

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B09-PLR-145826-03

Date:

October 24, 2003

Re:

**LEGEND**

- Decedent =
- Spouse =
- Revocable Trust =
- Date 1 =
- Date 2 =
- Date 3 =
- Accountant =
- Date 4 =
- Son =

Dear :

This responds to your letter dated July 28, 2003, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to sever a trust pursuant to § 26.2654-1(b)(1) of the Generation-Skipping Transfer (GST) Tax Regulations, and to make a “reverse” qualified terminable interest property (QTIP) election under § 2652(a)(3) of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: Decedent and Spouse executed Revocable Trust on Date 1. Decedent and Spouse amended Revocable Trust on a number of occasions, the last of which was Date 2.

Revocable Trust provides that at Decedent's death, the assets held as part of Revocable Trust shall be divided into three separate shares: the survivor's share, the marital deduction share, and the credit shelter share.

Article 5, paragraph 3 of Revocable Trust provides that the survivor's share shall consist of Spouse's interest in community property and quasi-community property, and Spouse's separate property.

Article 5, paragraph 4 provides that the marital deduction share shall consist of a pecuniary gift of the trust estate, other than the survivor's share, equal to the minimum amount that will result in the lowest federal estate tax being imposed on Decedent's estate after allowing for the unified credit and other allowable credits and deductions.

Article 5, paragraph 5 provides that the credit shelter share shall consist of the balance of the trust estate.

Article 5, paragraph 10 provides that the entire survivor's share shall be held and administered in a trust known as the "Survivor's Trust."

Article 5, paragraph 11 provides that the entire marital deduction share shall be held and administered in a trust known as the "Qualified Terminable Interest Property Trust" or the "QTIP Trust."

Article 5, paragraph 12 provides that the entire credit shelter share shall be held and administered in a trust known as the "Credit Shelter Trust."

Article 5, paragraph 18 sets forth the dispositive provisions of the QTIP Trust. Article 5, paragraph 18(a) provides that the trustee shall divide the trust property set apart as QTIP into two separate and distinct QTIP trusts. One shall be known as the "Qualified Terminable Interest Property Children's Trust" or the "QTIP C Trust." The other shall be known as the "Qualified Terminable Interest Property Grandchildren's Trust" or the "QTIP G Trust." The QTIP G Trust shall have a value equal to the difference between One Million Dollars (\$1,000,000) and the value of the credit shelter share, as defined in Article 5.5 of Revocable Trust. The QTIP C Trust shall consist of the balance of the QTIP, as defined in Article 5.4 of Revocable Trust.

Article 5, paragraph 18(b) provides, in part, that upon the death of Decedent, the trustee shall pay the entire net income of the trusts to Spouse so long as she lives, in monthly installments.

Article 5, paragraph 18(c) provides, in part, that the principal of the QTIP C Trust, but not the QTIP G Trust, may be used when Spouse is in need of funds to meet the reasonable expenses of (i) support in accordance with her accustomed manner of

living; and (ii) medical, dental, hospital and nursing services, and other costs relating to her medical care.

Article 5, paragraph 18(e) provides that the entire QTIP trust, including the QTIP C and QTIP G subtrusts, shall terminate upon the death of Spouse.

Article 5, paragraph 18(g) provides that the trustee shall dispose of the balance of the QTIP G Trust by adding the remaining trust fund to the Credit Shelter Trust to be held, administered or distributed as if it had been an original part of the Credit Shelter Trust.

Article 5, paragraph 18(h) provides that the trustee shall dispose of the balance of the QTIP C Trust by dividing the property into as many equal shares as may be necessary to provide one share for each then living child of Decedent and Spouse and one share for the then living issue of each deceased child of Decedent and Spouse. Each share so created shall be held in further trust for the benefit of that share's respective beneficiary.

Article 5, paragraph 19 sets forth the dispositive provisions of the Credit Shelter Trust. Article 5, paragraph 19(a) provides that upon Decedent's death, the trustee shall pay to Spouse all of the net income, in convenient installments, but not less frequently than quarterly.

Article 5, paragraph 19(b) provides that at any time after Decedent's death that the trustee determines that Spouse is in need of funds for support in accordance with her accustomed standard of living or for maintenance or medical care, the trustee may pay to or apply for the benefit of Spouse such amounts of principal as the trustee deems advisable.

Article 5, paragraph 20(a) provides that upon the death of Spouse, the trustee shall divide the Credit Shelter Trust into as many equal shares as may be necessary to provide one share for each then living grandchild of Decedent and Spouse and one share for the then living issue of each deceased grandchild of Decedent and Spouse. Each share so created shall be held in further trust for the benefit of that share's respective beneficiary.

Article 5, paragraph 23 sets forth the provisions for any trust created under Revocable Trust in which there is property that is or may become subject to the GST tax.

Article 5, paragraph 23(a) provides, in part, that on notification by Decedent's executor that the executor intends to allocate any part of Decedent's available GST exemption to some but not all the property in a trust that may become subject to the GST tax, the trustee shall divide that trust into two separate trusts, to be designated as

the “Exempt Trust” and the “Nonexempt Trust.” The Exempt Trust shall contain the portion of that trust equal in value to the amount of the GST exemption that the executor intends to allocate to the trust and shall have an inclusion ratio of zero for federal GST tax purposes. The Nonexempt Trust shall contain the balance of that trust and shall have an inclusion ratio of one for federal GST tax purposes.

Article 5, paragraph 23(f) provides, in part, that the purpose of Article 5, paragraph 23 is to allow the trustee to administer all trusts so as to decrease the amount of GST tax owed on the generation-skipping transfers from the trusts.

Decedent died on Date 3 survived by Spouse. The executor of Decedent’s estate hired Accountant to handle tax matters and prepare the Form 706, Estate (and Generation-Skipping Transfer) Tax Return for the estate. Accountant prepared the Form 706 and the return was timely filed. On Schedule M of the return, the estate claimed a marital deduction for the entire marital deduction share. However, no Schedule R was filed with the Form 706. Consequently, no election was made under § 2652(a)(3) and none of Decedent’s GST exemption was allocated on the Form 706.

Spouse died on Date 4. Son, in his capacity as statutory executor of Decedent’s estate, now requests an extension of time to sever the QTIP Trust into the QTIP C Trust and the QTIP G Trust and to make a “reverse” QTIP election with respect to the QTIP G Trust. In addition, Son requests a ruling that Decedent’s available GST exemption be automatically allocated to the QTIP G Trust in accordance with § 2632(e).

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a 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 to be 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.

Section 2056(b)(1) provides, in pertinent part, that no deduction shall be allowed under § 2056(a) 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.

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

Section 2056(b)(7)(B)(i) provides that the term “qualified terminable interest property” means property: (i) which passes from the decedent; (ii) in which the surviving

spouse has a qualifying income interest for life; and (iii) to which an election under § 2056(b)(7)(B)(v) applies.

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 2601 imposes a tax on every generation-skipping transfer made after October 22, 1986.

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 2631(a) 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 2632(a)(1) provides that any allocation by an individual of his 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(e)(1) provides that, in general, any portion of an individual’s GST exemption which has not been allocated within the time prescribed by § 2632(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 26.2632-1(d)(2) of the Generation-Skipping Transfer Tax Regulations provides, in pertinent part, that no automatic allocation of GST exemption is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the new trust.

Section 2652(a)(1) provides, in pertinent part, 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 that in the case of– (A) any trust with respect to which a deduction is allowed to the decedent under § 2056 by reason of subsection (b)(7) thereof, and (B) any trust with respect to which a deduction to the donor spouse

is allowed under § 2523 by reason of subsection (f) thereof, the estate of the decedent or the donor spouse, as the case may be, may elect to treat all of the property in such trust for purposes of this chapter as if the election to be treated as qualified terminable interest property had not been made.

Section 26.2652-2(b) provides that a “reverse” QTIP election is made on the return on which the QTIP election is made.

Section 2654(b) provides that for purposes of the generation-skipping transfer tax – (1) the portions of a trust attributable to transfers from different transferors shall be treated as separate trusts, and (2) substantially separate and independent shares of different beneficiaries in a trust shall be treated as separate trusts. Except as provided in the preceding sentence, nothing in chapter 13 is to be construed as authorizing a single trust to be treated as two or more trusts.

Section 26.2654-1(b)(1) 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 - (i) the trust is severed pursuant to a direction in the governing instrument providing that the trust is to be divided upon the death of the transferor; or (ii) 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 trust 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 nonpro rata basis provided funding is based on either the fair market value 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)(ii) if it were paid to an individual.

Under § 301.9100-1(c) of the Procedure and Administration Regulations the Commissioner may 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 301.9100-2 provides an automatic extension of time for making certain elections.

Section 301.9100-3(a) provides that, in general, requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3. Requests for relief subject to § 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 the grant of 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.

In this case, because a QTIP election was made on Decedent's Form 706, the assets of the QTIP Trust are currently includible in Spouse's gross estate pursuant to § 2044. In addition, Spouse is considered the transferor of such property for GST tax purposes, thereby initially precluding the allocation of Decedent's unused GST exemption to the QTIP G Trust. However, if Decedent's estate is allowed to make a "reverse" QTIP election under § 2652(a)(3) with respect to the assets of the QTIP G Trust, Decedent will be treated as the transferor of those assets for GST tax purposes.

Based on the facts submitted and the representations made, we conclude that the requirements of §§ 26.2654-1 and 301.9100-3 have been satisfied. We rule that an extension of time is granted until 60 days from the date of this letter (i) to sever the QTIP Trust into the QTIP C Trust and the QTIP G Trust; and (ii) to make a "reverse" QTIP election under § 2652(a)(3) with respect to the QTIP G Trust. The election should be made on a supplemental Form 706 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for that purpose.

The severance of the QTIP Trust into the QTIP C Trust and the QTIP G Trust will be recognized for GST purposes and the two trusts will be treated as separate trusts in accordance with § 2654(b)(1). In view of the severance of the QTIP Trust and the "reverse" QTIP election with respect to the resulting QTIP G Trust, Decedent's remaining GST exemption is allocated in accordance with the rules provided in § 2632(e)(1).

Except as expressly provided herein, no opinion is expressed or implied concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer(s) 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 the taxpayer.

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.

Sincerely,

Heather Maloy

Heather Maloy  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures

Copy of letter

Copy for 6110 purposes