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Department of the Treasury  
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Person To Contact:  
, ID No.

Telephone Number:

Refer Reply To:  
CC:PSI:4  
PLR-151406-08  
Date: MAY 21, 2009

Re:

EIN

Legend:

Decedent =  
Spouse =  
Attorney A =  
Attorney B =  
Attorney C =  
Trust =

Marital Trust =

Date 1 =  
Date 2 =  
Date 3 =  
a =  
b =  
c =  
d =

Dear :

This responds to your representative's December 3, 2008 letter requesting an extension of time under § 301. 9100-3 of the Procedure and Administration Regulations to: (i) sever a trust (for which an election was made under § 2056(b)(7) of the Internal Revenue Code) into two separate trusts, and (ii) elect under § 2652(a)(3) to treat the property of one such

trust, for Generation-Skipping Transfer Tax purposes, as if the § 2056(b)(7) election had not been made.

The facts submitted and representations made are as follows. On Date 1, Decedent created the Trust, a revocable trust. He died on Date 2, whereupon the Trust became irrevocable. Decedent was survived by his spouse (“Spouse”), children, and grandchildren. Article II, Paragraph D, of the Trust provides that, on Decedent’s death, a total of \$a is to be distributed to certain grandchildren. Under Article III, the Trust is to be divided into three separate trusts as follows. First, property equal in value to the applicable exclusion amount allowed to Decedent’s estate (the “Estate”) under § 2010(c) is to be distributed to one such trust (the “Credit Amount Trust”). This trust is to be held for Spouse during her life and, on her death, distributed to the Marital Trust, described below. Of the remaining Trust property, forty percent is to be distributed to a trust in which Spouse is granted a general power of appointment; and sixty percent is to be distributed to another trust (the “Marital Trust”) to be held for Spouse’s lifetime benefit. Under Article IV, Paragraph A, at Spouse’s death, an amount of Marital Trust property equal in value to Decedent’s unused generation-skipping transfer tax exemption is to pass to trusts for Decedent’s grandchildren. The remaining Marital Trust property is to be held for Decedent’s children. Accordingly, \$a was distributed outright to the grandchildren; \$b was distributed to the Credit Amount Trust; and \$c was distributed to the Marital Trust.

Spouse, as executor of the Estate, engaged Attorney A to prepare and assist in timely filing the Estate’s United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706). On Schedule M, Bequests, etc., to Surviving Spouse, an election was made under § 2056(b)(7) to treat the Marital Trust property as qualified terminable interest property (QTIP), and a deduction was claimed for the value of the property. On Schedule R, Generation-Skipping Transfer Tax, \$a of Decedent’s GST exemption was allocated to the outright transfers to the grandchildren. In addition, under the automatic allocation rules of § 2632(c), \$b of Decedent’s GST exemption was allocated to the Credit Amount Trust. Of the total GST exemption available to Decedent and his estate, \$d remained unused.

Attorney A failed to advise Spouse on utilizing Decedent’s unused GST exemption by severing the Marital Trust into two trusts and basing the value of property of one such trust on the amount of GST exemption available; making an election under § 2652(a)(3) (a “reverse QTIP election”) to treat all of the property of that trust as if the election under § 2056(b)(7) had not been made for purposes of Chapter 13; and then allocating the unused GST exemption to the property of that trust. This error was discovered after Spouse’s death on Date 3, by Attorney B and Attorney C in preparing the federal estate tax return for Spouse’s estate and reviewing the estate tax return filed for the Estate.

You have requested the following rulings.

1. An extension of time is granted under § 301.9100-3 and § 26.2654-1(b)(1) to sever the Marital Trust into two trusts: the GST Exempt Marital Trust and the

GST Non-Exempt Marital Trust;

2. An extension of time is granted under § 301.9100-3 to make a reverse QTIP election under § 2652(a)(3) for the GST Exempt Marital Trust;
3. The automatic allocation rules of § 2632 will operate to cause the unused portion of Decedent's GST exemption to be allocated to the GST Exempt Marital Trust.

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 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) defines the term "qualified terminable interest property" as 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, and that such an election, once made, shall be irrevocable.

Section 2044(a) provides that the value of the gross estate shall include the value of any property in which the decedent had a qualifying income interest for life. Section 2044(b) provides that the section applies to any property if a deduction was allowed with respect to the transfer of such property to the decedent under § 2056(b)(7).

Section 2601 imposes a tax on every generation-skipping transfer. Under § 2611(a), 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 GST is generally defined as the excess of 1 over the “applicable fraction.” With respect to a GST that is not a direct skip, the applicable fraction is generally defined under § 2642(a)(2) as a fraction the numerator of which is the amount of the GST exemption under § 2631 allocated to the trust and the denominator of which is the value of the property transferred to the trust.

Under § 2631(a), as in effect at Decedent’s death, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 that may be allocated by the individual (or his executor) to any property with respect to which the 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 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.

Under § 26.2632-1(d)(1), an allocation of a decedent's unused GST exemption by the executor of the estate is made on the estate tax return filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions granted). An allocation of GST exemption with respect to property included in the gross estate of a decedent is effective as of the date of death.

Under § 2632(e)(1) and § 26.2632-1(d)(2), a decedent's unused GST exemption is automatically allocated on the due date for filing the Form 706 to the extent not otherwise allocated by the decedent's executor on or before that date. The automatic allocation occurs whether or not a return is required to be filed. Unused exemption is allocated pro rata on the basis of the value of the property as finally determined for purposes of the estate tax, first to direct skips treated as occurring at the transferor’s death. The balance, if any, of unused GST exemption is allocated pro rata to trusts with respect to which a taxable termination may occur or from which a taxable distribution

may be made. The automatic allocation of GST exemption is irrevocable.

Under §2652(a)(1) and § 26.2652-1(a)(1), the individual with respect to whom property was last subject to federal estate or gift tax is the transferor of that property for purposes of chapter 13.

Under § 2652(a)(3), in the case of a trust for which a deduction is allowed to the decedent under § 2056(b)(7), the estate may elect to treat all of the property in the trust for GST tax purposes, as if the election to be treated as qualified terminable interest property had not been made. Accordingly, the decedent, and not the surviving spouse, is treated as the transferor of the property for GST tax purposes. The election is irrevocable. It is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies. Under § 26.2652-2(b), the election is made on the return of tax on which the QTIP election is made.

Under § 26.2654-1(b)(1)(ii), the severance of a trust that is included in the transferor's gross estate into two or more trusts is recognized for purposes of chapter 13 if the trust is severed pursuant to a direction in the governing instrument providing that the trust is to be divided upon the death of the transferor.

Under § 301.9100-1(c), 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 the grant of 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.

In this case, the executor of the Estate made a QTIP election with respect to the Marital Trust property, and it is includible in Spouse's gross estate under § 2044. Therefore, Spouse is considered to be the transferor of that property for GST tax purposes, and the Estate is precluded from allocating any of Decedent's unused GST exemption to the

property. However, if the Estate is granted an extension of time to sever the Marital Trust into a GST Exempt Marital Trust and a GST Non-exempt Marital Trust and to make a reverse QTIP election for the GST Exempt Marital Trust, Decedent will be treated as the transferor of the GST Exempt Marital Trust property for GST tax purposes. In such case, Decedent's unused GST exemption may be allocated to the GST Exempt Marital Trust.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-3 and § 26.2654-1(b) have been satisfied. Therefore, the Estate is granted an extension of time of 60 days from the date of this letter to sever the Marital Trust into the GST Exempt Marital Trust and a GST Non-exempt Marital Trust; to make a reverse QTIP election pursuant to § 2652(a)(3) with respect to the GST Exempt Marital Trust; and to allocate Decedent's unused GST exemption to the GST Exempt Marital Trust. The allocation will be effective as of Decedent's date of death.

The reverse QTIP election and the allocation should be made on a supplemental Form 706 and filed with the Cincinnati Service Center at the following address: Internal Revenue Service, Cincinnati Service Center — Stop 82, Cincinnati, OH 45999. A copy of this letter should be attached to the supplemental Form 706.

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.

This ruling is directed only to the taxpayer 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 your authorized representative.

Sincerely,

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

Enclosure: Copy for § 6110 purposes