Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:9-PLR-162243-02
Date:
January 21, 2003

In re:

LEGEND:

Decedent =

Spouse =

Date 1 =

Date 2 =

Son =

Daughter =

$a =

Dear :

This is in response to your letter dated November 6, 2002, sent on behalf of the estate of Decedent and Spouse in which you request a ruling regarding a qualified terminable interest property (QTIP) election made on Decedent's federal estate tax return.

The facts and representations are as follows: Decedent died testate on Date 1, survived by Spouse, Son, and Daughter.

Articles Two and Three of Decedent's will bequeath certain specific property to Son and Spouse, respectively.

Article Four of Decedent's will bequeaths to Spouse that portion of the residuary estate that, together with the total of any other amounts allowed as a marital deduction, if any, equals the maximum allowable marital deduction, then reduced by the amount, if any, needed to increase the taxable estate to the largest amount that will, after allowing for the unified credit against the federal estate tax and the credit for state death taxes, not result in a federal estate tax payable by Decedent's estate.

Article Five of Decedent's will bequeaths to Spouse the remainder of the residuary estate for the duration of Spouse's life. Article Five provides that all of the income from this portion of the residuary estate shall be retained absolutely by Spouse and Spouse shall have a right to use all or any part of the principal as she may determine necessary for her maintenance and support in the standards to which she has been accustomed, and for her medical, dental, hospital and nursing expenses, including, if any, expenses of her care and custody during any period of invalidism. Article Five further provides that no person shall have the power to appoint any part of the property to any person other than the spouse. Finally, Article Five provides that all that remains of this portion of the residuary estate at the death of Spouse, or the entire residuary estate should Spouse not survive Decedent, is bequeathed in accordance with the provisions of Articles Six through Fourteen of Decedent's will.

Articles Six through Fourteen of Decedent's will bequeath certain specific property to Son and Daughter in the event Spouse does not survive Decedent, or upon the death of Spouse.

A United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) was timely filed by the executor of Decedent's estate. Listed on Schedule M are all of the interests in property included in Decedent's gross estate except for the specific property bequeathed to Son in Article Two of Decedent's will. All of the property that was bequeathed to Spouse pursuant to Articles IV and V of Decedent's will is included on Schedule M. Because the property bequeathed to Spouse pursuant to Article V meets the requirements of qualified terminable interest property under § 2056(b)(7)(B)(i)(I) and (II) and the value of the property is listed on Schedule M, the estate is deemed to have made an election to have such property treated as qualified terminable interest property under § 2056(b)(7).

You have requested that we disregard the QTIP election made on Decedent's Form 706 and treat it as null and void in accordance with Rev. Proc. 2001-38, 2001-24 I.R.B. 1335. In addition, you ask that we rule that the property for which the election is

disregarded under this procedure will not be includible in the gross estate of Spouse under § 2044.

Section 2056(a) provides that the value of a decedent's taxable estate shall 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 that a deduction is not allowed for terminable interests that pass to the spouse. An interest is a terminable interest if the interest passing to the surviving spouse will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur, and on termination, an interest in the property passes to someone other than the surviving spouse.

Section 2056(b)(7)(A) provides that qualified terminable interest property shall be treated as passing to the surviving spouse and no part of such property shall be treated as passing to any person other than the surviving spouse. Thus, the value of such property is deductible from the value of the gross estate under § 2056(a) and is not treated as a terminable interest. Under § 2056(b)(7)(B)(i), qualified terminable interest property is property that passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and 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.

A QTIP election has transfer tax consequences for the surviving spouse. Section 2044(a) and (b) provides generally that the value of the gross estate includes the value of any property in which the decedent has a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under § 2056(b)(7). Under § 2519(a) and (b), any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest. Further, the surviving spouse will, in the absence of a "reverse QTIP" election under § 2652(a)(3), be treated as the transferor of the property for generation-skipping transfer tax purposes under § 2652(a).

In the case of a QTIP election to which Rev. Proc. 2001-38, 2001-24 I.R.B. 1335, applies, the Service will disregard a QTIP election made under § 2056(b)(7) and treat it as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652. Rev. Proc. 2001-38 applies to QTIP elections under § 2056(b)(7) where the election was not necessary to reduce the estate tax liability to zero, based on values as finally

determined for federal estate tax purposes. Rev. Proc. 2001-38 does not apply in situations where a partial QTIP election was required with respect to a trust to reduce the estate tax liability and the executor made the election with respect to more trust property than was necessary to reduce the estate tax liability to zero; nor does it apply to elections that are stated in terms of a formula designed to reduce the estate tax to zero.

In this case, the election under § 2056(b)(7) to treat property as qualified terminable interest property was not necessary to reduce the estate tax to zero because no estate tax would have been imposed whether or not the election was made. The outright bequests to Spouse pursuant to Articles Three and Four of Decedent's will qualify for the marital deduction under § 2056(a). You have represented that the value of the remaining property in the gross estate, which includes the property bequeathed to Son pursuant to Article Two and the property bequeathed to Spouse pursuant to Article Five, equals $600,000 (date of death values). After applying the unified credit amount under § 2010, the estate's federal estate tax liability is reduced to zero.

Because the QTIP election in this case was not necessary to reduce the estate tax liability to zero, Rev. Proc. 2001-38 applies and the Service will disregard the QTIP election and treat it as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652. The property for which the election is disregarded will not be includible in the Spouse's gross estate under § 2044(a). An amended Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999, listing on Schedule M only those assets that passed outright to Spouse pursuant to Articles Three and Four of Decedent's will. A copy of this letter should be attached to the amended return. A copy is enclosed for this purpose.

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. 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(s) requesting it. Section 6110(k)(3) of the Code 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.

Sincerely,

Melissa C. Liquerman

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Melissa C. Liquerman
Chief, Branch 9
Office of Associate Chief Counsel
Passthroughs and Special Industries

Enclosures:
Copy for § 6110 purposes
Copy of this letter