

## 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:

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-133235-17

Date:

April 30, 2018

### Legend

Decedent

Spouse

Date 1

Date 2

Date 3

Date 4

Date 5

Date 6

Date 7

Court

Trust

State

z

Year

Dear

:

This letter responds to your authorized representative's letter dated September 29, 2017, and subsequent correspondence, requesting an extension of time under § 301.9100-1 and § 301.9100-3 of the Procedure and Administration Regulations to make a qualified terminable interest property (QTIP) election under § 2056(b)(7)(B)(v) of the Internal Revenue Code.

The facts and representations submitted are as follows:

On Date 1, Decedent, a resident of State, executed Trust, a revocable trust. On Date 2, Decedent amended and restated Trust. On Date 3, Decedent died testate survived by Spouse. Trust became irrevocable upon Decedent's death.

Under Decedent's will, after the payment of certain residuary bequests, Decedent's residuary estate passed to Trust. The residuary estate included various assets, including a retirement account (IRA).

Article IV of Trust provides, in relevant part, that upon Decedent's death, the principal and any undistributed income then remaining shall be held by the trustee in trust for the benefit of Spouse.

Article IV, Paragraph A. of Trust provides that,

In each taxable year of the Trust during the lifetime of [Spouse], the Trustee[s] shall pay to [Spouse] an amount equal to the greater of (i) z Percent (z%) percent of the net fair market value of the assets of the Trust valued as of the first day of each taxable year of the Trust (including but not limited to any retirement account payable to the Trust); or (ii) the [required minimum distribution] amount . . . . The first day of the payment period shall be the date of [Decedent's] death and the last day of the payment period shall be the date of [Spouse's] death. If possibly [sic], the payment shall be made in equal quarterly installments at the end of each calendar quarter.

Article IV, Paragraph E. provides that at Spouse's death, the trustees are to distribute all of the principal and income of the trust to specified charities.

On Date 4, the executors of Decedent's estate timely filed a complete Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return (with extension). Based upon the value of the gross estate and amount of taxable gifts, the executors of Decedent's estate had a filing requirement under § 6018(a) and paid estate tax on or about Date 4. On the Form 706, the executors did not evidence any intent to divide Trust into separate trusts or elect under § 2056(b)(7) to treat any assets of Trust as QTIP.

On Date 5, the executors filed a supplemental Form 706 to claim a refund for federal estate taxes paid. Date 5 is within the limitations period prescribed by § 6511.

On Date 6, the trustees petitioned Court to divide and modify Trust into two trusts, an IRA Trust consisting of the retirement accounts payable to Trust and a non-IRA Trust holding the other assets of Trust. The purpose of the division is to qualify the Non-IRA Trust for QTIP treatment.

On Date 7, Court approved the division and modification of Trust.

As modified, Article IV of Trust provides, in relevant part, that upon Decedent's death,

the principal and any undistributed income then remaining shall be held by [Decedent's] Trustees in two (2) separate trusts: Trust A ("IRA Trust") and Trust B ("Non-IRA Trust"). . . . Trust A shall include the retirement account payable to the Trust and Trust B shall include the remaining principal and undistributed income of the Trust.

Trust is further modified by the addition of Article XV ("Marital Deduction Provisions"), the terms of which govern the two separate trusts, Trust A and Trust B, upon the division of Trust at Decedent's death. In relevant part, Article XV provides that "if [Spouse] survives [Decedent], then notwithstanding any other provision of this Agreement of Trust: . . . The Trustees shall not have any rights, powers, privileges, or immunities which would cause the trusts not to qualify for the federal estate tax marital deduction." Further, Article XV provides that "[a]ll provisions of [Trust] shall be construed in accordance with [Decedent's] primary intention that the trusts qualify for the federal estate tax marital deduction."

You have requested the following rulings:

1. An extension of time under §§ 301.9100-1 and -3 and § 20.2056(b)-7(b)(2)(ii) to sever Trust into IRA Trust and Non-IRA Trust, effective as of the date of Decedent's death.
2. An extension of time under §§ 301.9100-1 and -3 to make a QTIP election under § 2056(b)(7)(B)(v) with respect to the assets of the Non-IRA Trust.

## 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, the value of the taxable estate is, except as limited by § 2056(b), 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, in relevant part, that 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, no deduction

shall be allowed under § 2056(a) with respect to such interest if an interest in such property passes or has passed (for less than 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 the spouse), and if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse.

Section 2056(b)(7) provides an exception to the rule of § 2056(b)(1) in the case of QTIP.

Section 2056(b)(7)(A) provides that for purposes of § 2056(a), QTIP is treated as passing to the surviving spouse and for purposes of § 2056(b)(1)(A) no part of the property is treated as passing to any person other than the surviving spouse. Section 2056(b)(7)(B)(i) defines QTIP as property that 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. Under § 2056(b)(7)(B)(ii), a surviving spouse has a "qualifying income interest for life" if (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and (II) no person has a power to appoint any part of the property to any person other than the surviving spouse.

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)(2)(i) of the Estate Tax Regulations provides that the election may relate to all or any part of property that meets the requirements of § 2056(b)(7)(B)(i), provided that any partial election must be made with respect to a fractional or percentage share of the property so that the elective portion reflects its proportionate share of the increase or decrease in value of the entire property for purposes of applying § 2044 or 2519. The fraction or percentage may be defined by formula.

Section 20.2056(b)-7(b)(2)(ii) provides that a trust may be divided into separate trusts to reflect a partial election that has been made, or is to be made, if authorized under the governing instrument or otherwise permissible under local law. Any such division must be accomplished no later than the end of the period of estate administration. If, at the time of the filing of the estate tax return, the trust has not yet been divided, the intent to divide the trust must be unequivocally signified on the estate tax return.

Section 20.2056(b)-7(b)(4)(i) provides that, in general, 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). For purposes of this paragraph, 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 20.2056(b)-7(d)(2) provides that the principles of § 20.2056(b)-5(f) apply in determining whether the surviving spouse is entitled to all of the income for life from the entire interest or a specific portion of the entire interest.

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 the spouse substantially that degree of beneficial enjoyment of the trust property during the spouse’s life which the principles of the law of trusts accord to a person who is unqualifiedly designated as the life beneficiary of a trust. In addition, the surviving spouse’s interest shall meet the condition set forth in § 20.2056(b)-5(a)(1) if the spouse is entitled to all of the income as determined by applicable local law that provides for a reasonable apportionment between the income and remainder beneficiaries of the total return of the trust and that meets the requirements of § 1.643(b)-1 of the Income Tax Regulations.

Under § 20.2056(b)-5(f)(5) an interest passing in trust will not satisfy the condition in § 20.2056(b)-5(a)(1) that the surviving spouse be entitled to all the income if the primary purpose of the trust is to safeguard property without providing the spouse with the required beneficial enjoyment. For example, assume that the corpus of a trust consists substantially of property which is not likely to be income producing during the life of the surviving spouse and that the spouse cannot compel the trustee to convert or otherwise deal with the property as described in § 20.2056(b)-5(f)(4). An interest passing to such a trust will not qualify unless the applicable rules for trust administration require, or permit the spouse to require, that the trustee provide the required beneficial enjoyment, such as by payments to the spouse out of other assets of the trust.

Section 20.2056(b)-5(f)(8) provides that the terms “entitled for life” and “payable annually or at more frequent intervals” require that under the terms of the trust the income referred to must be currently (at least annually) distributable to the spouse or that the spouse must have such command over the income that it is virtually the spouse’s. Thus, the surviving spouse will be entitled for life to all of the income from the trust, payable annually, if, under the terms of the trust instrument, the spouse has the right exercisable annually (or at more frequent intervals) to require distribution to the spouse of the trust income and, to the extent that right is not exercised, the trust income is to be accumulated and added to principal.

Section 301.9100-1(c) provides that the Commissioner has discretion to 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.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute).

Requests for relief under § 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 that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(ii) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer failed to make the election because of intervening events beyond the taxpayer's control.

Based on the facts submitted and representations made, we conclude that the requirements of § 301.9100-3 are satisfied. Therefore, Decedent's estate is granted an extension of time of 120 days from the date of this letter to (1) sever Trust into IRA Trust and Non-IRA Trust, effective as of the date of Decedent's death, and (2) make a QTIP election under § 2056(b)(7)(B)(v) with respect to the assets of Non-IRA Trust.

The above elections should be made on a supplemental Form 706 for Year. The Form 706 should be filed with the Cincinnati Service Center at the following address: Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for this purpose.

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

Except as expressly provided herein, we neither express nor imply any opinion 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.

Sincerely,

Associate Chief Counsel  
Passthroughs & Special Industries

*Leslie H. Finlow*

By: \_\_\_\_\_  
Leslie H. Finlow  
Senior Technician Reviewer, Branch 4  
Office of the Associate Chief Counsel  
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Enclosures

Copy for § 6110 purposes  
Copy of this letter