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Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04-PLR-155397-01

Date:

February 05, 2002

In Re:

**LEGEND:**

- Trust =
- Decedent =
- Taxpayer =
- Spouse =
- Accountant =
- Date 1 =
- Date 2 =
- Date 3 =

Dear :

This letter is in response to your letter of September 26, 2001, requesting an extension of time under section 301.9100-1 of the Procedures and Administration Regulations to change a qualified terminable interest property ("QTIP") election under section 2056(b)(7) of the Internal Revenue Code.

**FACTS:**

Decedent died testate on Date 1, survived by his wife, Spouse. Trust, an inter vivos revocable trust, was created by Decedent prior to his death. Upon Decedent's death, Trust became irrevocable and Taxpayer became the successor trustee of Trust.

Under Article THIRD, Paragraph (C) of Trust, certain specific assets held in Trust passed to a trust (Marital Trust), for the benefit of Spouse. Marital Trust was intended to qualify for an estate tax marital deduction as qualified terminable interest property under section 2056(b)(7). Since Decedent's death, Taxpayer has served as sole trustee of the Marital Trust.

Decedent's estate tax return Form 706 was filed on Date 2. On Schedule M of Form 706, Taxpayer made an election under 2056(b)(7)(B)(v) to treat the entire Marital

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Trust as qualified terminable interest property. As a result, only a portion of the Decedent's unified credit against estate taxes as provided in section 2010 was effectively utilized. Spouse died on Date 3.

#### 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 2056(a) provides that, for purposes of the tax imposed by section 2001, the value of the taxable estate will, except as limited by section 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 the interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides that a deduction is not allowed under 2056(a) where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest passing to the surviving spouse will terminate or fail, and (a) an interest in the property passes from the decedent to any person other than the surviving spouse (or the estate of such spouse), and (b) by reason of such passing the person (or his heirs or assigns) may possess or enjoy any part of the property after the termination or failure of the interest passing to the surviving spouse.

Section 2056(b)(7) provides an exception to the terminable interest rule contained in section 2056(b)(1). Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property ("QTIP"), for purposes of section 2056(a), the property shall be treated as passing to the surviving spouse and for purposes of section 2056(b)(1)(A), no part of the property shall be treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" as property: (1) which passes from the decedent, (2) in which the surviving spouse has a qualifying, income interest for life, and (3) to which an election under section 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(v) provides that an election under section 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by section 2001. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that the election referred to in section 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by section 2001 (or section 2101, if applicable). For purposes of section 20.2056(b)-7(b)(4)(i), the term "return of tax imposed by section 2001" means the last estate tax return filed by the executor on or before the due date of the return, including

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extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Section 2044(a) provides that the value of the gross estate will include the value of any property to which that section applies in which the decedent had a qualifying income interest for life. Section 2044(b)(1)(A) provides that section 2044 applies to any property if a deduction was allowed with respect to the transfer of the property to the decedent under section 2056 by reason of section 2056(b)(7).

Section 301.9100-1(c) of the Procedure and Administration Regulations provides that the Commissioner may grant a reasonable extension of time under the rules set forth in sections 301.9100-2 and 301.9100-3 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.

Sections 301.9100-2 and 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make the election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of section 301.9100-2.

Requests for relief under section 301.9100-3 will be granted when the taxpayer provides the evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

In the instant case, the taxpayer is not seeking an extension of time to make the QTIP election. Rather, the taxpayer is in effect seeking to partially revoke a QTIP election previously made, that, pursuant to section 2056(b)(7)(B)(v), is irrevocable. See Estate of Cavanaugh v. Commissioner, 100 T.C. 407 at 421 (1993). Accordingly, section 301.9100 is not applicable in this case.

Furthermore, the situation presented is not within the purview of Rev. Proc. 2001-38, 2001-24 I.R.B. 1335. Pursuant to this revenue procedure, under certain circumstances, the Service will treat a QTIP election as null and void for purposes of sections 2044(a), 2056(b)(7), 2519(a) and 2652. Rev. Proc. 2001-38 applies 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 does not apply in situations where a partial QTIP election was required with respect to a trust to reduce the estate tax liability and the executor made the election with respect to more trust property than was necessary to reduce the estate tax liability to zero.

In this case, a QTIP election was required with respect to the Marital Trust to reduce Decedent's estate tax liability to zero. However, Taxpayer made the election for more Marital Trust property than was necessary in order to reduce Decedent's estate tax liability to zero. This situation is specifically excluded from the purview of Rev. Proc. 2001-38. Accordingly, the QTIP election with respect to 100% of the Marital Trust is

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valid and effective for estate tax purposes. Therefore, 100% of the value of the Marital Trust on the applicable valuation date is includible in Spouse's gross estate under section 2044.

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(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any tax return to which it is relevant. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

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,  
Paul F. Kugler  
Associate Chief Counsel  
(Passthroughs and Special Industries)