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Date:
January 20, 2010

RE:

Legend

Decedent	=
Spouse	=
Date 1	=
y	=
z	=

Dear :

This responds to your authorized representative's letter dated October 2, 2009, requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-2 C.B. 124, the qualified terminable interest property (QTIP) election made with respect to Decedent's estate is a nullity for federal estate, gift and generation-skipping transfer tax purposes.

The facts submitted and representations made are as follows:

Decedent died on Date 1, survived by Spouse. Pursuant to Article Three of Decedent's Last Will and Testament, upon Decedent's death, all of Decedent's property, both real and personal, was to be divided into two separate shares, the "Marital Deduction Share" and the "Family Share". Pursuant to Article Three, Section C, paragraph 1, the Marital Deduction Share is to be the "smallest fractional share of [Decedent's] residuary estate that qualifies for the Federal estate tax deduction… ." Article Three, Section C, paragraph 2, provides that the Family Share shall consist of the remaining fractional share after deducting the Marital Deduction Share. Under Article Four, the Family Share shall be held in trust, with the trustee applying for the Spouse's benefit, "such sums from the income and principal of the trust estate as the trustee deems necessary or advisable from time to time for her maintenance in health and reasonable comfort… ."

Decedent's United States Estate (and Generation-Skipping Transfer) Tax Return, Form 706, was timely filed. Decedent's gross estate consisted of jointly owned assets and stocks and bonds. The personal representative reported assets jointly owned by Decedent and Spouse on Schedule E, Jointly Owned Property, of Form 706. Pursuant to § 2040(b), Decedent's interest in such jointly owned property is $y. The balance of Decedent's estate consisted of stocks and bonds valued at $z, which were to be allocated, held, administered and distributed in the Family Share. Accordingly, $z was reported on Schedule B, Stocks and Bonds, of the Form 706. No property, either probate or non-probate, passed to any person other than Spouse.

On Schedule M, Bequests, etc., to Surviving Spouse, of Form 706, all of Decedent's interest in the assets reported on both Schedule B and Schedule E were reported as property interests passing to the surviving spouse and qualifying for the marital deduction. Further, a QTIP election was made with respect to all of these assets. In computing the estate tax liability, the estate claimed a marital deduction for the value of the jointly owned non-probate property and Decedent's probate assets (the stocks and bonds), which passed entirely to the Family Share in accordance with the terms of Decedent's will. The return reported an estate tax liability of zero.

The jointly owned property included in the Decedent's gross estate that passed to Spouse qualify for the marital deduction under § 2056(a); a QTIP election was not required in order for these assets to qualify for the marital deduction.

You request a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the QTIP election made with respect to the jointly owned assets and the assets passing to the Family Share established under Decedent's Will will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652 of the Internal Revenue Code, 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. Section 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 QTIP. For purposes of § 2056(a), QTIP 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), QTIP 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) provide 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 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). Another example set forth in the revenue procedure is 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, section 2.

In this case, one-half the value of the jointly owned assets was included in Decedent’s gross estate under § 2040(b), and qualified for the estate tax marital deduction under § 2056(a). A QTIP election was not required in order for these assets

to qualify for the marital deduction. Accordingly, the QTIP election made with respect to the value of the jointly owned property passing to Spouse is null and void for purposes of §§ 2044, 2056(b)(7), 2519, and 2652. In addition, the QTIP election made with respect to the value of the property passing to the Family Share was not necessary to reduce the estate tax liability to zero. In this case, the estate tax would have been zero whether or not the election was made with respect to the Family Share. Accordingly, the QTIP election with respect to the value of the property passing to the Family Share is null and void for purposes of §§ 2044, 2056(b)(7), 2519, and 2652. The value of the jointly owned property and the property held in the Family Share will not be includible in Spouse's gross estate under § 2044. Further, Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to the Family Share. Finally, Spouse will not be treated as the transferor of the jointly owned assets or the property in the Family Share 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. 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 representatives. 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.

Sincerely,

Lorraine E. Gardner
Senior Counsel, Branch 4
(Passthroughs & Special Industries)

Enclosures (2)
Copy for § 6110 purposes
Copy of this letter

cc: