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July 23, 2004

Mr. George Masnik
Internal Revenue Service
1111 Constitution Avenue N.W.
ATTN: CC:DOM:P&SI Branch 4
Room 5431
Washington D.C. 20224

Re: Request for Revenue Ruling on Granting First Spouse To Die a General Power of Appointment Over the Surviving Spouse's Property

Dear Mr. Masnik:

I am writing to you on behalf of the American College of Trust and Estate Counsel (ACTEC) to request that the Internal Revenue Service (IRS) issue a revenue ruling, or similar pronouncement upon which all taxpayers may rely, dealing with the above subject matter. We think the issuance of such a ruling would be in the public interest.

Background

Not infrequently, the first spouse to die will have inadequate assets in his or her taxable estate to ensure complete use of his or her estate tax exemption. This is more likely today now that the federal estate tax exemption has risen to \$1.5 million and will be even more likely as that exemption increases in future years. Although the other spouse could make gifts to the less wealthy spouse who might die first to try to fully use the exemption of the first spouse to die, orders of death of the spouses may be difficult to forecast. Also, even if it becomes almost certain which spouse will pass away first, the couple may not contact an attorney who would be in a position to recommend property transfers between them to try to ensure that the exemption of the one dying first will be used to the maximum extent possible.

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Recent Private Letter Rulings

Over the past few years, the IRS has issued a number of private letter rulings (PLRs) that permit a married couple to structure the ownership of their property so as to attempt to use the Applicable Exclusion Amount (or Estate Tax Exemption) of the spouse who dies first. Essentially, the PLRs conclude that, to the extent the spouse first to die is granted a testamentary general power of appointment over the other spouse's assets held in a revocable trust, such assets will be included in the gross estate of the spouse dying first under section 2041 of the Internal Revenue Code of 1986, as amended (the "Code") and can be used to make use of the Estate Tax Exemption of that spouse. See, e.g., PLR 2004-03-094 (single grantor revocable trust) and PLRs 2002-10-051, 2001-01-021 (joint grantor trusts).

The rulings also have consistently held that the gift deemed made by the surviving spouse to the spouse first to die (by granting the first spouse to die a general power of appointment over the survivor's property) qualifies for the gift tax marital deduction under section 2523 of the Code. Obviously, if the gift does not qualify for the marital deduction, the result would be adverse and the arrangement probably would not be implemented.

Unfortunately, as you know, taxpayers may not rely on private letter rulings granted to others. Code section 6110(k)(3). Therefore, some practitioners may wish to use this strategy for a client if only if they obtain a private letter ruling for the client or the IRS makes its position official, such as by issuing a revenue ruling.

The PLRs have also consistently ruled that the property over which the spouse first to die is granted this general power of appointment is not entitled to an income tax-free change in basis under Code section 1014(a), which generally provides for the income tax basis of any asset included in a decedent's gross estate to be equal to its estate tax value. Although the IRS has consistently held that property over which the spouse dying first is granted the general power of appointment is included in that spouse's estate, the IRS has concluded the change in income tax basis is denied under Code section 1014(e). That section provides that no change in basis is allowed with respect to any property received by gift by the decedent within one year before his or her death that passes back at his or her death to the donor of the gift.

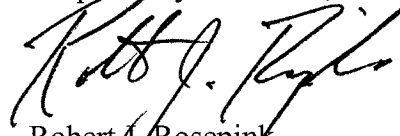
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Our Request

We respectfully request that the IRS promptly issue a revenue ruling (or other pronouncement upon which taxpayers may rely) holding, in line with the PLRs cited above, (1) that property belonging to the surviving spouse but over which the first spouse to die holds a general power of appointment exercisable at death will be included in the gross estate of the first spouse to die under Code section 2041 and against which any unused Applicable Exclusion Amount of that spouse may be applied, and (2) that the gift made by the surviving spouse to the spouse first to die by granting that spouse the general power of appointment qualifies for the marital deduction under Code section 2523 if that spouse is a U.S. citizen. (As you are well aware, Code section 2523(i) denies any gift tax marital deduction if the spouse is not a U.S. citizen.) We request that the ruling be made applicable to both a revocable trust funded solely by the surviving spouse and a so-called "joint" revocable trust (that is, one created by and funded with property of both spouses.)

We do not ask that you address the issue of the income tax basis of the property over which the first spouse to die has been granted a general power of appointment. We think that the extent to which Code section 1014(e) may apply is dependent upon how the property is disposed of. That seems to us an issue beyond the facts typically recited in the PLRs. We also note that regulations under that Code section have never been proposed. As a consequence, we believe that it may not be appropriate to address the basis issue in the revenue ruling we hope you will promulgate but only the estate and gift tax issues.

Respectfully submitted,



Robert J. Rosepink
President