the extent that the consent of any person other than the surviving spouse is required as a condition precedent to distribution of the income; or to the extent that any person other than the surviving spouse has the power to alter the terms of the trust so as to deprive her of her right to the income.

In the instant case, Marital Trust instructs the trustee to distribute the entire net income of Marital Trust to Spouse in at least quarter-annual installments during the lifetime of Spouse. Neither Revocable Trust nor Marital Trust grants any person a power to appoint the Marital Trust estate to any person other than Spouse. Marital Trust also directs the trustee to administer Marital Trust so as to accord to Spouse that degree of beneficial enjoyment of Marital Trust assets which the principles of the law of trusts accord to a person unqualifiedly designated as the life beneficiary of a trust, including, at the written request of Spouse, making unproductive or underproductive assets productive. Accordingly, Marital Trust evidences an intention by Taxpayer to give Spouse, after his death, the beneficial enjoyment of the Marital Trust estate requisite to a qualifying income interest for life for purposes of § 2056(b)(7)(B)(ii).

The surrounding circumstances also manifest Taxpayer's intention that, after his death, Marital Trust should produce for Spouse during her life that degree of beneficial enjoyment of the LLC Preferred Units which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust. Under the terms of Operating Agreement, as the owner of LLC Preferred Units, Marital Trust will be entitled to an eight percent return on the aggregate face value of its LLC Preferred

Units, payable no less often than annually. LLC cannot redeem Marital Trust's LLC Preferred Units for less than the greater of their face value or fair market value. In addition, without the affirmative vote or consent of all of the Preferred Members, LLC's Voting Common Members cannot amend, restate, alter or repeal Operating Agreement whether by merger, consolidation or otherwise so as to directly materially and adversely affect any right or preference of the Preferred Units or Preferred Unit holders.

Moreover, the sale of LLC Preferred Units is not unreasonably restricted. At the written request of Spouse, the trustee of Marital Trust may sell the LLC Preferred Units to permitted purchasers without the consent of other LLC Members. Subject only to reasonable administrative restrictions, these purchasers will become substitute Preferred Members. The permitted purchases are other Members of LLC, Taxpayer's children, and Qualified Institutional Investors (as defined by Operating Agreement). Taxpayer has demonstrated that a substantial number of Qualified Institutional Investors currently own interests in B and that they are common purchasers of REITs. With respect to the actual receipt of income from an investment in B, an indirect owner of interests in B who owns LLC Preferred Units is in a similar position as a direct owner of interests in B because LLC is required to distribute an eight percent preferred return annually to owners of LLC Preferred Units.

Consequently, based on the facts submitted and the representations made, we conclude that Spouse will have a qualifying income interest for life in the LLC Preferred Units and a marital deduction will be allowed under § 2056 for LLC Preferred Units distributed at Taxpayer's death to Marital Trust provided that Taxpayer's executor timely makes the appropriate election under § 2056(b)(7)(B)(v).

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.

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.

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

Sincerely,

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

Enclosures (2)

Copy of this letter
Copy for § 6110 purposes

cc: