

Internal Revenue Service

Department of the Treasury
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Person To Contact:

ID No.
Telephone Number:

In Re:

Refer Reply To:
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PLR-106710-11
Date:
August 05, 2011

Legend:

Decedent =
Spouse =
Trust =

Year 1 =
Year 2 =
Year 3 =
State Law 1 =
State Law 2 =
State Law 3 =

X =
Y =
Z =
Court =

Dear :

This letter responds to a letter from your authorized representative dated April 6, 2011, and other correspondence, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to treat a qualified terminable interest property (QTIP) trust as two separate trusts under § 26.2652-2(c) of the Generation-Skipping Transfer Tax Regulations and to make a "reverse" QTIP election under § 2652(a)(3) of the Internal Revenue Code with respect to one of the two resulting trusts.

The facts submitted and the representations made are as follows. Decedent and Spouse executed a revocable trust (Trust) in Year 1. Decedent died in Year 2.

Article IV, 4.01 of Trust provides that after the death of the first spouse to die, the trustee is to divide the trust estate into three separate trusts, the Survivor's Trust, the Family Trust, and the Qualified Terminable Interest Trust (QTIP Trust). The Survivor's Trust is to be funded with the surviving spouse's interest in the Decedent's and Spouse's community estate and the surviving spouse's separate property. The Family Trust is to be funded with a pecuniary amount equal to the maximum sum that can be allocated to a trust that does not qualify for the federal estate tax marital deduction to any extent, without producing any federal estate tax. The QTIP Trust is to be funded with the remaining trust estate.

Article IV, 4.05 provides that the trustee is to pay to or apply for the benefit of the surviving spouse the net income of the QTIP Trust in quarter-annual or more frequent installments. The trustee may also pay to or provide for the benefit of the surviving spouse trust principal to provide for the surviving spouse's health, education, support, and maintenance. Trust's terms do not provide the trustee with the power to divide the Survivor's Trust, the Family Trust, or the QTIP Trust.

Spouse, as executrix of Decedent's estate, retained an accountant to prepare the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, for Decedent's estate. On Schedule M of the Form 706, the accountant made the QTIP election for the QTIP Trust. On Schedule R of the form, however, the accountant did not make the "reverse" QTIP election under § 2652(a)(3) and did not affirmatively allocate Decedent's available generation-skipping transfer (GST) exemption.

The Form 706 reported that assets valued at \$X were contributed to the Family Trust and assets valued at \$Y were contributed to the QTIP Trust. Pursuant to § 2632(c)(1) (in effect at the time of Decedent's death), Decedent's available GST exemption in the amount of \$X was automatically allocated to the Family Trust effective as of Decedent's date of death. It has been represented that Decedent (during his life and at death) did not make any other transfers that would have been subject to GST tax. As a result, Decedent's GST exemption in the amount of \$Z was never allocated.

In Year 3, Spouse, as trustee of the QTIP Trust, petitioned Court to divide and modify the QTIP Trust. Also, in Year 3, Court issued an order that divided the QTIP Trust pursuant to State Law 1, 2, and 3 by adding new subparagraph 4.01.4.A to Trust. New subparagraph 4.01.4.A provides as follows:

4.01.4.A Division of QTIP Trust To fully utilize the deceased Trustor's generation-skipping transfer ("GST") exemption (as defined in Internal Revenue Code Section 2631) and if authorized by the relevant sections of the Internal Revenue Code, the QTIP Trust may be divided into two (2) separate trusts, designated as the "Exempt QTIP Trust" and the "Non-Exempt QTIP Trust," as follows.

4.01.4.A.1 Exempt QTIP Trust The Exempt QTIP Trust shall consist of a fractional share that is equal in value to the deceased Trustor's GST exemption, reduced by the aggregate amount of said exemption that has been allocated by the deceased Trustor, the Trustee hereunder, the Trustee(s) of any other trust created by the deceased Trustor, or by the deceased Trustor's Executor to other transfers of property by the deceased Trustor's death. The Exempt QTIP Trust shall be satisfied in cash or in kind or partly in each. Assets allocated in kind shall be deemed to satisfy this gift on the basis of their fair market values at the date or dates of distribution to the Exempt QTIP Trust.

4.01.4.A.2 Non-Exempt QTIP Trust The Non-Exempt QTIP Trust shall consist of the balance of the Marital Trust not allocated to the Exempt QTIP Trust, if any.

4.01.4.A.3 Reverse Election For GST purposes, the Executor of the deceased Trustor (or if none is appointed, the Trustee of this Trust) shall elect to treat the deceased Trustor as the transferor of the assets held in the Exempt QTIP Trust pursuant to Internal Revenue Code section 2652(a)(3).

4.01.4.A.4 Administration as QTIP Trusts The Trustee shall hold, administer and distribute the Exempt QTIP Trust and the Non-Exempt QTIP Trust as separate trusts (herein sometimes referred to collectively as the "QTIP Trusts") under the same terms and conditions as provided for the QTIP Trust in Paragraphs 4.01.4 through 4.01.9.

The trustee of the QTIP Trust is requesting: (1) an extension of time under § 301.9100-3 to treat the QTIP Trust as two separate trusts (Exempt QTIP Trust and Non-Exempt QTIP Trust) pursuant to § 26.2652-2(c); (2) an extension of time under § 301.9100-3 to make the "reverse" QTIP election under § 2652(a)(3) for the Exempt QTIP Trust; and (3) a ruling that the automatic allocation rules of § 2632(c)(1) (in effect at the time of Decedent's death) will operate to cause GST exemption in the amount of \$Z, the unused portion of Decedent's GST exemption, to be automatically allocated to the Exempt QTIP Trust.

Law and Analysis:

Section 2601 imposes a tax on every GST. A GST is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of the tax is the taxable amount multiplied by the applicable rate. Section 2641(a) defines "applicable rate" as the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2631(a) (in effect at the time of Decedent's death) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor.

Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Section 2632(c)(1) (in effect at the time of Decedent's death) provides that any portion of an individual's GST exemption which has not been allocated within the time prescribed by § 2032(a) shall be deemed to be allocated as follows – (A) first, to property which is the subject of a direct skip occurring at such individual's death, and (B) second, to trusts with respect to which such individual is the transferor and from which a taxable distribution or a taxable termination might occur at or after such individual's death.

Section 2632(c)(2)(A) (in effect at the time of Decedent's death) provides that the allocation under § 2632(c)(1) shall be made among the properties described in § 2632(c)(1)(A) and the trust described in § 2632(c)(1)(B) in proportion to the respective amounts (at the time of allocation) of the nonexempt portions of such properties or trusts.

Section 2642(c)(2)(B) (in effect at the time of Decedent's death) provided that for purposes of § 2632(c)(2)(A), the term "nonexempt portion" means the value (at the time of allocation) of the property or trust, multiplied by the inclusion ratio with respect to such property or trust.

Section 2652(a)(1) provides, in part, that for purposes of chapter 13, the term "transferor" means in the case of any property subject to the tax imposed by chapter 11, the decedent. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) states that, with respect to any trust for which a deduction is allowed under § 2056(b)(7) (regarding QTIP), the estate of the decedent may elect to treat all of the property in such trust for purposes of the GST tax provisions as if the QTIP election had not been made. This election is referred to as the "reverse" QTIP election. The consequence of a reverse QTIP election is that the decedent remains, for

GST tax purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GST exemption may be allocated to that QTIP trust.

Section 26.2652-2(a) of the Generation-Skipping Transfer Tax Regulations provides that a reverse QTIP election is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies.

Section 26.2652-2(c) provides that if a reverse QTIP election is made with respect to a trust prior to December 27, 1995, and the GST exemption has been allocated to that trust, the transferor (or the transferor's executor) may elect to treat the trust as two separate trusts, one of which has a zero inclusion ratio by reason of the transferor's GST exemption previously allocated to the trust. The separate trust with the zero inclusion ratio consists of that fractional share of the value of the entire trust equal to the value of the nontax portion of the trust under § 26.2642-4(a). The reverse QTIP election is treated as applying only to the trust with the zero inclusion ratio. An election under this section is made by attaching a statement to a copy of the return on which the reverse QTIP election was made under § 2652(a). The statement is to be filed before June 24, 1996.

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 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). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) under the provisions of § 301.9100-3.

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)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

State Law 1 provides, in part, that on petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.

State Law 2 provides that on petition by a trustee or beneficiary, the court, for good cause shown, may divide a trust into two or more separate trusts, if the court determines that dividing the trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries.

State Law 3 provides that a trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust or to determine the existence of the trust. Proceedings concerning the internal affairs of a trust include, but are not limited to, determining questions of construction of a trust instrument and approving or directing the combination or division of trusts.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, Decedent's estate is granted an extension of time of 120 days from the date of this letter to make the election under § 26.2652-2(c) to treat the QTIP Trust as two separate trusts, the Exempt QTIP Trust and the Non-Exempt QTIP Trust. The election will be effective as of the date of Decedent's death.

Decedent's estate is also granted an extension of time of 120 days from the date of this letter to make a reverse QTIP election pursuant to § 2652(a)(3), effective as of the date of Decedent's death, with respect to the Exempt QTIP Trust. The portion of the QTIP Trust allocated to the Exempt QTIP Trust is that percentage of the fair market value of the QTIP Trust on the date of division equal to the fraction $\$Z$ divided by $\$Y$.

Finally, we rule that, as a result of the election to treat the QTIP Trust as two separate trusts together with the reverse QTIP election, the automatic allocation rules of § 2632(c) (in effect as of Decedent's date of death) will automatically allocate Decedent's unused GST exemption in the amount of $\$Z$ to the Exempt QTIP Trust. This allocation will be effective as of the date of Decedent's death.

The reverse QTIP election under § 2652(a)(3) should be made on a supplemental Form 706. The election under § 26.2652-2(c) should be made by completing the statement required in § 26.2652-2(c) and attaching this statement to the supplemental Form 706 on which the reverse QTIP election has been made. A copy of this letter should be attached to the supplemental Form 706. The supplemental Form

706 should be filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center - Stop 82, Cincinnati, OH 45999.

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.

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) 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.

Sincerely,

Curt G. Wilson,
Associate Chief Counsel
(Passthroughs & Special Industries)

James F. Hogan

By: _____
James F. Hogan
Chief, Branch 4
(Passthroughs & Special Industries)

Enclosures

Copy for § 6110 purposes
Copy of this letter