Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Telephone Number:

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Legend

Decedent =
Spouse =
Son =
Co-trustees =
Trust =

Marital Trust =

Residuary
Trust
Corporation =
Date 1 =
Date 2 =
Date 3 =
X =
Y =

Dear :

This responds to your letter dated July 31, 2009, requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the Service treat as null and void for purposes

of Internal Revenue Code §§ 2044(a), 2056(b)(7), 2519(a), and 2652 the qualified terminable interest property election taken on Schedule M of Decedent's federal estate tax return for property passing to Marital Trust.

The facts and representations submitted are summarized as follows:

Decedent executed a will and revocable trust (Trust) on Date 1. On Date 2, Decedent gave stock in Corporation valued at $X to Son and timely filed Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return reporting the gift. On Form 709, Decedent and Spouse elected to treat the gift as made one-half by Decedent and one-half by Spouse under § 2513 of the Internal Revenue Code (Code). Decedent died on Date 3, survived by Spouse and Son.

Under the provisions of Article II of Decedent's will, Decedent bequeathed all tangible personal property outright to Spouse. Decedent bequeathed the residue of his estate to Trust under Article III of his will. Article IV(H) and (I) of Decedent's will grants the personal representative the authority to make all tax elections permitted by law and to determine whether to elect under § 2056(b)(7) to qualify any "qualified terminable interest" trust for the federal estate tax marital deduction. Upon Decedent's death, Spouse and Son became Co-trustees of Trust.

Under the provisions of Articles 5 and 6 of Trust, upon Decedent's death if Spouse survives him, the Co-trustees are directed to establish two trusts, a Marital Trust and a Residuary Trust. The Co-trustees must fund the Residuary Trust with any assets not part of the Decedent's estate for federal estate tax purposes and, after payment of funeral expenses, debts of Decedent, allowances, estate administration expenses, will devises, and all inheritance, estate and succession taxes, the largest amount, which after taking into consideration factors such as (a) the unified credit against the federal estate tax, (b) the allowable state death tax credit, and (c) all deductions (excluding marital) allowed in computing the taxable estate for federal estate tax purposes, will result in the least amount available for the Marital Trust without increasing the federal estate tax on Decedent's estate. The Marital Trust is funded with the remainder of the assets of Trust.

Article 5(B) of Trust grants Spouse the authority to compel the Co-trustees to convert unproductive property held in Marital Trust to income producing property. The Co-trustees are directed to distribute the net income from Marital Trust to Spouse at least annually during Spouse's lifetime and to distribute any accrued and undistributed income to Spouse's estate. The Co-trustees may make discretionary distributions of the principal to Spouse for her support, maintenance, and comfort. Upon Spouse's death, Marital Trust will be distributed in accordance with Article 7 of Trust, which provides for trusts created for Decedent's children.

Residuary Trust is also held for Spouse's benefit. The Co-trustees are required to distribute all net income to Spouse at least quarter-annually. Notwithstanding the foregoing, the Co-trustees are authorized to divert the income and distribute it to Decedent's living lineal descendants and their spouses for their support, welfare and best interests if the Co-trustees determine such diversion is not detrimental to the health, reasonable comfort and maintenance of the accustomed standard of living of Spouse. Spouse may receive distributions of principal for emergencies, health, support, and maintenance consistent with her standard of living. Spouse may also request, annually, a distribution of the greater of $5,000 or 5 percent of the value of the principal of Residuary Trust. Upon Spouse's death, Residuary Trust will also be distributed in accordance with Article 7 of Trust.

Decedent's executor filed a timely Form 706, United States Estate (and Generation Skipping-Transfer) Tax Return. On Form 706, Decedent's executor incorrectly listed Decedent's adjusted taxable gifts as $X. Furthermore, Decedent's executor listed all assets of Marital Trust and Residuary Trust on Schedule M, thereby electing to treat all such property as qualified terminable interest property under § 2056(b)(7).

Co-trustees represent that Decedent's estate received a closing letter from the Internal Revenue Service pertaining to the Decedent's Form 706.

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 that a 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 the terminable interest rule in the case of qualified terminable interest property (QTIP). For purposes of § 2056(a), qualified terminable interest property 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), qualified terminable interest property 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.

A QTIP election has transfer tax consequences for the surviving spouse. Section 2044(a) and (b) provides, in part, 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) provides 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, 2001-1 C.B. 1335, 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 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, § 2. Rev. Proc. 2001-38 does not apply in situations where a partial QTIP election was required with respect to a trust to reduce the estate tax liability to zero; nor does it apply to elections that are stated in terms of a formula designed to reduce the estate tax to zero. See Rev. Proc. 2001-38, § 3.

In this case, the election under § 2056(b)(7) to treat the assets of Residuary Trust as QTIP was not necessary to reduce the estate tax to zero because no estate tax would have been imposed on the assets in Residuary Trust whether or not the election was made. Residuary Trust is a credit shelter trust that was funded with an amount not exceeding Decedent's remaining § 2010(c) exclusion amount. If relief under Rev. Proc. 2001-38 is granted, the estate's federal estate tax liability will remain at zero after applying Decedent's remaining unified credit amount under § 2010.

Because the QTIP election in this case was not necessary to reduce the estate tax liability to zero, Rev. Proc. 2001-38 applies and the Service will disregard the QTIP election with respect to Residuary Trust and treat it as null and void for purposes of §§ 2044, 2056(b)(7), 2516(a), and 2652. For purposes of determining the proper amount of assets passing to Residuary Trust, Decedent's remaining unified credit amount is equal to Decedent's unified credit amount under § 2010 less $Y. Accordingly, the property for which the election is disregarded will not be includible in the Spouse's gross estate under § 2044(a).

Furthermore, 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. The ruling in this letter pertaining to the federal estate and/or generation-skipping transfer tax applies only to the extent that the relevant sections of the Internal Revenue Code are in effect during the period at issue.

This ruling is directed only to the taxpayers 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 representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers 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,

James F. Hogan
Acting Chief, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosure: Copy for § 6110 purposes

cc: