

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200410011**

Release Date: 03/05/2004

Index Number: 9100.00-00; 2056.07-01

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B09 – PLR-122445-03

Date:

November 28, 2003

Re:

LEGEND:

Decedent =

Spouse =

Marital Trust =

Probate =

Counsel =

Accountant =

Tax Counsel =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear

This is in response to your authorized representative's letter, dated March 28, 2003, requesting on your behalf an extension of time under 301.9100-1 and 301.9100-3

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of the Procedure and Administration Regulations to make a qualified terminable interest property ("QTIP") election under § 2056(b)(7) of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: On Date 1, Decedent executed a will, the terms of which provide that personal property is to pass outright to Decedent's three children from her first marriage and that the residue of her estate is to pass to a trust for the benefit of the children.

On Date 2, Decedent executed the trust agreement establishing Marital Trust, an irrevocable trust for the benefit of Spouse.

Article 2.2.1 of Marital Trust provides, in pertinent part, that during Spouse's life the trustee shall distribute to Spouse all of the net income and so much of the rest of the trust estate as may be necessary for the comfortable maintenance, support, and health of Spouse, notwithstanding that the distributions may completely exhaust the trust estate.

Articles 2.2.3 and 2.2.4, provide, in pertinent part, that upon the death of Spouse, the trustee shall pay to Spouse's estate any undistributed accumulated net income and then terminate the trust and distribute one-third of the remaining trust estate outright to each of Decedent's children.

On Date 3, Decedent executed a codicil to her will providing, in pertinent part, for a bequest to Marital Trust of cash or other property, as selected by her executor, with a value of \$A, which was to fund Marital Trust.

Decedent died on Date 4, survived by Spouse and her three children.

Decedent's executor hired Probate Counsel to probate Decedent's estate, Accountant to prepare the Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return for Decedent's estate, and Tax Counsel to advise the estate on matters relating to the preparation of the return and to represent the estate if the return was examined. The executor provided certified copies of Decedent's will and will codicil to Probate Counsel and instructed Probate Counsel to transmit the certified copies to Accountant for use in preparation of the estate tax return. The certified copy of the codicil containing the bequest to Marital Spouse, however, was not included in the documents Probate Counsel provided to Accountant. Because Accountant was unaware of the bequest to Marital Trust, he did not advise the executor to make an election under § 2056(b)(7) on the Form 706 to treat Marital Trust as QTIP property.

Consequently, Schedule M of Decedent's timely-filed Form 706, prepared by Accountant, neither listed the bequest to Marital Trust as property passing to Spouse

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nor contained a § 2056(b)(7) QTIP election pertaining to Marital Trust. A copy of Decedent's will, but not of the will codicil, was attached to the return. Tax Counsel, who reviewed the return as prepared by Accountant, similarly was unaware of the codicil, the bequest to Marital Trust, or of the need to make an election under § 2056(b)(7) on the estate's Form 706 to treat Marital Trust as QTIP property.

In the course of subsequent discussions with the executor about distributing Decedent's estate to her beneficiaries, Tax Counsel learned of the existence of the will codicil and the bequest to the Marital Trust, and realized that a QTIP election had not been made.

Decedent's executor has represented that he was not knowledgeable about tax matters or the need for a QTIP election to be made in order for the bequest to Marital Trust to qualify for the estate tax marital deduction, that he relied upon Probate Counsel to provide all necessary documents to Accountant and Tax Counsel, and that he relied upon Accountant and Tax Counsel for advice in preparing the Form 706. The executor has further represented that he did not know that Accountant had not received a copy of the will codicil and that Accountant and Tax Counsel were unaware of the bequest to Marital Trust at the time that the Form 706 was filed.

An extension of time under §§ 301.9100-1 and 301.9100-3 to make a QTIP election under § 2056(b)(7) pertaining to Marital Trust is requested.

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 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 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 no deduction shall be allowed for an interest passing to the surviving spouse if, on the lapse of time, the occurrence of an event or contingency, or the failure of an event or contingency to occur, the interest 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 the property shall be treated as passing to any person other than the surviving spouse for purposes of § 2056(b)(1)(A).

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Section 2056(b)(7)(B)(i) defines "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)(ii) 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.

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. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that, in general, the election referred to in § 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001 (or § 2101). For purposes of this paragraph, the term "return of tax imposed by § 2001" means the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election.

Under § 301.9100-1(c), the Commissioner may grant a reasonable extension of time 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 301.9100-2 provides automatic extensions of time for making certain elections, not pertinent here.

Section 301.9100-3(a) provides, in general, that requests for extensions of time for regulatory elections that do not meet the requirements of § 301.9100-2 must be made under the rules of § 301.9100-3. 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.

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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.

Based on the facts submitted and the representations made, we conclude that the requirements of § 301.9100-1 and § 301.9100-3 have been met because Decedent's executor acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government. Consequently, an extension of time of 60 days from the date of this letter is granted in which to make the QTIP election for Marital Trust under § 2056(b)(7). The election should be made on a supplemental Form 706 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the supplemental Form 706. A copy is enclosed for that purpose.

Except as expressly ruled herein, we express or imply no opinion concerning the federal tax consequences of any aspect of any transaction or item discussed or referenced in this letter under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) 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.

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,

Heather C. Maloy

Heather C. Maloy
Associate Chief Counsel
(Office of Passthroughs and Special Industries)

Enclosure

Copy for § 6110 purposes