Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Number: **200407016**
Release Date: 2/13/04
Index Number: 2056.07-00; 2044.01-00
2519.00-00; 2652.01-00

Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4-PLR-141024-03
Date:
OCTOBER 24, 2003

Re:

LEGEND:

Decedent =

Spouse =

Child =

Date =

$A =

Dear :

This is in response to your June 23, 2003 letter requesting a ruling that a qualified terminable interest property (QTIP) election made on Decedent's federal estate tax return be considered null and void and that the property subject to the QTIP election will not be includible in the gross estate of Spouse under § 2044 of the Internal Revenue Code.

The facts and representations are summarized as follows: Decedent died on Date. Spouse and Child survived Decedent. Under Articles First and Second of Decedent's will, Decedent bequeathed specific personal and real property to Spouse. Article Third of Decedent's will provides for a life estate to Spouse in all remaining real property, with the remainder of the property to Child. Article Third also provides that Spouse shall have the absolute right to enjoy and use the income from the property during her lifetime.

A United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) was timely filed by the executor of Decedent's estate. The property which

constituted Spouse's life estate was included on Part 2 of Schedule M of Form 706. Because the property bequeathed to Spouse pursuant to Article Third 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, Decedent's estate was deemed to have made an election to have such property treated as qualified terminable interest property under § 2056(b)(7).

Spouse requests a ruling that, pursuant to Revenue Procedure 2001-38, 2001-24 I.R.B. 1335, the QTIP election made on Decedent's Form 706 is null and void and that the property subject to the QTIP election will not be includible in the gross estate of Spouse under § 2044.

LAW AND ANALYSIS

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. Sections 2044(a) and (b) provide 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. For example, in some cases, a QTIP election was made when the taxable estate (before allowance of the marital deduction) was less than the applicable exclusion amount under § 2010(c). The QTIP election was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made. 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 First and Second of Decedent's will qualify for the marital deduction under § 2056(a). It is represented that the value of the remaining real property in the gross estate, which includes the property bequeathed to Spouse pursuant to Article Third, equals $A (date of death value). After applying the unified credit amount under § 2010, the estate's federal estate tax liability is reduced to zero.

Based solely on the facts and representations submitted, we conclude that, 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. Accordingly, the property for which the election is disregarded will not be includible in the Spouse's gross estate under § 2044(a). A supplemental Form 706 should be filed with the Internal Revenue Service Center, Cincinnati, OH 45999, listing on Schedule M only those assets that passed outright to Spouse pursuant to Articles First and Second of Decedent's will. A copy of this letter should be attached to the supplemental return. A copy is enclosed for this purpose.

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.

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) provides that it may not be used or cited as precedent.

Sincerely yours,

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Lorraine E. Gardner
Senior Counsel, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure:
Copy of letter for section 6110 purposes