Internal Revenue Service

Number: **200612001**
Release Date: 3/24/2006
Index Number: 2056.07-01

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B09
PLR-101164-05
Date:
November 29, 2005

Legend:

Decedent =

Date 1 =
Trust =
Spouse =
Date 2 =
Attorney =
Grandchild =
Child 1 =
Child 2 =
Child 3 =
Child 4 =
State =
Date 3 =
Court =
Date 4 =

Dear :

This is in response to your authorized representative's letter dated January 3, 2005, and subsequent correspondence, submitted on behalf of Decedent's estate, requesting a ruling regarding 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 last will and testament and Trust, a revocable trust for his benefit during his life. Article III of Decedent's will provides that the residue of his estate is to be held, administered, and distributed in accordance with the terms of Trust.

Article VII, paragraph B of Trust provides that upon Decedent's death, if Spouse survives him, the trustee shall establish a separate trust ("Lifetime Marital Deduction Trust"). The Lifetime Marital Deduction Trust shall consist of all of Trust but reduced by an amount equal to the largest amount necessary to increase Decedent's taxable estate sufficiently to fully utilize all of Decedent's available federal estate tax credit but without increasing state death taxes. The Lifetime Marital Deduction Trust may be funded with cash, real property, personal property or fractional interests in real or personal property as shall be selected by the trustee. Only assets that qualify for the federal estate tax marital deduction shall be placed in the Lifetime Marital Deduction Trust. All of the rest, residue, and remainder of Trust shall be placed in a separate trust to be designated as the "Family Trust."

Article VIII, paragraph A of Trust provides that the trustee shall pay all of the net income to Spouse during her lifetime in periodic installments to be paid not less frequently than quarterly. The trustee may, in its sole discretion, distribute to Spouse so much of the trust principal as is necessary for her health, maintenance, and support, taking into account other resources available to her. No distributions may be made to anyone other than Spouse during her life.

Decedent died on Date 2. Following Decedent's death, Attorney, the attorney for Decedent's family, communicated with Decedent's children concerning the possibility of Spouse executing disclaimers in order to allow certain assets from Decedent's estate to pass directly to Decedent's children and Grandchild. Based on Attorney's understanding that Spouse was not personally able to make financial decisions, Attorney prepared disclaimers for the signatures of Child 1 and Child 2, the two co-attorneys-in-fact for Spouse. It is represented that Child 1 and Child 2 did not know if Spouse knew about the disclaimers and that Child 1 and Child 2 do not recall discussing the disclaimers with Spouse.

Attorney prepared the documents necessary to transfer the property subject to the disclaimers from Decedent's estate to Decedent's six children and Grandchild. In preparing Decedent's Form 706 United States Estate (and Generation-Skipping Transfer) Tax Return ("estate tax return"), Attorney made the QTIP election for all of the property passing to the Lifetime Marital Deduction Trust, with the exception of the disclaimed property. Specifically, Schedule M of Decedent's estate tax return provides, in part, that "the QTIP election under § 2056(b)(7) is hereby made for the items listed as Nos. 1, 2, 3, 4, 5, 6, 7, 9, and 10." The property subject to the disclaimers was not among the assets specifically listed on Schedule M.

At some point after Decedent's estate tax return was filed, Child 3 retained his own legal counsel to review the estate's administration. Child 3's counsel concluded that the disclaimers prepared by Attorney were invalid and ineffective, both by their terms and under State law. Based upon communications from Child 3's attorney, Child 1 and Child 4 sought new legal counsel. The new legal counsel for Child 1 and Child 4 also concluded that the disclaimers were invalid. In Date 3, Decedent's family

members entered into a restitution agreement that was approved by Court on Date 4. The restitution agreement provides, in part, that Decedent's six children and Grandchild shall individually make restitution to Decedent's estate for the value of the purportedly disclaimed property that had been transferred to them.

You have requested, on behalf of Decedent's estate, a ruling as to whether the co-personal representatives of Decedent's estate made a timely QTIP election for 100 percent of the value of property passing to the Lifetime Marital Deduction Trust, inclusive of the purportedly disclaimed property. In the alternative, you have requested, on behalf of Decedent's estate, an extension of time under § 301.9100-3 to amend the QTIP election to include the value of all property passing to the Lifetime Marital Deduction Trust.

Section 2001 provides that a tax is imposed 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 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) provides, in part, that no deduction shall be 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, an interest passing to the surviving spouse will terminate or fail, and on such termination, an interest in that property passes or has passed from the decedent to any person other than the surviving spouse.

Section 2056(b)(7) provides an exception to the terminable interest rule of § 2056(b)(1) in the case of qualified terminable interest property. Under § 2056(b)(7)(A), qualified terminable interest property is treated as passing to the surviving spouse for purposes of § 2056(a) and no part of the property is treated as passing to any person other than the surviving spouse for purposes of § 2056(b)(1)(A).

Section 2056(b)(7)(B)(i) provides that the term "qualified terminable interest property" means 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)(ii) provides that the surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property, and 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, generally, that 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, if applicable). For purposes of § 20.2056(b)-7(b)(4)(i), 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.

Section 20.2056(b)-7(b)(4)(ii) provides, in part, that the election, once made, is irrevocable. If an executor appointed under local law has made an election on the return of tax imposed by § 2001 (or § 2101) with respect to one or more properties, no subsequent election may be made with respect to other properties included in the gross estate after the return of tax imposed by § 2001 is filed.

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 §§ 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 § 301.9100-2.

Requests for relief under §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 this case, the disclaimers executed by Child 1 and Child 2, as co-attorneys-in-fact for Spouse, were invalid both by their terms and under State law. Thus, the purportedly disclaimed assets pass, as a matter of law, to the Lifetime Marital Deduction Trust due to the invalidity of the disclaimers. However, the executor of Decedent's estate made a timely QTIP election only with respect to those assets specifically identified on Schedule M of Decedent's estate tax return. Accordingly, because the property that was purportedly disclaimed was not among the other specifically listed properties on Schedule M, we conclude that the QTIP election does not apply to those assets.

With respect to the alternative ruling requested, the taxpayer in the instant case is not seeking an extension of time to make the QTIP election. Rather, the taxpayer is seeking to change a previously made QTIP election to include additional property which

is not permitted under § 20.2056(b)-7(b)(4)(ii). Accordingly, § 301.9100 is not applicable in this case.

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.

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 provisions of the Code.

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.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Melissa C. Liquerman
Branch Chief, Branch 9
(Passthroughs & Special Industries)

Enclosure:
Copy for § 6110 purposes