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-155813-01
Date:
JULY 02, 2002

Re:

Legend:

Decedent	=
Spouse	=
D	=
E	=
$x	=
$y	=
$z	=
State	=
State Statute	=
Date 1	=
Date 2	=
Date 3	=
Company	=
Attorney C	=

Dear :

This is in response to your letter of January 14, 2002, and previous correspondence, requesting an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to sever Trust A into a GST Exempt Marital Trust A and a GST Nonexempt Marital Trust A under § 26.2654-1(b)(1) of the Generation-Skipping Transfer Tax (GST) Regulations, and to make a reverse QTIP election with respect to the GST Exempt Marital Trust A to cause the automatic allocation rules under § 2632(e) of the Internal Revenue Code to allocate a portion of Decedent's GST

exemption to the GST Exempt Marital Trust A.

On Date 1, Decedent, a resident of State, executed a revocable Trust Agreement (Trust). The current co-trustees of Trust are D and E. Article One of Trust provides that, during Decedent's life the trustees are to distribute the net income of Trust to Decedent, quarter-annually or at more frequent intervals, as Decedent agrees. In addition, the trustees are authorized to distribute to Decedent such portions of the Trust property as shall be necessary or proper in the trustees judgment to provide for the support, care, health and welfare of Decedent and Decedent's wife, Spouse, and for the support, care, health, welfare, and education of Decedent's daughter, E.

Under Article Two, upon Decedent's death, if Spouse survives Decedent, the Trust property (including any additions as a result of Decedent's death, but after provision for all specific bequests, charitable gifts and charitable contributions) are to be divided into two parts: Trust A and Trust B. The trustees are to allocate to Trust B any property received that is excludable from Decedent's gross estate for federal estate tax purposes and any property that cannot qualify for the marital deduction in Decedent's estate. In addition, the trustees are to further allocate to Trust B a sum equal to the largest amount, if any, that can pass free of federal estate tax taking into account property previously allocated under this provision, the unified credit and state death tax credit (but only to the extent that the latter credit does not require an increase in the state death taxes paid), but no other credit reduced by any charges to principal (as defined in Internal Revenue Code Sections 2053 and 2054) that are not deducted in computing Decedent's federal estate tax.

The trustees are to retain the remaining Trust property after the funding of Trust B as a separate trust, that is a marital trust, referred to as Trust A. Trust A provides that during the life of Spouse, the trustees are authorized to distribute to Spouse the entire net income from Trust A in quarter-annual installments or more frequently as the trustees and Spouse may agree.

During the life of Spouse, the trustees are authorized to distribute to Spouse from Trust A, at any time and from time to time such portions of the principal of Trust A as shall be necessary or proper in the judgment of the trustees to provide for Spouse's support, care, health and welfare in accordance with the standard of living to which she was accustomed at the time of Decedent's death.

Trust provides that upon the death of Spouse (assuming Spouse survives Decedent), assets totaling $z are to be set aside in a separate trust for the benefit of Decedent's daughter, E, or her children. Upon the death of E, the remaining Trust property is to be divided into equal shares for each of Decedent's then living grandchildren and the descendants of any deceased grandchild.

Decedent died on Date 2. The federal estate tax return (Form 706) for

Decedent's estate was filed on Date 3. Pursuant to the terms of Trust, $x was to be distributed to Trust A. On Schedule M (Marital Deduction) of the return, Decedent's executor elected to treat 100% ($x) of Trust A as qualified terminable interest property (QTIP) pursuant to § 2056(b)(7). A marital deduction in the amount of $x was claimed with respect to Trust A.

On Schedule R of the return, the executor did not make the reverse QTIP election under § 2652(a)(3) with respect to Trust A, or a portion of Trust A, and did not allocate any of Decedent's remaining GST exemption to Trust A, or to a portion of Trust A.

It is represented that Decedent's federal estate tax return was prepared by Company. It is also represented that Attorney C had the primary responsibility for the preparation of the estate tax return. Such attorney considered the issue of the allocation of GST exemption to Trust A or Trust B but no allocation of exemption was made, nor was a reverse QTIP election made on the estate tax return. It is represented that Decedent's estate acted reasonably and in good faith by relying on a qualified tax professional, and the tax professional failed to make election.

Executor requests an extension of time under § 301.9100-1 and 3 of the Procedure and Administration Regulations to sever Trust A into two separate trusts, a GST Exempt Martial Trust A and a GST Nonexempt Marital Trust A. Trust A will be divided on a fractional share basis pursuant to § 26.2654-1(b)(1) and State Statute.

The formula for dividing Trust A will be computed as follows: $y (Decedent's available GST exemption) divided by $x (the date of death value of Trust A) = .41621 or 41.621 %. The 41.621% share that will comprise the GST Exempt Marital Trust A will have a value equal to $y, the value of Decedent's remaining GST exemption. The percentage share that will comprise the GST Nonexempt Marital Trust A will have a value equal to $x minus $y.

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 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 shall be 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) 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.

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

Section 2044(c) provides that for purposes of chapter 11 and chapter 13, property includible in the gross estate of the decedent under § 2044(a) shall be treated as property passing from the decedent.

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 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, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction." The applicable fraction, as defined in § 2642(a)(2) is a fraction, the numerator of which is the amount of the GST exemption under § 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator of which is the value of the property transferred to the trust or involved in the 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 (adjusted for inflation under § 2631(c)) 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)(1) 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(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) provides that a decedent's unused GST exemption is automatically allocated on the due date for filing the Form 706, or Form 706NA, to the extent not otherwise allocated by the decedent's executor on or before that date. Unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)), on the basis of the value of the property as finally determined for purposes of chapter 11 (chapter 11 value), first to direct skips treated as occurring at the transferor's death. The balance, if any, of unused GST exemption is allocated pro rata (subject to the rules of § 26.2642-2(b)) on the basis of the chapter 11 value of the nonexempt portion of the trust property to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. 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 trust.

Section 26.2654-1(b)(1) provides rules for severing a trust that is included in the transferor's gross estate. Such a severance is recognized for purposes of chapter 13 if 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; and (B) the severance occurs prior to the date prescribed for filing the federal estate tax return (including extensions actually granted) for the estate of the transferor; and (C) the new trusts are severed on a fractional basis.

State Statute provides that the trustee of an inter vivos or testamentary trust may consolidate two or more trusts into a single trust or divide a single trust into two or more separate trusts if the consolidation or division is in the best interests of the beneficiaries of the trust or trusts, is equitable and practicable, and will not defeat or substantially impair the accomplishment of the purpose of the trust or trusts or the interests of the beneficiary or beneficiaries of the trust or trusts.

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 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 an election under § 2652(a)(3) is made on the return on which the QTIP election is made.

Under § 301.9100-1(c) 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, in pertinent part, that 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) provides, in part, except as provided in § 301.9100-3(b)(3)(i) through (iii), 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.

Section 301.9100-3(c)(1) provides, in pertinent part, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

As a result of the QTIP election made on the Decedent’s Form 706, the property of Trust A is includible in Spouse's gross estate pursuant to § 2044. Spouse, accordingly, is considered the transferor of the property for GST tax purposes.

Therefore, Decedent's remaining GST exemption may not be allocated to Trust A's assets. However, if Trust A is severed into two portions on a fractional share basis and a "reverse" QTIP election under § 2652(a)(3) is made for one of the severed portions (referred to as the GST Exempt Marital Trust A), Decedent will be treated as the transferor of the GST Exempt Marital Trust A's assets and the automatic allocation rules of § 2632(e) will apply Decedent's remaining GST tax exemption to the GST Exempt Marital Trust A.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Accordingly, an extension of time of 60 days from the date of this letter is granted to sever Trust A into a GST Exempt Marital Trust A and a GST Nonexempt Marital Trust A and to file a supplemental Form 706 making the "reverse" QTIP election with respect to the GST Exempt Marital Trust A. Thereupon, the automatic allocation rules of § 2632(e) will apply Decedent's remaining GST tax exemption to the GST Exempt Marital Trust A. The Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the form. A copy is enclosed for this purpose.

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) 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.

Sincerely,

_____

William P. O'Shea
Acting Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy for § 6110 purposes
Copy of this letter

cc: