

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201845007**
Release Date: 11/9/2018

Third Party Communication: None
Date of Communication: Not Applicable

Index Number: 9100.00-00, 2642.00-00,
2654.03-00

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-103623-18

RE:

Date:
July 31, 2018

LEGEND

Date 1 =
Decedent =
Spouse =
Trust =

Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Law Firm =
Accounting Firm =

Dear :

This letter responds to your authorized representative's letter of January 2, 2018, and subsequent correspondence, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to sever a trust under § 26.2654-1(b)(1) of the Generation-Skipping Transfer (GST) Tax Regulations.

FACTS

The facts and representations submitted are summarized as follows:

On Date 1, Decedent and Spouse executed a revocable trust, Trust. Trust was revised and restated on Date 2, and further amended on Date 3 and Date 4. Trust became irrevocable upon Decedent's death on Date 5. Decedent was survived by Spouse, children, and grandchildren.

Under the terms of Trust, on the death of the first settlor to die, the trustee shall divide the trust estate into separate trusts: Survivor's Trust, to be funded with the separate property and one-half of the community property of the survivor of the first settlor to die, and the Credit Shelter Trust and Marital Trust, to be funded with the separate property and one-half of the community property of the first settlor to die. Credit Shelter Trust and Marital Trust became irrevocable upon the date of death of the first settlor to die.

Both Credit Shelter Trust and Marital Trust provide for distributions of net income to Spouse during Spouse's lifetime and, upon Spouse's death, distributions to Decedent's children and grandchildren. Under certain circumstances, principal may be paid in the trustee's discretion to or for the benefit of Spouse.

Pursuant to Article III, Paragraph N, the trustee shall have the power to divide a trust into separate trusts, one portion not to exceed the transferor's remaining GST exemption (after taking into account any prior allocations made to lifetime gifts by Decedent), and one portion comprised of the remaining trust estate from such trust. Further, the trustee shall have the power to allocate any remaining GST exemption after lifetime allocations to that first portion after division so that the applicable fraction for that portion is one (1) and the transferor utilizes the maximum amount of the GST exemption available for that portion. Any trust that is divided into separate portions shall be held on terms and conditions that are equivalent to those terms of the trust from which it was separated so that the aggregate interests of each beneficiary in the several trusts are equivalent to the beneficiary's interest in the trust before separation, but each trust portion created pursuant to Article III, Paragraph N shall be held from and after the effective date of separation as a separate trust for all purposes.

Spouse served as executor of Decedent's estate and the trustee of Trust. Spouse relied on Law Firm to prepare and provide advice regarding Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. Law Firm prepared Decedent's Form 706, which shows on Schedule M an election under § 2056(b)(7) to treat Marital Trust as "qualified terminable interest property" (QTIP). Schedule R of the Form 706 reflects the intent to allocate the full amount of Decedent's GST exemption to the Marital Trust and no part of Decedent's GST exemption to the Credit Shelter Trust. However, Spouse failed to effectively allocate Decedent's GST exemption due to errors on the Schedule R. Spouse was not advised to exercise the trust power in Article III, Paragraph N, to divide any trust into a GST exempt portion and a GST non-exempt portion.

It is represented that a portion of Decedent's GST exemption was automatically allocated under § 2632(b)(1) to transfers to several irrevocable trusts during her lifetime

and that Decedent had remaining GST exemption available at her death. Spouse died on Date 6. Accounting Firm was retained to prepare and provide advice regarding the Form 706 for Spouse's estate. In the course of this review, Accounting Firm learned that line 8 of Part 1 on Schedule R of Decedent's Form 706 incorrectly reported Decedent's available GST exemption available for allocation by failing to take into account the automatic allocation of GST exemption to several of Decedent's lifetime transfers. Accounting Firm also learned that Marital Trust had not been divided into a GST exempt portion and a GST non-exempt portion, pursuant to Article III, Paragraph N, so that a "reverse" QTIP election under § 2652(a)(3) could be made with respect to only the exempt portion.

To date, there have been no taxable terminations or taxable distributions from Marital Trust.

You request an extension of time under § 301.9100-3 and § 26.2654-1(b)(1)(ii) to sever Marital Trust into a GST exempt portion (GST Exempt Marital Trust) and a GST non-exempt portion (GST Non-Exempt Marital Trust), to make a reverse QTIP election under § 2652(a)(3) with respect to GST Exempt Marital Trust, and to allocate Decedent's available GST exemption to the GST Exempt Marital Trust, effective as of the Decedent's date of death.

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 shall, except as limited by § 2056(b), be 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 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 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 this section with respect to such interest —

- (A) if an interest in such property passes or has passed (for less than adequate consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and
- (B) 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;

and no deduction shall be allowed with respect to such interest.

Section 2056(b)(7)(A) provides that, in the case of QTIP, for purposes of § 2056(a), such property shall be treated as passing to the surviving spouse, and for purposes of § 2056(b)(1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines the term QTIP as property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under this paragraph applies.

Section 2056(b)(7)(B)(v) provides, in part, that an election with respect to any property shall be made by the executor on the return of tax imposed by § 2001.

Under § 2044, any property in which the decedent had a qualifying income interest for life and for which a deduction was allowed under § 2056(b)(7) is includible in the decedent's gross estate.

Section 2601 imposes a tax on every generation-skipping transfer. Section 2611(a) provides that the term "generation-skipping transfer" means: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means, with respect to any GST transfer, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Section 2642(a)(1) provides that, generally, the inclusion ratio with respect to any property transferred in a GST is the excess of one over the applicable fraction determined for the trust. Section 2642(a)(2) provides that, in general, the applicable fraction is a fraction the numerator of which is the amount of the GST exemption allocated to the trust and the denominator of which is the value of the property transferred to the trust, reduced by the sum of any federal estate tax or state death tax actually recovered from the trust attributable to such property, and any charitable deduction allowed under § 2055 or 2522 with respect to such property.

Section 2631(a) provides that for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount 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)(2) provides that for purposes of § 2632(c)(1), the unused portion of an individual's GST exemption is that portion of such exemption which has not previously been — (A) allocated by such individual, (B) treated as allocated under § 2632(b) with respect to a direct skip occurring during or before the calendar year in which the indirect skip is made, or (C) treated as allocated under paragraph (c)(1) with respect to a prior indirect skip.

Section 2652(a)(1) provides that for purposes of chapter 13, the term "transferor" means: (A) in the case of any property subject to the tax imposed by chapter 11, the decedent; and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides, in part, that in the case of any trust with respect to which a deduction is allowed to the decedent under § 2056 by reason of § 2056(b)(7), the estate of the decedent may elect to treat all of the property in such trust for GST tax purposes as if the election to be treated as QTIP had not been made ("reverse" QTIP election).

Section 26.2652-2(a) provides, in part, 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(b) provides that an election under § 2652(a)(3) is made on the return on which the QTIP election is made.

Section 26.2654-1(b)(1)(ii) provides that the severance of a trust that is included in the transferor's gross estate (or created under the transferor's will) into two or more trusts is recognized for purposes of chapter 13 if the governing instrument does not require or otherwise direct severance but the trust is severed pursuant to discretionary authority granted either under the governing instrument or under local law; and

- (A) The terms of the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust;
- (B) The severance occurs (or a reformation proceeding, if required, is commenced) prior to the date prescribed for filing the federal estate tax return (including extensions actually granted) for the estate of the transferor; and
- (C) Either —
 - (1) The new trusts are severed on a fractional basis. If severed on a fractional basis, the separate trusts need not be funded with a pro rata portion of each asset held by the undivided trust. The trusts may be funded on a non pro rata basis provided funding is based on either the fair market value of the assets

on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding; or

- (2) If the severance is required (by the terms of the governing instrument) to be made on the basis of a pecuniary amount, the pecuniary payment is satisfied in a manner that would meet the requirements of § 26.2654-1(a)(1)(ii) if it were paid to an individual.

Notice 2001-50, 2001-2 C.B. 189, provides that under § 2642(g)(1)(B), the time for allocating the GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a GST trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-1 through 301.9100-3.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-1 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than six 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)(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.

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 sever Marital Trust into GST Exempt Marital Trust and GST Non-Exempt Marital Trust, to make a reverse QTIP election with respect to GST Exempt Marital Trust, and to allocate Decedent's available GST exemption to GST Exempt Marital Trust. The allocation will be effective as of Decedent's date of death.

The severance should be reported on a supplemental Form 706 for the estate of Decedent. The supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 706.

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 the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Associate Chief Counsel
(Passthroughs & Special Industries)

Karlene M. Lesho

By: _____
Karlene M. Lesho
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy for § 6110 purposes
Copy of this letter

cc: