Internal Revenue Service

Department of the Treasury

Washington, DC 20224

Number: **200045004**
Release Date: 11/9/2000
Index Number: 2010.00-00

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:P&SI:7-PLR-108803-00
Date:
June 30, 2000

Legend

Decedent =

Date 1 =
Trust 1 =
Trust 2 =
Date 2 =
Date 3 =
Date 4 =
Year 1 =
Court =
State =

Dear Madam:

We received your letter, dated April 7, 2000 and prior correspondence, requesting a ruling regarding a State court construction of Decedent's Will and Codicil, as described below, for Federal Estate tax purposes. This letter responds to your request.

The information submitted and representations made are summarized as follows: Decedent's Will was executed on Date 1 and was drafted to take advantage of the unlimited marital deduction and the § 2010 exemption from Federal Estate tax so that no estate taxes would be due on his death. Section 2.2 of the Will made a

pecuniary bequest of Decedent's applicable credit amount to Trust 1 for the benefit of Decedent's spouse and descendants. Section 3.1 of the Will made a residuary bequest to Trust 2, a general power of appointment marital trust. Section 3.1 provides that the gift in that section is intended to qualify for the marital deduction allowed by § 2056 of the Internal Revenue Code.

In Year 1, Decedent contacted his attorney ("Drafting Attorney") requesting a revision to his Will. The revision Decedent requested was unrelated to Section 2.2 or Section 3.1 but Decedent did authorize Drafting Attorney to update Section 2.2 and the tax apportionment provision in Section 7.2 of his Will to reflect changes in the tax law. Decedent did not authorize Drafting Attorney to reverse the order of the marital and credit bequests. In revising Decedent's Will a scrivener's error was made resulting in a marital deduction bequest being directed to Trust 1, a trust that does not qualify for a marital deduction. In addition, the tax apportionment provision was revised in a manner that would not be in accordance with Decedent's intent.

Drafting Attorney represents that he intended to revise Section 2.2 to add language relating to the excise tax on excess retirement accumulations but to make no other changes to Section 2.2. He further represents, that it was clearly not Decedent's intent in signing the Codicil to alter the Federal Estate tax consequences of his will, as he only intended to revise his fiduciary appointments and any other tax provisions that would be necessary in light of tax law changes.

Decedent executed his Codicil, reflecting these changes, on Date 2. Decedent died on Date 3. The drafting error was not discovered until after Decedent's death.

On Date 4, the Court issued a declaratory judgment construing Decedent's Will and Codicil. The Court amended Section 2.2 and Section 7.2 to correct the drafting errors in the Codicil. Section 2.2, as amended by the Court, now makes a pecuniary bequest of Decedent's applicable credit amount to Trust 1 for the benefit of Decedent's spouse and descendants. Section 3.1, the original residuary bequest to a general power of appointment marital trust, was not amended by the Court.

You requested the following rulings: Will the State Court order construing the Will and Codicil to correct the scrivener's error be effective for Federal Estate tax purposes: 1) to treat the bequest in Section 2.2 of Item I of the Codicil as a pecuniary bequest of the Decedent's applicable credit amount; and 2) to limit the tax apportionment provision to property passing under the Will.

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Court considered whether a state trial court's characterization of property rights conclusively binds a federal court or agency in a Federal Estate tax controversy. The Court concluded that the decision of a trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the highest court of the state is

the best authority on the underlying substantive rule of state law to be applied in the federal matter. If there is a decision by that court, then the federal authority must apply what it finds to be state law after giving "proper regard" to the state trial court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

You represent that under State law, it is the primary concern of a court in the construction of wills to determine the testator's intent. Sellers v. Powers, 426 S.W.2d (1968). Generally, courts must determine the testator's intent from the language contained in the will. McGill v. Johnson, 799 S.W.2d 673 (1990). If the instrument is unambiguous, extrinsic evidence is not admissible. Nowlin v. Frost National Bank, 908 S.W.2d 283, 286 (1995). However, where a will is uncertain or creates an ambiguity, extrinsic evidence may be admitted to aid in explaining a testator's intent. Hinson v. Hinson, 280 S.W.2d 731 (1955); Estate of Brown, 507 S.W.2d 801 (1974). In addition to other types of extrinsic evidence, the statement of an Attorney that he made a "drafting error" and what that drafting error entailed is admissible as extrinsic evidence. Skinner v. Moore, 940 S.W.2d 755 (1997). In determining testator's intent, it is also a well established rule of construction that paragraphs in a will may be transposed. Words, clauses of sentences, or even whole paragraphs, may be transposed to any extent, with a view to show the intention of the testator. Id at 757-58.

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 2010(a) provides that a credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by § 2001.

Section 2056(a) states that for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 2056(b)(1) disallows this deduction where, upon 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) provides that, in the case of qualified terminable interest property, for purposes of § 2056(a), the property is treated as passing to the surviving spouse and for purposes of § 2056(b)(1)(A), no part of the property is treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines the term "qualified terminable interest property" as property: (1) that passes from the decedent, (2) in which the surviving spouse has a

qualifying income interest for life, and (3) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(i) provides that the surviving spouse has a qualifying income interest for life if: (1) the surviving spouse is entitled to all of the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and (2) no person has a power to appoint any part of the property to any person other than the surviving spouse.

Based on information submitted and representations made, we conclude that Decedent intended Section 2.2 and Section 7.2 to read as it has been construed by the State Court. The State Court order is consistent with applicable State law. Therefore, in accordance with the court order, the Service will treat the bequest in Section 2.2 of Item I of the Codicil as a pecuniary bequest of Decedent's applicable credit amount and will limit the tax apportionment in Section 7.2 of Item III of the Codicil to property passing under the Will for Federal Estate tax purposes.

A copy of this letter should be attached to Form 706. A copy is enclosed for that purpose.

This ruling is based on the facts presented and the applicable law in effect on the date of this letter. If there is a change in material fact or law before the transactions considered in this ruling take effect, the ruling will have no force or effect. Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provision of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,

Christine E. Ellison

Christine E. Ellison
Chief, Branch 7
Office of the Assistant Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy for section 6110 purposes
Copy of this letter