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**LEGEND**

Taxpayer =

Revocable Trust =

Husband =

Date 1 =

Date 2 =

State Court =

Date 3 =

Date 4 =

State X =

Date 5 =

Dear :

In a letter dated March 22, 2004, your authorized representative requested rulings regarding an estate's right of recovery under § 2207A of the Internal Revenue Code. This letter responds to that request.

The facts as represented are as follows: During her lifetime, Taxpayer was a beneficiary of Revocable Trust, a trust created by her late husband ("Husband") for her benefit and for the benefit of his children from a previous marriage.

Paragraph 5 of Revocable Trust provides that upon Husband's death, a portion of the trust assets are to be distributed to a marital trust for the benefit of Taxpayer. The trustee is directed to pay to Taxpayer, during her lifetime, all of the net income of the trust in quarterly installments. Upon Taxpayer's death, the trustee is directed to divide the balance of the trust estate into equal shares for Husband's then living children.

Husband died on Date 1. On Date 2, State Court approved the division of the marital trust created under paragraph 5 of Revocable Trust in accordance with the provisions of § 2652(a)(3). As a result, the marital trust created under the terms of paragraph 5 of Revocable Trust was divided into two separate trusts: a GST-Exempt QTIP Trust and a Non-Exempt QTIP Trust (collectively the "QTIP Trusts").

On or about Date 3, Husband's estate filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. On Schedule M of the return, the estate made an election under § 2056(b)(7) with respect to the property held as part of the QTIP Trusts.

Taxpayer died on Date 4 a resident of State X. Taxpayer's last will and testament was admitted to probate on Date 5. Item 1 of Taxpayer's last will and testament provides as follows:

I direct that all estate, inheritance, succession, death or similar taxes (except generation-skipping transfer taxes) assessed with respect to my estate herein disposed of, or any part thereof, or on any bequest or devise contained in this my Last Will (which term wherever used herein shall include any Codicil hereto), or on any insurance upon my life or on any property held jointly by me with another or on any transfer made by me during my lifetime or on any other property or interests in property included in my estate for such tax purposes be paid out of my residuary estate and shall not be charged to or against any recipient, beneficiary, transferee or owner of any such property or interests in property included in my estate for such tax purposes.

Following Taxpayer's death, the personal representative of Taxpayer's estate was in communication with the trustee of the QTIP Trusts for the purpose of determining the correct value of the QTIP Trusts' assets that were includible in Taxpayer's estate under § 2044 so that the assets could be accurately reported on Taxpayer's federal estate tax return. In addition, the personal representative sought to recover from the QTIP Trusts, pursuant to § 2207A, the estate taxes attributable to the inclusion of the QTIP Trusts' assets in Taxpayer's estate. The personal representative was advised and had proceeded on the basis that the federal estate tax attributable to the inclusion in Taxpayer's gross estate of the value of the QTIP Trusts would be borne by the QTIP Trusts pursuant to the right of recovery granted to the Taxpayer's estate under § 2207A.

However, two business days before the due date for filing Taxpayer's federal estate tax return, the trustee of the QTIP Trusts notified the personal representative of Taxpayer's estate that it would not reimburse the estate for the estate taxes attributable to the inclusion of the QTIP Trusts in Taxpayer's gross estate. The trustee's rationale was that it believed that under Item 1 of Taxpayer's last will and testament the estate's right of recovery under § 2207A was waived by Taxpayer.

The personal representative of Taxpayer's estate now requests rulings as to whether Item 1 of Taxpayer's last will and testament constitutes a waiver of the estate's right of recovery under § 2207A(a)(1) and whether Taxpayer's estate is entitled to recover from the trustee of the QTIP Trusts the amount of federal estate tax attributable to those trusts.

### 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 that 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 the general rule that no deduction shall be allowed for an interest passing to the surviving spouse if, on the lapse of time, the occurrence of an event or contingency, or the failure of an event or contingency to occur, the interest will terminate or fail.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, the entire property shall be treated as passing to the surviving spouse for purposes of § 2056(a), and no part of the 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) defines "qualified terminable interest property" as property: (1) that passes from the decedent, (2) in which the surviving spouse has a qualifying income interest for life, and (3) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides that the surviving spouse has a qualifying income interest for life if: (1) the surviving spouse is entitled to all of the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and (2) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Section 2044(a) provides that the value of the gross estate shall include the value of any property to which this section applies in which the decedent had a qualifying income interest for life.

Section 2044(b)(1)(A) provides that § 2044 applies to any property if a deduction was allowed with respect to the transfer of such property to the decedent under § 2056(b)(7).

Section 2207A(a)(1) provides that if any part of the gross estate consists of property the value of which is includible in the gross estate by reason of § 2044 (relating to certain property for which a marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which the total tax under chapter 11 that has been paid exceeds the total tax under chapter 11 that would have been payable if the value of such property had not been included in the gross estate.

Section 2207A(a)(2) provides that § 2207A(a)(1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under subchapter C with respect to such property.

Section 20.2207A-1(a)(1) of the Estate Tax Regulations provides that if the gross estate includes the value of property that is includible by reason of § 2044 (relating to certain property in which the decedent had a qualifying income interest for life under § 2056(b)(7) or 2523(f)), the estate of the surviving spouse is entitled to recover from the person receiving the property (as defined in § 20.2207A-1(d)) the amount of federal estate tax attributable to that property. The right of recovery arises when the federal estate tax with respect to the property includible in the gross estate is paid by the estate. There is no right of recovery from any person for the property received by that person for which a deduction was allowed from the gross estate if no tax is attributable to that property.

Section 20.2207A-1(b) provides that the amount of federal estate tax attributable to property includible in the gross estate under § 2044 is the amount by which the total federal estate tax (including penalties and interest attributable to the tax) under chapter 11 that has been paid exceeds the total federal estate tax (including penalties and interest attributable to the tax) under chapter 11 that would have been paid if the value of the property includible in the gross estate by reason of § 2044 had not been so included.

Section 20.2207A-1(d) provides that if the property is in a trust at the time of the decedent's death, the person receiving the property is the trustee and any person who has received a distribution of the property prior to the expiration of

the right of recovery if the property does not remain in trust. Paragraph (d) does not affect the right, if any, under local law, of any person with an interest in property to reimbursement or contribution from another person with an interest in the property.

We note that § 2207A(a)(2) was amended in the Taxpayer Relief Act of 1997, Pub L. No. 105-34, § 1302(a). Prior to the amendment, § 2207A(a)(2) provided that the right of recovery set forth in § 2207A(a)(1) did not apply if the decedent otherwise directed by will. As a result of the 1997 amendment, § 2207A(a)(2) now provides that no right of recovery will exist under § 2207A(a)(1) to the extent that the language in a decedent's will or revocable trust specifically indicates the decedent's intent to waive the estate's right of recovery. The House Report that accompanied the change to § 2207A(a)(2) states:

It is understood that persons utilizing standard testamentary language often inadvertently waive the right of recovery with respect to QTIP. Similarly, persons waiving a right to contribution are unlikely to refer to the code section granting the right. Accordingly, allowing the right of recovery (or granting the right of contribution) to be waived only by specific reference should simplify the drafting of wills by better conforming with the testator's likely intent.

#### *Explanation of Provision*

The bill provides that the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by specific reference to QTIP, the QTIP trust, section 2044, or section 2207A). Thus, a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery.

H.R. Rep. No. 105-148, at 614, 1997-4 C.B. 319, 936.

As stated above, § 2207A(a)(2) as amended in 1997, provides that no right of recovery will exist to the to the extent that a decedent in his or her will specifically indicates an intent to waive any right of recovery with respect to the property includible in the decedent's gross estate by reason of § 2044. Item 1 of Taxpayer's last will and testament requires that all taxes imposed on Taxpayer's estate be borne by the residuary beneficiaries. Item 1, however, does not contain any specific language indicating an intent to waive the estate's right of recovery under § 2207A(a)(1). Accordingly, we conclude that Item 1 of Taxpayer's last will and testament does not constitute a waiver by Taxpayer of her estate's right to recover the amount of federal estate taxes attributable to the

QTIP Trusts. Because Taxpayer's last will and testament does not waive the estate's right of recovery under § 2207A, once the federal estate tax on Taxpayer's estate has been paid, Taxpayer's estate will be entitled to recover from the trustee of the QTIP Trusts the amount of federal estate tax (including penalties and interest) attributable to the QTIP Trusts.

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. Specifically, no opinion is expressed or implied regarding any of recovery with regard to state estate or inheritance taxes.

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.

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,

James F. Hogan  
Senior Technican Reviewer, Branch 9  
(Passthroughs & Special Industries)

Enclosures

Copy for 6110 purposes