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Department of the Treasury
Washington, DC 20224

Person To Contact:

              , ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-130547-08
Date: NOVEMBER 20, 2008

Legend:

Decedent =
Spouse =
Son 1 =
Son 2 =
Son 3 =
Country =
Will =

Attorney =
Law Firm =
Date 1 =
Date 2 =
Date 3 =
Spouse's QDOT =
$X =

Dear   :

This is in response to a letter from your authorized representative dated July 8, 2008, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make a Qualified Domestic Trust (QDOT) election with respect to certain property passing to Spouse from Decedent's estate as well as an extension of time to assign certain property to a QDOT.

The facts and representations submitted are summarized as follows: On Date 1, Decedent died, survived by Spouse, and Sons 1, 2, and 3. Spouse is a citizen of Country and is not a citizen of the United States. Under Decedent's Will, his tangible

personal property passed outright to Spouse. In addition, Article THIRD of Will provides an outright bequest to Spouse pursuant to which Spouse is to receive the smallest amount of property that qualifies for the marital deduction that will be sufficient to result in the imposition of the lowest amount of federal estate tax, taking into account all available credits, etc. Spouse was appointed executrix of the probate estate. At his death, Decedent owned real estate interests as a tenant in common with unrelated parties, a bank account held jointly with an unrelated individual, and interests in real estate and bank accounts held jointly with Spouse.

The executrix hired Attorney to prepare the Form 706, United States Estate (and Generation-Skipping) Tax Return. The Form 706 was timely filed on Date 2. Attorney was told that Spouse was not a United States citizen. On the return, the estate claimed a marital deduction for the property interests passing to Spouse.

Subsequently, Spouse, as executrix retained Law Firm to represent the estate. On Date 3, Spouse created a QDOT (Spouse's QDOT) described in § 2056A(a). Further, Spouse made an irrevocable protective assignment under § 20.2056A-4(b)(8) pursuant to which Spouse assigned to Spouse's QDOT joint property includible in Decedent's gross estate that passed to Spouse and of any other interests includible in the gross estate that passed to Spouse outside of Will as a result of Decedent's death. Spouse also assigned to Spouse's QDOT all property that passed outright to Spouse under the formula bequest under Article THIRD of Will. Also on Date 3, Law Firm filed a supplemental Form 706 for the estate. On the supplemental Form 706, the estate made a protective QDOT election under § 20.2056A-3(c) to treat Spouse's QDOT as a QDOT. The estate stated that the protective assignment and election were made because there was uncertainty at that time regarding the extent to which the joint property was includible in the Decedent's gross estate. In addition, the estate anticipated identifying additional assets that could be includible in the gross estate. The estate reported that as of the time of filing, the amount passing to Spouse's QDOT was $X and the estate claimed a marital deduction for that amount.

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(d)(1)(A) provides that if the surviving spouse is not a citizen of the United States, no deduction shall be allowed under § 2056(a). However, § 2056(d)(2)(A) provides that § 2056(d)(1)(A) will not apply to any property passing to the surviving spouse in a qualified domestic trust (QDOT).

Under § 2056A, in order for a trust to qualify as a QDOT: (1) the trust instrument must require that at least one trustee of the trust be an individual citizen of the United

States or domestic corporation and that no distribution other than a distribution of income may be made from the trust unless a trustee who is an individual citizen of the United States or a domestic corporation has the right to withhold from the distribution the additional estate tax imposed by § 2056A(b)(1) on the distribution; (2) the trust must meet the requirements that are prescribed under Treasury regulations to ensure the collection of the tax imposed by § 2056A(b); and (3) the executor must make the election prescribed by § 2056A(d) to treat the trust as QDOT.

Under § 2056(d)(2)(B) and § 20.2056A-4(b)(1) of the Estate Tax Regulations, if an interest in property passes outright from a decedent to a noncitizen surviving spouse either by testamentary bequest or devise, by operation of law, or pursuant to an annuity or other similar plan or arrangement, and such property interest otherwise qualifies for a marital deduction except that it does not pass in a QDOT, then solely for purposes of § 2056(d)(2)(A), the property is treated as passing to the surviving spouse in a QDOT if the property interest is assigned to a QDOT under an enforceable and irrevocable written assignment made on or before the date on which the return is filed and on or before the last date prescribed by law that the QDOT election may be made.

Under § 20.2056A-4(b)(8), a protective assignment of property to a QDOT may be made, subject to the requirements of § 20.2056A-4(b)(1), only if, at the time the federal estate tax return is filed, the executor of the decedent's estate reasonably believes that there is a bona fide issue that concerns either the residency or citizenship of the decedent, the citizenship of the surviving spouse, whether all or a portion of an asset is includible in the decedent's gross estate, or the amount or nature of the property the surviving spouse is entitled to receive. The protective assignment must identify the specific assets to which the protective assignment refers and the specific basis for the protective assignment. However, the protective election may otherwise be defined by means of a formula. The protective assignment, once made is irrevocable.

Under § 2056(d) and § 20.2056A-3(a), the election to treat a trust as a QDOT must be made on the last federal estate tax return filed before the due date (including extensions of time to file actually granted) or, if a timely return is not filed, on the first federal estate tax return filed after the due date. The election, once made, is irrevocable. No election may be made if the return is filed more than 1 year after the due date of the return.

Under § 20.2056A-3(c), a protective election may be made, subject to the requirements of § 20.2056A-3(a), to treat a trust as a QDOT only if at the time the federal estate tax return is filed, the executor of the decedent's estate reasonably believes that there is a bona fide issue that concerns either the residency or citizenship of the decedent, the citizenship of the surviving spouse, whether an asset is includible in the decedent's gross estate, or the amount or nature of the property the surviving spouse is entitled to receive. The protective QDOT election must be attached to the

return and must identify the specific assets to which the protective election refers and the specific basis for the protective election. However, the protective election may otherwise be defined by means of a formula. Once made, the protective election is irrevocable.

Under § 2056(d)(1)(B) and § 20.2056A-8(a), where property is held by the decedent and the surviving spouse of the decedent as joint tenants with right of survivorship, or as tenants by the entirety, and the surviving spouse is not a United States citizen at the time of the decedent's death, the property is subject to inclusion in the decedent's gross estate in accordance with the rules of §2040(a), and § 2040(b) does not apply. Accordingly, the rules contained in §2040(a) and § 20.2040-1 govern the extent to which such joint interests are includible in the gross estate of a decedent who was a citizen or resident of the United States. Under § 20.2040-1(a)(2), the entire value of jointly held property is included in the decedent's gross estate unless the executor submits facts sufficient to show that the property was not entirely acquired with consideration furnished by the decedent, or was acquired by the decedent and the other joint owner by gift, bequest, devise or inheritance.

Section 301.9100-1(c) provides that the Commissioner has discretion to 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 Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Requests for relief under § 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 that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that 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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. Therefore, an extension of time until the date that is 60 days after the date of this letter is granted to Decedent's estate to make a protective assignment to Spouse's QDOT with respect to: (i) the joint property that is includible in Decedent's gross estate and passes to Spouse; and (ii) any other property that is includible in Decedent's gross estate and passes to Spouse outside of the will as a result of Decedent's death. Further, an extension of time until the date that

is 60 days after the date of this letter is granted to Decedent's estate to make an assignment with respect to that amount passing to Spouse under the formula bequest under Article THIRD of Will, which amount may be dependent upon the value of the property included in (i) and (ii) above. Finally, an extension of time until the date that is 60 days after the date of this letter is granted to Decedent's estate to make the election to treat Spouse's QDOT as a QDOT.

The election should be made on, and the assignments attached to, a supplemental Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 706. 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. 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 specifically ruled herein, no opinion is expressed or implied concerning the federal tax consequences, under the cited provisions or under any other provisions of the Code, 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.

In accordance with a power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Curtis G. Wilson
Deputy Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
        Copy for section 6110 purposes
        Copy of this letter