Internal Revenue Service

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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-138032-09
Date:
February 04, 2010

Legend:

Decedent =
Spouse =

Child 1 =
Child 2 =
Child 3 =
Child 4 =
Individual =
Individual 1 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =

Marital Trust =

Will =

Court =

Order =
Final Order =

State =

x =

Dear :

This responds to your July 31, 2009 letter and other correspondence requesting rulings regarding the federal gift and estate tax consequences of Spouse's disposition of an interest in Marital Trust, as described below.

The facts submitted and representations made are as follows:

Decedent died on Date 1, survived by Spouse and Decedent's children, Child 1, Child 2, Child 3, and Child 4 (Children), who are all adults.

Article III, Paragraph 3.113 of Decedent's will (Will) provides for the creation of Marital Trust. Under Paragraph 6.2 of Article VI of Will, Spouse is to receive all of the net income of Marital Trust at least quarterly. Spouse is entitled to receive such principal as the trustee, other than Spouse, deems necessary for Spouse's support, maintenance, health, and other necessities. Under Paragraph 6.4 of Article VI, at Spouse's death, the remaining principal of Marital Trust will be distributed to Decedent's issue, as Spouse appoints in his will. In default of this appointment, the remaining principal will be divided into equal shares for Decedent's children. The share of a deceased child with surviving issue will be held for those issue as a group. Each share will be held as a separate trust under the terms of Article VII of Will.

Under Paragraph 7.12 of Article VII of Will, the beneficiary of each trust will receive any income and principal the trustees deem necessary for the support, maintenance, education, and other necessities of the beneficiary, the beneficiary's spouse, or the beneficiary's issue. Trust principal will be distributed to a beneficiary as follows: 1/3 at age 30, 1/2 at age 38, and the balance at age 45. If a beneficiary dies before the final distribution, the beneficiary has a testamentary general power of appointment over the remaining trust balance. Any unappointed portion will be distributed by right of representation to the beneficiary's then living issue, or, if none, to Decedent's then living issue.

Decedent's personal representative elected on the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, to treat Marital Trust as qualified terminable interest property (QTIP) under § 2056(b)(7) of the Internal Revenue Code.

Prior to Date 4, a date prior to January 1, 2010, Marital Trust held cash, cash equivalents, bonds, publicly traded securities and a promissory note (Note), and Spouse and Individual were the trustees of Marital Trust. Individual is not related to Decedent, Spouse, or Children.

Prior to Date 4, Spouse concluded that he did not need principal distributions from Marital Trust and that he did not want to exercise his testamentary power over the trust. Thus, Children and Spouse, as beneficiary of, and as trustee of, Marital Trust petitioned Court to request an order authorizing the trustees to divide Marital Trust into "Trust 1" and "Trust 2" and terminate Marital Trust. On Date 2, Court issued Order authorizing the trustees to divide and terminate Marital Trust. "Trust 1" will hold the actuarial present value of Spouse's income interest in Marital Trust. "Trust 2" will hold the balance of Marital Trust property. On Date 3, Children, Spouse as beneficiary of, and as trustee of, Marital Trust, and Individual, as trustee of Marital Trust, executed an agreement (Agreement). Agreement sets forth the steps for completing the division and termination of Marital Trust. In the Agreement, the parties agreed that Spouse's gift of his qualifying income interest will be net of federal gift tax and that Spouse will exercise his right of recovery under § 2207A(b) of the Internal Revenue Code to recover the gift tax attributable to the gift under § 2519. Agreement also provides that Individual 1 will serve as sole trustee of the Children's Trusts (to be established under Order and Agreement) and that Spouse will renounce all interest in his testamentary power of appointment over Marital Trust property.

Under Order and Agreement, all of the following steps are to occur simultaneously on the same date. The trustee of Marital Trust will allocate Note to "Trust 1" and terminate "Trust 1." The trustee of Marital Trust will distribute Note and $x in cash to Spouse and will distribute the balance of "Trust 1," net of gift taxes, in equal shares to separate trusts, one trust for each of Child 1, Child 2, Child 3, and Child 4 in accordance with Articles VI and VII of Will (Children's Trusts). The trustee of Marital Trust will terminate "Trust 2" and distribute the assets, net of gift taxes, in equal shares to the Children's Trusts.

On Date 4, Court issued Final Order, ratifying and confirming Order, and the above-described transaction was completed.

You have requested the following rulings:

1. Spouse is treated as making a net gift of the remainder interest in Marital Trust under § 2519 upon the distribution of Marital Trust property on Date 4.

2. Spouse is treated as making a net gift of Spouse's qualifying income interest in Marital Trust, less the value of Note and $x in cash retained by Spouse, under § 2511 upon the distribution of Marital Trust property on Date 4.

3. No portion of the property of the Marital Trust will be included in Spouse's gross estate pursuant to § 2044.

LAW AND ANALYSIS

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 2044 provides for the inclusion in the gross estate of the surviving spouse of the value of qualified terminable interest property for which a deduction was allowed under § 2056(b)(7) in the decedent's gross estate. Under § 2044(b)(2), § 2044 does not apply with respect to qualified terminable interest property treated as transferred for gift tax purposes by the surviving spouse during her lifetime under § 2519.

Section 2501 imposes a tax on the transfer of property by gift. Section 2511 provides that the gift tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(a) of the Gift Tax Regulations provides that the gift tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable. Section 2512(b) provides that where property is transferred for less than adequate consideration in money or money's worth, the amount of the gift is the amount by which the value of the property transferred exceeds the value of the consideration received in exchange.

Section 2519 provides that for gift tax purposes any disposition by the surviving spouse of all or part of a qualifying income interest for life in any property for which a deduction was allowed under § 2056(b)(7) is treated as a transfer by the surviving spouse of all interests in the property other than the qualifying income interest. The transfer of the qualifying income interest is a transfer subject to gift tax under § 2511.

Section 25.2519-1(c)(1) provides that the amount treated as a transfer under § 2519 upon a disposition of all or part of a qualifying income interest for life in qualified terminable interest property is equal to the fair market value of the entire property subject to the qualifying income interest, determined on the date of the disposition (including any accumulated income and not reduced by any amount excluded from total gifts under § 2503(b) with respect to the transfer creating the interest), less the value of the qualifying income interest in the property on the date of the disposition. The gift tax consequences of the disposition of the qualifying income interest are determined separately under § 25.2511-2.

Section 25.2519-1(c)(4) provides that the amount treated as a transfer under § 25.2519-1(c)(1) is further reduced by the amount of gift tax the donee spouse is entitled to recover under § 2207A(b). If the donee spouse is entitled to recover gift tax under § 2207A(b), the amount of the gift tax recoverable and the value of the remainder interest treated as transferred under § 2519 are determined by using the same interrelated computation applicable for other transfers in which the transferee assumes the gift tax liability. The gift tax consequences of failing to exercise the right of recovery are determined separately under § 25.2207A-1(b).

Under §§ 2207A(b) and 25.2207A-1(a), if an individual is treated as transferring an interest in property by reason of § 2519, the individual is entitled to recover from the "person receiving the property" (as defined in § 25.2207A-1(e)) the amount of gift tax attributable to that property. Under § 25.2207A-1(e), if the property is in trust at the time of the transfer, the "person receiving the property" is the trustee, and any person who has received a distribution of the property prior to the expiration of the right of recovery if the property does not remain in trust. Under § 25.2207A-1(b)(1), the failure of a person to exercise a right of recovery provided by § 2207A(b) is treated as a transfer for federal gift tax purposes of the unrecovered amounts to the persons from whom the recovery could have been obtained.

Rev. Rul. 75-72, 1975-1 C.B. 310, holds that if, at the time of the transfer, a gift is made subject to a condition that the gift tax is to be paid by the donee or out of the transferred property, then the donor receives consideration for the transfer in the amount of the gift tax to be paid by the donee. Thus, under § 2512(b), the value of the gift is the fair market value of the property passing from the donor less the amount of the gift tax to be paid by the donee or from the property itself.

Rev. Rul. 81-223, 1981-2 C.B. 189, holds that, in determining the amount of the gift tax liability that is to be subtracted from the value of the transferred property, the donor's available unified credit must be used to reduce the gift tax liability that the donee has assumed to the extent the unified credit is available.

Based on the facts submitted and representations made and assuming Court issues Final Order and that the proposed division and termination of Marital Trust are effective under State law, we conclude as follows:

1. Spouse is treated as making a net gift of the remainder interest in Marital Trust under § 2519 upon the distribution of Marital Trust property on Date 4.

2. Spouse is treated as making a net gift of Spouse's qualifying income interest in Marital Trust, less the value of Note and $x in cash retained by Spouse, under § 2511 upon the distribution of Marital Trust property on Date 4.

3. No portion of the property of the Marital Trust will be included in Spouse's gross estate pursuant to § 2044.

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

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. The ruling in this letter pertaining to the federal estate tax applies only to the extent that the relevant section of the Internal Revenue Code is in effect during the period at issue.

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

Sincerely,

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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

cc: