Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4\PLR-111439-02
Date:
JUNE 25, 2002

Re:

Legend:

Decedent =

Spouse =
City =
Country =
Date 1 =
Date 2 =
Date 3 =
$x =
Residence =

Dear :

This is in response to your letter, of March 5, 2002, and prior correspondence, requesting a ruling on the gift and estate tax consequences of an inter vivos transfer by Decedent to his non-citizen spouse (Spouse).

The facts and representations submitted are summarized as follows: Decedent, a citizen of the United States, died on Date 2, survived by Spouse. Spouse is a citizen and resident of Country, and is not a United States citizen. Prior to his death, Decedent moved to City, and remained a resident of Country until his death.

After Decedent moved to Country, Decedent purchased a 50 year leasehold interest in Residence. The leasehold interest entitled the Decedent to all possessory rights as a lessee with respect to the property until the expiration of the lease term on Date 3. On Date 1, approximately two months prior to Decedent's death on Date 2, Decedent irrevocably transferred his entire leasehold interest in Residence to Spouse. Thereafter, Decedent continued to live in the Residence with Spouse until his death on Date 2. The estimated value of the leasehold interest at the time of the transfer was $x. It is represented that Decedent's transfer of the leasehold interest was valid and binding under Country law.

You have requested a private letter ruling regarding the gift and estate tax consequences of Decedent's transfer of the leasehold interest in Residence to Spouse.

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(b) of the Gift Tax Regulations provides that as to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or the benefit of another, the gift is complete.

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.

Section 2523(a) provides the general rule that where the donor transfers property to a donee, who, at the time of the gift is donor's spouse, then in computing taxable gifts for the calendar year, a marital deduction is allowed for the value of the gift to the spouse. However, under § 2523(i)(1), the marital deduction is not allowable if the spouse of the donor is not a citizen of the United States.

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 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life or for any period not ascertainable without reference to

death or for any period which does not in fact end before death, (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income from the property.

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.

Sections 2056(d)(1) and (2) provide that if the surviving spouse is not a citizen of the United States, then no deduction is allowed under § 2056(a) unless the property passes to the surviving spouse in a qualified domestic trust (QDOT), described in § 2056A(a). Section 2056(d)(2)(B) provides that if any property passes from the decedent to the surviving spouse of the decedent then, for purposes of § 2056(d)(2)(A), such property will be treated as passing to the surviving spouse in a QDOT if: (1) such property is transferred to a QDOT before the date on which the return of tax imposed by chapter 11 is made, or (2) such property is irrevocably assigned to a QDOT under an irrevocable assignment made on or before such date which is enforceable under local law. Under § 20.2056A-4(b)(3), only assets included in the decedent's gross estate and passing from the decedent to the surviving spouse (or the proceeds from the sale, exchange or conversion of such assets) may be transferred to a QDOT under this rule.

Where a decedent transfers a residence to family members and then continues to reside in the residence until death, the property will be includible in the decedent's gross estate under § 2036(a)(1), if the decedent continues to occupy the residence pursuant to an understanding between the parties, either express or implied, that the decedent would retain possession or enjoyment of the property. See, e.g., Estate of Maxwell v. Commissioner, 3 F. 3rd 591 (2d Cir.1993); Estate of Trotter v. Commissioner, TCM 2001-250; Rev. Rul 70-155, 1970-1 C.B. 189. On the other hand, where the decedent transfers the residence to his or her spouse, the decedent's continued co-occupancy of the residence with the spouse after the transfer does not raise any inference of an agreement or understanding as to retained possession or enjoyment of the property by the decedent, such that the property would be subject to inclusion under § 2036. Rev. Rul. 70-155, citing Estate of Gutchess v. Commissioner, 46 T.C. 554 (1966), acq. 1967-1 C.B. 2.

In the instant case, on Date 1, prior to his death, Decedent irrevocably transferred his leasehold interest in Residence to Spouse. We conclude that the transfer on Date 1 was a completed gift for gift tax purposes under § 2511. The value of the leasehold interest on Date 1 is subject to gift tax under § 2501. Under § 2523(i), the transfer does not qualify for the gift tax marital deduction. Further, as discussed above, under the facts presented, the leasehold interest in Residence is not includible

in Decedent's gross estate under § 2036. Accordingly, §§ 2056(d) and 2056A are not applicable with respect to the leasehold interest.

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 Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy of letter for section 6110 purposes

cc: