

July 23, 2010

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Re: PLR 201025021 (June 28, 2010)

Dear Mr. Wilson and Mr. Hogan:

In PLR 201025021 (June 28, 2010), the Internal Revenue Service (the “IRS”) granted a 60-day extension of time within which to make a Federal gift tax election pursuant to section¹ 2523(f)(2)(C) (hereinafter “gift tax QTIP election”) on a supplemental Form 709 pursuant to Regulations section 301.9100-3. We believe that the IRS reached the correct result in PLR 201025021. Taxpayers should be able to seek discretionary relief under Regulations section 301.9100-3 to make a gift tax QTIP election on a late filed Federal gift tax return when the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government. This relief is appropriate for the following reasons:

1. Good Policy. As a matter of policy, the Government should have the ability to grant relief to file late gift tax QTIP elections since this relief is already available for similar errors made on the Federal estate tax and generation-skipping transfer tax returns. The relief, known as section 9100 relief, requires the taxpayer to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government. Section 9100 relief for failures to make a QTIP election for a QTIP trust on the Federal estate tax return has been available for over 20 years. Section 9100 relief for failures

¹ References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated, and references to Regulations are to the Treasury Regulations promulgated thereunder.

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to make the reverse QTIP election of section 2652(a)(3) for the generation-skipping transfer tax has also been available.

Congress and the IRS have been generous in providing for relief for errors in making elections in the transfer tax area because the number of elections has increased dramatically and the Code provisions are very complex. Often, taxpayers rely on accountants and other advisors who are experienced and competent with respect to income tax matters, but prepare estate and gift tax returns on only an occasional basis. Lack of familiarity with the requirements for a QTIP election has led to numerous errors on gift tax returns. Failure to provide an avenue for relief similar to that provided in the estate and GST areas has left taxpayers with the sole recourse of pursuing a claim against their advisors. This remedy is unsatisfactory because damages are difficult to measure, many taxpayers are unwilling to pursue a claim against a long-time family advisor, and the statute of limitations may prevent such a claim if the error is not discovered quickly. Allowing section 9100 relief for failed QTIP elections on the gift tax return would provide a much more efficient solution and discourage needless litigation. Moreover, allowing such relief would be consistent with underlying goal of section 9100 relief: to put taxpayers in the same position – not a better position – than they would have been in had they made their elections in a timely fashion.

2. Prior Interpretation Too Restrictive. In PLRs 200314012 and 9641023, the IRS ruled that it may not grant a request for an extension beyond the six-month period allowed automatically by Regulations section 301.9100-2 because the time for filing a gift tax QTIP election is expressly prescribed by section 2523(f)(4), and the IRS's authority to grant discretionary extensions applies only to requests for extensions of time fixed by regulations or other published guidance. We believe these ruling take an overly restrictive view of the 9100 relief provisions in this context.

Section 2523(f)(4)(A) provides that the gift tax QTIP election must be made “on or before the date prescribed by section 6075(b) for filing a gift tax return with respect to the transfer (determined without regard to section 6019(2)) and shall be made in such manner as the Secretary shall by regulations prescribe.” We believe the prior rulings failed to give sufficient emphasis to the Secretary’s role in the election process as authorized by the statutory provision.

In this regard, consider that Regulations section 25.2523(f)-1(b)(4) also provides that the election must be made on a timely filed gift tax return, including extensions authorized under the section 6075(b)(2) six-month automatic extension to file rule. In addition, the regulations further provide that if the donor died during the calendar year of the transfer, an election must be filed no later than the time for filing the donor’s estate tax return, including extensions. The regulatory rule is binding on

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taxpayers notwithstanding the presence of the statutory rule and is arguably authorized by the language of section 2523(f)(4)(A).

Regulations section 301.9100-1(b) defines a regulatory election as one whose deadline is prescribed by regulations published in the Federal Register or by a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin, and define a statutory election as one whose deadline is prescribed by statute. These definitions, however, are not mutually exclusive; they do not preclude a statutory election from also being a regulatory election for purposes of application of the 9100 relief provisions. Making a valid gift tax QTIP election is both a statutory election and regulatory election. We submit that pursuant to the regulations governing 9100 relief the gift tax QTIP election qualifies for relief as either a statutory or a regulatory election.

Regulations section 301.9100-3 permits a request for relief relating to a regulatory election that that does not meet the requirements of Regulations section 301.9100-2. As discussed above, the gift tax QTIP election is a regulatory election for this purpose. If the taxpayer provides the evidence that he or she acted reasonably and in good faith, and the interests of the Government are not prejudiced, relief should be available for a taxpayer who failed to make a gift tax QTIP election.

3. Automatic Extension. The position of PLR 201025021 is a logical extension of Regulations section 301.9100-2(b). Under Regulations section 301.9100-2(b), an automatic six month extension of time (from the due date of a return excluding extensions) to make a regulatory or statutory election such as the gift tax QTIP election is available if corrective action is taken within that six month period. This is an existing regulatory relief provision applicable to the limitations period governed by statute. Whatever authority justifies the automatic relief under Regulations section 301.9100-2(b) could also justify the outcome in PLR 201025021, which sensibly extends this policy to the realm of discretionary relief.

4. No Prejudice to Government. Finally, the interests of the Government are not prejudiced by this interpretation. Allowing the QTIP election merely defers the imposition of the Federal gift tax until a disposition under section 2519 or substitutes the imposition of the Federal estate tax at the time of the donee spouse's death by providing for the inclusion of the QTIP trust assets in the donee spouse's estate under section 2044. Section 2044 requires inclusion in the donee spouse's estate of any property held at the time of death for which a deduction was allowed under section 2523(f) or section 2056(b)(7). If the taxpayer applies for and is granted relief under Regulations section 301.9100-3 to make a late retroactive gift tax QTIP election, a deduction would have been allowed by reason of section 2523(f) and inclusion under section 2044 would be required. If there is any doubt about this, the IRS could require

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a representation from the donee spouse that any assets remaining in the QTIP trust will be included in his or her estate, such as that set forth in Regulations section 20.2056(b)-7(d)(3)(ii)(C) and signed by the donee spouse or the donee spouse's representative:
"The undersigned certifies that the property with respect to which the QTIP election is being made will be included in the gross estate of the surviving spouse as provided in section 2044 of the Internal Revenue Code, in determining the federal estate tax liability on the spouse's death."

For all of the reasons discussed above, the result reached in PLR 201025021 is appropriate, consistent with policy considerations, and within the discretion of the IRS. The requirements of the section 9100 regulations adequately protect the Government's interests by requiring that the taxpayer demonstrate that he or she acted reasonably and in good faith and that the granting of the relief does not prejudice the interests of the Government. We applaud the IRS's decision to issue PLR 201025021 and urge you to continue to issue such relief in appropriate cases.

Sincerely,

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