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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-155492-09
Date:
June 02, 2010

In Re:

Legend

Decedent	=
Spouse	=
Date 1	=
Date 2	=
Date 3	=
Trust	=
X	=

Dear :

This responds to your authorized representative's letter of December 16, 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 and generation-skipping (GST) transfer tax purposes.

The facts and representations submitted are as follows: Decedent died testate on Date 1 survived by Spouse. Article II, paragraph 2 of Decedent's will bequeaths certain personal property to certain individuals and Spouse. Article III of Decedent's will bequeaths the residuary estate to Trust.

Article VI, paragraph 1, of Trust provides that if Spouse survives Decedent, the trustee shall set aside as a separate and distinct trust (Trust B), the largest amount needed to permit Decedent's estate to use in full any estate tax unified credit (and state

death tax credit) that has not been claimed by Decedent for distributions during Decedent's lifetime. Article VI, paragraph 4, provides that until the death of Spouse, all income from Trust B is to be paid to Spouse during her lifetime and the trustee will pay or apply to Spouse's benefit such sums from the principal of Trust B as shall be necessary for her health, education, maintenance, and support.

Article VI, paragraph 2, of Trust provides that if Spouse survives Decedent, the balance of the trust estate (after funding Trust B) shall be set aside as a separate and distinct trust (Trust A). Article V, paragraph 2(c) provides that all the income from Trust A will be paid to Spouse during her lifetime and the trustee will pay or apply to Spouse's benefit such sums from the principal of Trust A as shall be necessary for her health, education, maintenance and support. Article VI, paragraph 2(c), provides that any undistributed principal on the death of Spouse will be distributed to Trust B.

The executor of Decedent's estate timely filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. All of the assets of Trust were included on Schedule M, Bequests to Surviving Spouse. All of the assets other than the assets that funded Trust B passed to Spouse outright by operation of law. Because all of the Trust B property bequeathed to Spouse qualifies for the QTIP election under § 2056(b)(7), the estate is deemed to have made an election to treat all of theTrust B property as QTIP property under § 2056(b)(7). Decedent's estate received an estate tax closing letter on Date 2 indicating that no tax was due. Spouse died on Date 3, and the executor subsequently discovered that the QTIP election was not necessary to reduce the estate tax to zero.

You request a ruling that the QTIP marital deduction election taken on Form 706 be treated in its entirety as null and void in accordance with Rev. Proc. 2001-38. In addition you request a ruling that the Trust B property for which the election was made will not be includible in Spouse's gross estate under § 2044.

LAW AND ANALYSIS

Section 2001(a) of the Internal Revenue Code 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 provides 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 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, the QTIP election was not necessary to reduce the estate tax liability to zero because no estate tax liability would have been imposed whether or not the election was made. The outright bequests to Spouse qualify for the marital deduction under § 2056(a) because they pass directly from Decedent to Spouse. The remaining assets were valued by the estate at $X and allocated to Trust B. After applying the

unified credit amount under § 2010, the estate's federal estate tax liability is reduced to zero. Consequently, we rule that the QTIP election is null and void for purposes of §§ 2044, 2056(b)(7), and 2652. Accordingly, 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 the transferor of the property in Trust B for generation-skipping transfer tax purposes under § 2652(a).

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.

The ruling contained in this letter is 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 the ruling, 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.

The Estate and GST tax rulings in this letter apply only to the extent that the relevant sections of the Internal Revenue Code are in effect during the period at issue.

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,

Lorraine E. Gardner
Senior Counsel, Branch 4
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy for section 6110 purposes

cc: