Internal Revenue Service

Department of the Treasury

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Index Nos.: 2503.00-00, 2513.00-00
2523.00-00

199903040

Person to Contact:

Telephone Number:

Refer Reply to:
CC:DOM:P&SI:4/PLR-103126-98

Date:

OCT 14 1998

Legend:

Husband =
Wife =
State =
Bank =
Trust =
$x =
$y =

This is in response to your letter of January 22, 1998, requesting rulings under §§ 2031, 2503, 2513, and 2523 of the Internal Revenue Code.

On June 20, 1989, Husband established Trust, an irrevocable trust, for the lifetime benefit of Wife. Both Husband and Wife are United States citizens. Bank was appointed trustee of Trust and continues to serve in that capacity. Husband contributed $x to Trust on August 4, 1989 and, $y on April 11, 1990. It is represented that the property transferred by Husband to Trust is not community property.

Section 3.1 of Trust provides that the trustee is to pay the net income of Trust to Wife at least quarter-annually during her life. Section 3.2 of Trust provides that if, in the sole discretion of the trustee, the net income of Trust is insufficient to provide for the support, maintenance and medical care of Wife, the trustee may distribute to Wife as much of the principal as the trustee determines is necessary for such purposes. In exercising the discretionary power, the trustee may, but need not, consider Wife's other income and means of support known to the trustee.

Section 3.3 of Trust provides that upon the death of Wife, Trust will terminate. Upon termination, any undistributed income of Trust (including income accrued or accumulated by the trustee prior to termination) is to be distributed to the estate of Wife, and the remaining assets of Trust are to be distributed to Husband's then living issue, per stirpes, provided that any share required to be distributed to a child of Husband, is not to be distributed outright but is to continue to be held as a separate trust for his or her benefit under the provisions of section 4 of Trust. Any share to be distributed to a more remote issue of Husband is to be distributed, pursuant to Section 5 of Trust.

Both the Husband and Wife filed federal gift tax returns (Form 709) for 1989 and 1990. On Husband's 1989 and 1990 returns, Wife executed the consent under § 2513 to treat one-half of all gifts made by Husband as having been made one-half by Wife. On Wife's 1989 and 1990 returns, Husband executed the consent under § 2513 to treat one-half of all gifts made by Wife as having been made one-half by Husband. However, the 1989 and 1990 transfers to Trust were not reported on either Husband's or Wife's returns filed for those years and no election was made on Husband's returns under § 2523(f)(4), to treat Trust as qualified terminable interest property (QTIP).

Wife died on November 26, 1997. At the time of Wife's death, Husband and Wife's son and daughter were living. Two trusts, one established for the benefit of the son and one established for the benefit of the daughter will receive each child's respective per stirpes share of Trust assets.

According to the facts submitted, Wife was born on October 8, 1929. It is represented that on the date of the 1989 transfer to Trust the present value of Wife's income interest in Trust, determined under § 7520, was 77.326 percent of $x, the 1989 transfer. On the date of the 1990 transfer to Trust, the present value of Wife's income interest with respect to the 1990 transfer was 77.558 percent of $y, the 1990 transfer. Both of these amounts are in excess of $10,000. These factors do not reflect the possibility of invasion for Wife's benefit.

It is represented that Husband, upon receipt of this ruling, will file amended gift tax returns for 1989 and 1990 on which he will report the 1989 and 1990 transfers, respectively, to Trust. Husband will amend all gift tax returns filed for years subsequent to reflect the 1989 and 1990 transfers.

The following rulings are requested.

1. Husband's 1989 and 1990 transfers to Trust were taxable gifts that were not subject to a QTIP election under § 2523(f)(4).

2. The transfers made by Husband to Trust in 1989 and 1990 will qualify for the annual exclusion under § 2503(b).

3. The remainder interest passing to Husband's issue on Wife's death is subject to a split gift election under § 2513.

4. The Trust assets attributable to Husband's 1989 and 1990 transfers to Trust will not be included in Wife's federal gross estate.

5. The Trust assets attributable to Husband's 1989 and 1990 transfers to Trust will not be included in Husband's federal gross estate.

Section 2501 of the Internal Revenue Code imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident. Section 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2523(a) provides that where a donor transfers property to the donor's spouse, a marital deduction is allowed in computing taxable gifts for the calendar year equal to the value of the gift to the spouse.

Section 2523(b)(1) provides that, in general, a marital deduction is not allowed for a property interest transferred to the spouse, if the interest will terminate on the occurrence of an event or contingency such as the death of the spouse, and after the spouse's interest terminates, the property will pass to a person other than the spouse.

Section 2523(f)(1) provides an exception to the terminable interest rule in § 2523(b)(1) in the case of qualified terminable interest property (QTIP). Such property is treated as transferred to the donee spouse, and for purposes of § 2523(b)(1), no part of the property is considered transferred to any person other than the donee spouse.

Section 2523(f)(2) provides that the term "qualified terminable interest property" means any property - (A) which is transferred by the donor spouse, (B) in which the donor spouse has a qualifying income interest for life, and (C) to which an election under § 2523(f)(4) applies. A 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. _See also_, § 2056(b)(7)(B)(ii).

Section 2523(f)(4) provides that an election under § 2523(f) with respect to any property shall be made on or before the date prescribed by § 6075(b) for filing the gift tax return with respect to the transfer (determined without regard to § 6019(2)) and shall be made in such manner as the Secretary shall by regulations prescribe.

Under § 6075(b)(1), returns made under § 6019 (relating to gift taxes) are to be filed on or before the 15th of April following the close of the calendar year in which the transfer was made.

Section 2044 provides that the value of the gross estate shall include the value of any property to which § 2044 applies in which the decedent had a qualifying income interest for life. Section 2044 applies to any property if a deduction was allowed with respect to the transfer of such property to the decedent under § 2523(f).

Section 2503(b) provides that in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first $10,000 of such gifts to such person shall not, for purposes of determining the amount of taxable gifts within the meaning of § 2503(a), be included in the total amount of gifts made during such year. Where there has been a transfer to any person of a present interest in property, the possibility that such interest may be diminished by the exercise of a power is to be disregarded in applying § 2503(b), if no part of such interest will at any time pass to any other person.

Under § 25.2503-3(b), an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain) is a present interest in property. An exclusion is allowable with respect to a gift of such an interest (but not in excess of the value of the interest).

Section 2513(a)(1) provides that a gift made by one spouse to any person other than the other spouse shall, for the purposes of the gift tax chapter, be considered as made one-half by the donor spouse and one-half by the other spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

Section 2513(a)(2) provides that § 2513(a)(1) shall apply only if both spouses have signified (under the regulations promulgated under § 2513(b)) their consent to the application of § 2513(a)(1) in the case of all such gifts made during the calendar year by either while married to the other.

Section 25.2513-1(b) provides that the provisions of

§ 25.2513 will apply to gifts made during a particular "calendar period" (as defined in § 25.2502-1(c)(1)) only if both spouses signify their consent to treat all gifts made to third parties during that calendar period by both spouses while married to each other as having been made one-half by each spouse.

Section 25.2513-2(a)(1) provides that if both spouses file gift tax returns within the time for signifying consent, it is sufficient if: (i) The consent of the husband is signified on the wife's return, and the consent of the wife is signified on the husband's return; (ii) the consent of each spouse is signified on his own return; or (iii) the consent of both spouses is signified on one of the returns.

Under section 25.2513-1(b), if such consent is signified with respect to any calendar period, it is effective with respect to all gifts made to third parties during such calendar period except (in pertinent part), if one spouse transferred property in part to his spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift and hence severable from the interest transferred to his spouse.

In Rev. Rul. 56-439, 1956-2 C.B. 605, a gift is made in trust pursuant to which the trustee is to distribute any part or all of the income or principal of the trust to or among the spouse of the donor and other descendants of the donor at such times and in such proportions and amounts as the trustee determines in its sole discretion. The ruling concludes that under the facts presented, the value of the right to receive the income or principal to be distributed to the spouse is not susceptible of determination. Therefore, the gift to the spouse is not severable from the gifts to the other beneficiaries and the gift may not to any extent be considered as made one-half by the donor and one-half by his spouse within the meaning of § 2513.

In Wang v. Commissioner, T.C. Memo. 1972-143, the court stated that in determining whether a remainder interest is ascertainable as of the time of the gift and thus eligible for split gift treatment under § 2513, the same principles are applied as are employed in determining whether a charitable remainder interest subject to an invasion power is ascertainable and thus deductible for estate tax purposes (under rules in effect prior to the enactment of §§ 2055(e)(1) and (e)(2).

Generally, the charitable remainder interest would be ascertainable if the invasion power was limited by an ascertainable standard such that the possibility of invasion could be measured or stated in definite terms of money. Rev.

Rul. 70-450, 1970-2 C.B. 195; Wang v. Commissioner, supra. If the remainder interest was ascertainable, then a charitable deduction was allowed in an amount in excess of the potential invasions. If the probability of invasion was so remote as to be negligible, a deduction would be allowed for the entire value of the remainder interest. Rev. Rul. 1954-285, 1954-2 C.B. 302.

Ruling #1. The Husband's 1989 and 1990 transfers to Trust provided Wife with the necessary qualifying income interest for life under § 2523(f)(2)(B) such that the election under § 2523(f)(2)(C) to treat the property as qualified terminable interest property (QTIP) could have been made.

The transfers to Trust were not reported nor was the QTIP election made on either the 1989 or the 1990 gift tax returns filed by Husband. Because no election was made, we conclude that Husband's 1989 and 1990 transfers to Trust are not subject to a QTIP election under § 2523(f)(4), and are, therefore, not deductible from the Husband's taxable gifts in those years.

Ruling #2. Wife, during her lifetime, was entitled to the net income from the Trust property, payable at least quarter-annually. In addition, in the event that the net income of Trust was insufficient to provide for the support, maintenance and medical care of Wife, the trustee was authorized to distribute to Wife as much of the principal as the trustee determined to be necessary for such purposes.

Since Wife received an unrestricted right to the income from the property transferred to the Trust in 1989 and in 1990, Wife received a present interest, within the meaning of § 25.2503-3(b), in the property. It is represented that the actuarially determined value of Wife's lifetime income interest in the transfers by Husband to the Trust in 1989 and 1990, are each in excess of $10,000. Accordingly, an exclusion of $10,000 is allowable with respect to both the 1989 and 1990 transfers by Husband to Trust, pursuant to § 2503(b).

Ruling #3. In the present case, Trust provides that if, in the sole discretion of the trustee, the net income of Trust is insufficient to provide for the support, maintenance and medical care of Wife, the trustee may distribute to Wife as much of the principal as the trustee determines is necessary for such purposes. In exercising the discretionary power, the trustee may, but need not, consider Wife's other income and means of support known to the trustee. We conclude that the standard for invasion provided in Trust constitutes an ascertainable standard. See, Rev. Rul. 78-398, 1978-2 C.B 237, holding that a similar standard constitutes an ascertainable standard for purposes of § 2041.

However, if and to what extent, the trust corpus would be invaded (determined as of the date of the transfer) is a factual determination. Section 7.01 of Rev. Proc. 98-1,, 1998-1 I.R.B. 7, 23, provides that the Service will not issue letter rulings on factual determinations. Accordingly, we are not ruling on the extent to which the value of the remainder interest may be treated as a gift made one-half by Wife.

Ruling #4. The Trust assets attributable to Husband's 1989 and 1990 transfers to Trust will not be included in Wife's gross estate under § 2044 because no election was made under § 2523(f)(4) with respect to Trust. Additionally, the remainder interest that passes upon Wife's death to Husband's living issue is not subject to inclusion in Wife's gross estate under §§ 2036, 2037, and 2038 since Wife did not transfer the property to the Trust. We conclude that the Trust assets attributable to Husband's 1989 and 1990 transfers to Trust will not be includible in Wife's gross estate for federal estate tax purposes.

Although the Trust assets attributable to Husband's 1989 and 1990 transfers to Trust will not be includible in Wife's gross estate, one-half the value of the transfers to Trust in 1989 and 1990, attributable to Wife by virtue of Wife's consent to split gifts with Husband, to the extent eligible for split-gift treatment under § 2513, as discussed above, will be included in Wife's adjusted taxable gifts pursuant to § 2001(b).

Ruling #5. At the time of Husband's 1989 and 1990 transfers to Trust, Husband did not retain any interest in the transferred property that would subject the property to inclusion in Husband's gross estate under §§ 2036, 2037, and 2038. Instead, Husband relinquished all dominion and control over both the income interest that passed to Wife and the remainder interest that passed to or for the benefit of Husband and Wife's son and daughter. Therefore, the Trust assets attributable to Husband's 1989 and 1990 transfers to Trust will not be included in Husband's gross estate.

Except as we have specifically ruled herein, we express no opinion as to the consequences of this transaction under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter should be attached to the amended federal gift tax returns when they are filed. A copy is enclosed for that purpose.

Sincerely yours,

Assistant Chief Counsel
(Passthroughs and Special
Industries)

By George Masnik
George Masnik
Chief, Branch 4

Enclosures
Copy for section 6110 purpose
Copy of letter