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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-151802-06

Date: APRIL 11, 2007

In Re:

Legend:

Decedent =

Date 1 =
Trust =

State =

Dear :

This is in response to a letter dated October 31, 2006, and other correspondence, requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the qualified terminable interest property (QTIP) election made with respect to a credit shelter trust established under the terms of Trust is a nullity for federal estate, gift, and generation-skipping transfer tax purposes.

Facts

The facts submitted and representations made are as follows. Decedent died testate on Date 1. Decedent and Decedent's husband, Spouse, were residents of

State, a community property state. Under the terms of Article Second of Decedent's will, all of Decedent's property, both real and personal, was bequeathed to Spouse.

During Decedent's lifetime, Decedent and Spouse (Trustors) created a revocable trust (Trust). Under Article III of Trust, at the death of the first trustor to die, the trustee will divide Trust into Trust A and Trust B. The trustee will allocate to Trust B an amount of the Trust estate necessary to take advantage of the maximum federal estate tax unified credit. The balance of the Trust estate will be allocated to Trust A. Trust provides:

> It is the intention of the TRUSTORS that the allocation between TRUST B and TRUST A shall be made in such a manner that the unified credit available to the estate of the deceased TRUSTOR and the unlimited marital deduction which shall be available to the property allocated to Trust A, shall be utilized so that no federal estate taxes shall be payable by the estate of the deceased TRUSTOR who shall first die.

Article I, paragraph (A) provides that Trust will be irrevocable after the death of the first Trustor to die, except as otherwise provided. Under Article IV, during the surviving Trustor's life, that Trustor will be paid the entire income of Trust A at least quarterly and may be paid such sums of principal as the trustee deems advisable for surviving Trustor's health, maintenance and support, if income payments are insufficient to provide adequately for those purposes. The surviving Trustor may withdraw at any time all of the principal and income of Trust A and has a testamentary general power to appoint the assets of Trust A remaining at the death of the surviving Trustor. At the surviving Trustor's death, any unappointed assets will be added to Trust B and administered under Article V. Under Article V, during the surviving Trustor's life, that Trustor will be paid the net income of Trust B. The trustee has a right to pay the surviving Trustor principal for maintenance and health in the manner to which that Trustor has become accustomed, if income is insufficient for those purposes. The surviving Trustor also has a noncumulative right to withdraw annually the greater of $5,000 or 5 percent from the principal of Trust B. Article V provides for the payment of taxes at the surviving Trustor's death and for the disposition of the remaining assets in Trust B and Trust A to the issue of the Trustors. Under Article VIII, at the death of either Trustor, the surviving Trustor serves as the sole trustee.

It is represented that all of Decedent and Spouse's separate and community property was held in Trust at the time of Decedent's death and passed on Decedent's death under the terms of Trust. It is further represented that no property other than Decedent's tangible personal property of nominal value passed under the terms of Decedent's will. Further, it is represented that no property, either probate or non-probate, passed to any person other than Spouse.

Decedent's United States Estate (and Generation-skipping Transfer) Tax return, Form 706, was timely filed. On Schedule M of Form 706, the executor listed Decedent's community property interest in all the assets reported on Schedules A through I of Form 706 as property interests passing to the surviving spouse and qualifying for the marital deduction. Consequently, by listing all the assets included in the gross estate on Schedule M, the executor made a QTIP election with respect to the assets passing to Trust B. (The assets included in the Decedent's gross estate that passed to Trust A qualify for the marital deduction under section 2056(b)(5); a QTIP election was not required in order for these assets to qualify for the marital deduction.) In computing the estate tax liability, the estate claimed a marital deduction for the value of Decedent's assets passing to both Trust A and Trust B. The return reported an estate tax liability of zero.

The taxpayer has requested a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the QTIP election made with respect to the assets passing to Trust B established under Trust will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, 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.

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, except as limited by § 2056(b), 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, but only to the extent that such interest is included in determining the value of the gross estate. Under § 2056(b)(1) provides the general rule that a marital deduction is not allowed for an interest passing to the surviving spouse that is a "terminable interest." 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) provides an exception to this terminable interest rule in the case of qualified terminable interest property (QTIP). For purposes of § 2056(a), qualified terminable interest property is treated as passing to the surviving spouse, and no part of the property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), qualified terminable interest property is property which 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 the election to treat property as QTIP under §

2056(b)(7) is made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Section 2044(a) and (b) provides generally that the value of the gross estate includes the value of any property in which the decedent had 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).

Section 2519(a) and (b) provide that 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. Section 2652(a) provides that, in the case of property subject to an election under § 2056(b)(7), the surviving spouse will be treated as the transferor of the property for generation-skipping transfer tax purposes in the absence of a "reverse QTIP" election under § 2652(a)(3).

In general, under Rev. Proc. 2001-38, a QTIP election under § 2056(b)(7) will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, 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. The revenue procedure provides an example where the decedent's will provides for a "credit shelter trust" to be funded with an amount equal to the applicable exclusion amount under § 2010(c), with the balance of the estate passing to a marital trust intended to qualify under § 2056(b)(7). The estate makes QTIP elections with respect to both the credit shelter trust and the marital trust. The QTIP election for the credit shelter trust was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made for that trust. See Rev. Proc. 2001-38, § 2.

In this case, based on the facts submitted and representations made, the QTIP election with respect to the value of the property passing to the Trust B was not necessary to reduce the estate tax liability to zero. That is, the estate tax liability would have been zero whether or not the election was made with respect to Trust B. Accordingly, we rule that the QTIP election with respect to the value of property passing to Trust B is null and void for purposes of §§ 2044, 2056(b)(7), 2519 and 2652. The property held in Trust B will not be includible in the gross estate of Spouse under § 2044, and Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to that property. Further, Spouse will not be treated as the transferor of the property in Trust B for generation-skipping transfer tax purposes under § 2652.

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. In addition, we express or imply no opinion regarding the value of the property transferred to the trusts.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

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George Masnik, Chief
Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy for section 6110 purposes