Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:

Telephone Number:

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Date:
January 11, 2016

In Re:

Legend

Decedent
Spouse
Date 1
Date 2
Date 3
Date 4
Trust
a
State
State Statute 1
State Statute 2
Probate Court

Dear :

This letter responds to your authorized representative's letter dated July 15, 2015, requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-1 C.B. 1335, the qualified terminable interest property (QTIP) election made with respect to Trust C is a nullity for federal gift, estate and generation-skipping transfer (GST) tax purposes, and rulings regarding the gift, estate, and GST tax consequences to Spouse upon the termination of Trust C.

The facts and representations submitted are summarized as follows:

On Date 1, Decedent executed Trust, a revocable trust, and a will. Decedent's will provided that all remaining property (other than his personal tangible property) is

devised to the successor trustee of Trust. The successor trustee is to hold, administer, and distribute the property in accordance with the provisions of Trust.

Article VIII of Trust provides that upon Decedent's death, the trustee is to divide Trust into two separate shares, "Marital Share" and "Trust B." The Marital Share is to be a fraction of Trust. The numerator of the fraction is the maximum available marital deduction amount allowable to the estate reduced by the amount needed to increase Decedent's taxable estate to the largest amount that, after allowing for the unified credit against the federal estate tax, will result in the smallest federal estate tax being imposed on the estate. The denominator of the fraction is equal to the value of the Trust estate as finally determined for estate tax purposes. Trust B is to be comprised of the balance of the Trust estate.

Article VIII of Trust further provides that Marital Share is to be further divided into two trusts, "Trust C-1" and "Trust C." Trust C-1 is to be a fraction of Trust. The numerator of the fraction is equal to Decedent's available GST exemption minus the amount allocated to Trust B. The denominator of the fraction is equal to the value of the Trust estate as finally determined for estate tax purposes. Trust C is to be a fraction of Trust. The numerator of the fraction is equal to the Marital Share numerator minus the amount of the Trust C-1 numerator. The denominator of the fraction is equal to the value of the Trust estate as finally determined for estate tax purposes.

Article IX(1) of Trust provides, in relevant part, that the trustee is to pay to or apply for the benefit of any of Decedent's issue, such sums from the net income and/or principal of Trust B in such shares and proportions as in its sole discretion are advisable for the medical care, education, support, and maintenance of Decedent's issue.

Article IX(2) of Trust provides, in relevant part, that when Decedent's youngest child reaches age 25, the trustee is to divide Trust B as then constituted into equal separate shares so as to provide one share for each then living child of Decedent and one share for each deceased child of Decedent who shall leave issue then living.

Article IX(3) of Trust provides, in relevant part, that after the division into shares for children, all the net income from each share so provided for a living child of Decedent is to be paid in convenient installments to or applied for the benefit of the child until complete distribution of the share as herein provided.

Article X(1) of Trust provides that commencing with the date of Decedent's death, the trustee is to pay or apply for the benefit of Spouse during her lifetime all the net income from Trust C for each tax year of Trust C, payable in convenient installments but no less frequently than quarter-annually. Any accrued and undistributed income at the death of Spouse is to be paid to her personal representatives.

Article X(2) of Trust provides that the trustee may pay to or apply for the benefit of Spouse such sums from the principal of Trust C as in its sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of Spouse, taking into consideration any other income or resources of Spouse known to the trustee.

Article X(4) of Trust provides that upon the death of Spouse, the entire remaining principal of Trust C is to be paid over, conveyed and distributed to or in trust for such appointee or appointees from among Decedent's issue, or estate in the manner and in the proportions as Spouse may appoint in and by the last will of Spouse, making specific reference to the general power of appointment herein conferred upon Spouse. In default of the exercise of this power of appointment by Spouse, or insofar as any part of Trust C is not effectively appointed, then upon the death of Spouse, the entire remaining principal of Trust C is to be held and administered or distributed in whole or in part, as if it had been an original part of Trust B.

Article XI(1) of Trust provides that commencing with the date of Decedent's death, the trustee is to pay or apply for the benefit of Spouse during her lifetime all the net income from Trust C-1 for each tax year of Trust C-1, payable in convenient installments but no less frequently than quarter-annually. Any accrued and undistributed income at the death of Spouse is to be paid to her personal representatives.

Article XI(2) of Trust provides that the trustee may pay to or apply for the benefit of Spouse such sums from the principal of Trust C-1 as in its sole discretion shall be necessary or advisable from time to time for the medical care, education, support and maintenance in reasonable comfort of Spouse, taking into consideration any other income or resources of Spouse known to the trustee.

Article XI(5) of Trust provides that upon the death of Spouse, the entire remaining principal of Trust C-1 is to be added to and become part of Trust B and is to be held and administered or distributed in whole or in part, as if it had been an original part of Trust B.

Decedent died on Date 2 survived by Spouse and two children from a prior marriage. Decedent's youngest child has not yet reached age 25. Trust B, Trust C, and Trust C-1 are administered in State.

The executor of Decedent's estate timely filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. The executor listed Trust C and Trust C-1 on Schedule M of Form 706, and, by doing so, was deemed to have made the QTIP election with respect to those trusts.

State Statute 1 provides that a noncharitable irrevocable trust may be terminated upon consent of all beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. State Statute 2 provides that upon termination of a trust under State Statute 1, the trustee shall distribute the trust property as ordered by the court.

On Date 3, the trustee, Spouse, and Decedent's children entered into a Settlement Agreement to terminate Trust C and Trust C-1. Upon termination, Spouse will be paid $a in cash and securities, which represents the liquid assets of Trust. In exchange, the trustee agreed to pay a percentage of Spouse's income tax liability, if any, with respect to the distribution and any gift taxes payable under § 2519, if any, with respect to the distribution. Upon termination, Spouse will be treated as deceased for all purposes, and the remaining assets of Trust C and Trust C-1 will be distributed to Trust B. On the same date, the trustee, Spouse, and Decedent's children petitioned Probate Court to approve the termination of Trust C and Trust C-1 and the distribution of $a to Spouse and the remaining property of the trusts to Trust B. On Date 4, Probate Court concluded that the standard for termination of the trusts under State Statute 1 was met and continuance of Trust C and Trust C-1 was not necessary to achieve any material purposes of the trusts, which was to provide for Spouse and Decedent's children. Probate Court ordered that Trust C and Trust C-1 shall terminate and the assets would be distributed pursuant to the Settlement Agreement. This private letter ruling request is limited to the tax consequences to Trust C and Spouse as a result of the termination of Trust C.

You have requested the following rulings:

1) Since Trust C qualifies for the marital deduction pursuant to § 2056(b)(5), pursuant to Rev. Proc. 2001-38, the QTIP election made with respect to Trust C is a nullity for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652.

2) The termination of Spouse's interest in Trust C will result in an *inter vivos* release of her testamentary general power of appointment. However, the amount of the gift is offset by the value of consideration received by Spouse for the exchange under § 2512(b).

3) For purposes of the GST tax, Spouse will not be treated as the transferor of Trust C.

LAW AND ANALYSIS

Ruling 1

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)(5) provides that, in the case of an interest in property passing from the decedent, if the surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse -- (A) the interest or such portion thereof so passing shall, for purposes of § 2056(a), be considered as passing to the surviving spouse, and (B) no part of the interest so passing shall, for purposes of § 2056(b)(1)(A), be considered as passing to any person other than the surviving spouse. This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Section 2056(b)(7) provides that 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(a) and (b) provides generally 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) provide, in part, 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, 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, based on the facts submitted and representations made, the QTIP election with respect to Trust C was not necessary to reduce the estate tax liability to zero. That is, the estate tax liability would have been zero whether or not the election was made with respect to Trust C. Accordingly, we rule that the QTIP election with respect to Trust C is null and void for purposes of §§ 2044, 2056(b)(7), 2519 and 2652. The property held in Trust C will not be includible in the gross estate of Spouse under § 2044, and Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to that property.

Further, we rule that the QTIP election will not cause Spouse to be treated as the transferor of the property in Trust C for generation-skipping transfer tax purposes under § 2652. However, as will be discussed in further detail in the discussion of Ruling 3, Spouse's release of her general power of appointment will cause her to be treated as the transferor of the property in Trust C for generation-skipping transfer tax purposes under § 2652.

Ruling 2

Section 2501(a) imposes a gift tax for each calendar year on the transfer of property by gift during the year by an individual.

Section 2511 provides that the gift tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2512(a) provides that if the gift is made in property, the value thereof at the date of the gift is considered the amount of the gift.

Section 2512(b) provides that where property is transferred for less than an adequate and full consideration in money or money's worth, the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift.

Section 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, is deemed a transfer of property by the individual possessing such power.

Section 2514(c) provides, in relevant part, that for purposes of § 2514, the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.

Section 25.2512-8 of the Gift Tax Regulations provides, in relevant part, that transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, and free from any donative intent), will be considered as made for an adequate consideration in money or money's worth.

Section 25.2514-3(c)(4) provides, in part, that a release of a power of appointment need not be formal or express in character. For example, the failure to

exercise a general power of appointment created after October 21, 1942, within a specified time so that the power lapses, constitutes a release of the power.

Upon the termination of Spouse's interest in Trust C, Spouse released her general power of appointment under § 2514. Pursuant to § 2514(b), the release of this general power of appointment is deemed a taxable transfer by Spouse of the value of the Trust C assets at the time of the release. Accordingly, based upon the facts and representations made, we rule that the termination of Spouse's interest in Trust C will result in an *inter vivos* release of her testamentary general power of appointment.

Further, we rule that pursuant to § 2512(b), where Spouse releases her general power and transfers the assets of Trust C for less than an adequate and full consideration in money or money's worth, the amount by which the value of the Trust C property exceeded the value of the consideration that Spouse received shall be deemed a gift. Accordingly, only the excess of the fair market value of the Trust C assets at the time of the release over the value of the consideration received therefor by Spouse would be deemed a taxable gift.

Spouse requested a ruling that the amount of the gift will be offset by the value of consideration received by Spouse for the exchange under § 2512(b). The value of this gift is a question of fact and the Service does not rule on such factual determinations. See § 6.02 of Rev. Proc. 2015-1, 2015-1 I.R.B. 1, 17.

Ruling 3

Section 2652(a) provides, in relevant part, that the term "transferor" means (A) in the case of any property subject to the tax imposed by chapter 11, the decedent, and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

In this case, we have previously ruled that Spouse made a taxable gift equal to the excess of the fair market value of the Trust C assets at the time of the release of Spouse's general power of appointment over the value of the consideration received by Spouse. Accordingly, based on the facts submitted and the representations made, we conclude that Spouse is the transferor of Trust C for GST purposes to the extent that she made a taxable gift.

In accordance with the Power of Attorney on file with this office, we have sent a copy of this letter to your authorized representatives.

Except as expressly provided herein, we neither express nor imply any opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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.

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

Sincerely,

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

Enclosures
Copy for § 6110 purposes
Copy of this letter