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Department of the Treasury

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CC:DOM:P&SI:4 - PLR-106092-98

Date: November 30, 1998

Re :

LEGEND:

Taxpayer =

Spouse =

Decedent =

State =

Dear :

This is in response to your authorized representative's letter, requesting a ruling concerning the gift tax consequences of a proposed termination of a marital trust for which a deduction was allowed under § 2056(b)(7) of the Internal Revenue Code. This letter responds to that request.

The facts and representations submitted are summarized as follows: Decedent died on July 30, 1985. Under the terms of Decedent's revocable trust, a portion of the trust estate passed to a marital trust (Trust C) qualifying as qualified terminable interest property (QTIP) under § 2056(b)(7). Under the terms of Trust C, Spouse is entitled to receive all the income from Trust C during Spouse's lifetime. Upon Spouse's death, the remaining principal of Trust C is to pass to Trust A. The beneficiaries of Trust A are the children of the marriage of Decedent and Spouse.

On the federal estate return (Form 706) filed by Decedent's estate, an election was made under § 2057(b)(7) to treat Trust C as QTIP.

Spouse, the trustee of Trust C, the trustee of Trust A, and the children of Decedent and Spouse (including Taxpayer) intend to petition the local probate court for termination of Trust C

and distribution of the entire corpus of Trust C to Spouse, free of trust. The petition will be filed under a State statute which permits the termination of a trust when, owing to circumstances unforeseen by the settlor, the continuation of the trust would impair or defeat the settlor's intentions in establishing the trust.

Taxpayer requests a ruling that Taxpayer's consent to termination of Trust C will not be a gift by the Taxpayer to Spouse of Taxpayer's interest in the remainder of Trust C.

Section 2056(a) provides that 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.

Under § 2056(b)(1), if an interest passing to the surviving spouse will terminate, no deduction is allowed with respect to such interest if, after termination of the spouse's interest, 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).

Section 2056(b)(7)(A) provides that qualified terminable interest property, for purposes of § 2056(a), is treated as passing to the surviving spouse, and no part of such property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), qualified terminable interest property is property: (1) which passes from the decedent; (2) in which the surviving spouse has a qualifying income interest for life; and (3) for which the election under § 2056(b)(7)(B)(v) is made.

Section 2044(a) provides that the value of the gross estate includes the value of any property described in § 2044(b) in which the decedent had a qualifying income interest for life. Section 2044(b) provides that § 2044 applies to any property if a deduction was allowed with respect to the transfer of the property to the decedent under § 2056(b)(7).

Under § 2501, a tax is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 2511(a) provides that the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(a) of the Gift Tax Regulations provides that the gift tax is measured by the value of the property passing from the donor, and is not determined by the enrichment of the donee.

Section 2512(b) provides that where property is transferred for less than an adequate consideration in money's worth, the amount by which the value of the property exceeds the value of the consideration is deemed a gift.

In Commissioner v. Wemyss, 324 U.S.303 (1945), the Court, described the broad application of the gift tax as applying whenever property is transferred for less than adequate consideration. Specifically, the Court stated: "Where property is transferred for less than adequate consideration in money or money's worth, the excess in such money value, shall, be deemed a gift". Commissioner v. Wemyss, 324 U.S. at 307.

In Rev. Rul. 98-8, 1998-7 I.R.B. 24, a surviving spouse purchases, from the trust remainderman, the remainder interest in a QTIP trust for an amount equal to the actuarial value of the remainder interest. As a result of the transaction, the trust terminates and the entire trust corpus is paid to the spouse. The spouse then pays the purchase price to the remainderman from the proceeds of the trust corpus.

The revenue ruling concludes that the surviving spouse has made a gift of property equal to the value of the remainder interest in the QTIP trust. One basis for this conclusion is that the surviving spouse acquired an asset (the remainder interest in the QTIP trust) that is already subject to inclusion in the surviving spouse's transfer tax base under § 2044. The receipt of an asset that does not effectively increase the value of the recipient's potential gross estate does not constitute adequate consideration for purposes of the gift and estate tax. Thus, the spouse did not receive adequate consideration for the for the transfer of the purchase price.

In this case, the Taxpayer argues that under Rev. Rul 98-8, a remainder interest in a QTIP trust is accorded a value of zero when received by the spouse (or is already treated as owned by the spouse for transfer tax purposes). Accordingly, the Taxpayer's transfer of his interest in the Trust C remainder to Spouse is not subject to gift tax.

We disagree. In this case the Taxpayer proposes to transfer a valuable property interest to Spouse and to receive nothing in exchange. Under § 2512(b) and Commissioner v. Wemyss, this transfer by the Taxpayer for less than adequate consideration constitutes a gift. Further, Rev. Rul. 98-8 focuses on what constitutes adequate consideration for transfer tax purposes and

concludes that the receipt of the remainder interest by the Spouse does not constitute adequate consideration for the spouse's transfer to the remainderman. It does not follow that the remainder interest should be valued at zero (or the transfer of the interest should not constitute a gift) when the remainderman (Taxpayer) transfers the interest to the Spouse and receives no consideration in exchange. Rather, the Taxpayer proposes to make a transfer for less than adequate consideration that will deplete his potential taxable estate.

If Taxpayer were to transfer the remainder interest to a third party other than Spouse, the transfer would clearly be a gift. The result is the same if the donee is the surviving spouse. The fact that the receipt of the remainder interest by Spouse will not increase the value of Spouse's potential taxable estate is not pertinent to the determination of the federal gift tax consequences to Taxpayer with respect to Taxpayer's proposed transfer. § 25.2512-2(a).

Accordingly, the proposed transfer by the Taxpayer will constitute a gift for gift tax purposes.

Except as ruled above, we express or imply no opinion concerning the federal tax consequences of this transaction under the cited provisions of the Code or any other provision of the Code.

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

Sincerely yours,

George Masnik
Chief, Branch 4
Office of the Assistant Chief
Counsel
(Passthroughs and Special
Industries)

Enclosure

Copy of letter for section 6110 purposes