

## Rev. Proc. 2001-38

### SECTION 1. PURPOSE

This revenue procedure provides relief for surviving spouses and their estates in situations where a predeceased spouse's estate made an unnecessary qualified terminable interest property (QTIP) election under § 2056(b)(7) of the Internal Revenue Code that did not reduce the estate tax liability of the estate. This revenue procedure describes the circumstances in which these QTIP elections will be treated as a nullity for federal estate, gift, and generation-skipping transfer tax purposes, so that the property will not be subject to transfer tax with respect to the surviving spouse.

### SECTION 2. BACKGROUND

Section 2056(a) provides that, except as limited by § 2056(b), the value of a taxable estate is 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 the surviving spouse. Section 2056(b)(1) denies a marital deduction 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)(A) provides an exception to this terminable interest rule in the case of qualified terminable interest property. 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. This election, once made, is irrevocable.

Section 20.2056(b)-7(b)(4)(i) of the Estate Tax Regulations provides that the QTIP election is made on the return of tax imposed by § 2001 (or § 2101). The term "return of tax imposed by § 2001" means the last estate tax return (*Form 706-United States Estate (and Generation-Skipping Transfer) 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 after the due date. Section 20.2056(b)-7(b)(4)(ii) provides that the election, once made, is irrevocable.

A QTIP election has transfer tax consequences for the surviving spouse. Section 2044(a) and (b) provides generally that the value of the gross estate includes the value of any property in which the decedent has 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). Under § 2519(a) and (b), 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. Further, the surviving spouse will, in the absence of a "reverse QTIP" election under § 2652(a)(3), be treated as the transferor of the property for generation-skipping transfer tax purposes under § 2652(a).

The Internal Revenue Service has received requests for relief in situations where an estate made an unnecessary QTIP election. In some cases, 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). The QTIP election was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made. In other cases, the decedent's will provided 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 made QTIP elections for 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. In these situations, as a consequence of the unnecessary QTIP election, the property subject to the election would be included in the surviving spouse's gross estate under § 2044(a), or if that spouse disposes of the income interest, would be subject to gift tax under § 2519. Further, the surviving spouse would, in the absence of a "reverse QTIP" election under § 2652(a)(3), be treated as the transferor of the property for generation-skipping transfer tax purposes under § 2652(a).

### SECTION 3. SCOPE

This revenue procedure applies to elections under § 2056(b)(7) to treat property as qualified terminable interest property 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. This 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. This revenue procedure also does not apply to elections that are stated in terms of a formula designed to reduce the estate tax to zero. See, for example, § 20.2056(b)-7(h), *Examples 7 and 8*. In addition, this revenue procedure does not apply to protective elections under § 20.2056(b)-7(c).

### SECTION 4. PROCEDURE

In the case of a QTIP election within the scope of this revenue procedure, the Service will disregard the election and treat it as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652. The property for which the election is disregarded under this procedure will not be includible in the gross estate of the surviving spouse under § 2044, and the spouse will not be treated as making a gift under § 2519 if the spouse disposes of the income interest with respect to the property. Further, the surviving spouse will

not be treated as the transferor of the property for generation-skipping transfer tax purposes under § 2652(a). To establish that an election is within the scope of this revenue procedure, the taxpayer must produce sufficient evidence to that effect. For example, the taxpayer may produce a copy of the estate tax return filed by the predeceased spouse's estate establishing that the election was not necessary to reduce the estate tax liability to zero, based on values as finally determined for federal estate tax purposes. Such information, including an explanation of why the election should be treated as void under this

revenue procedure, should be submitted either with the Form 706 filed for the surviving spouse's estate, or with a request for a private letter ruling submitted at any time prior to filing that Form 706.

#### SECTION 5. EFFECTIVE DATE

This revenue procedure is effective as of June 4, 2001, and applies to elections within the scope of this revenue procedure, whenever made. If prior to June 4, 2001, property subject to an election within the scope of this revenue procedure was subject to transfer tax (for example, because the surviving spouse has died or disposed

of all or part of an income interest), the taxpayer may file a claim for refund provided the time prescribed by § 6511 for filing the claim has not expired.

#### SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Scott S. Landes of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Landes at (202) 622-3090 (not a toll-free call).