



SC PRIVATE LETTER RULING #87-12

TO: The Estate of Mr. X

SUBJECT: Marital Deduction

REFERENCE: S.C. Code Ann. Section 12-15-60 (Supp. 1986)
IRS Private Letter Ruling 8325056
Internal Revenue Code 2056(b)(7)

AUTHORITY: S.C. Code Ann. Section 12-3-170 (1976)
SC Revenue Procedure #87-3

SCOPE: A Private Letter Ruling is a temporary document issued to a taxpayer, upon request, and it applies only to the specific facts or circumstances related in the request. Private Letter Rulings have no precedential value and are not intended for general distribution.

Question:

Is the Qualified Terminable Interest Property election available for all or any specific part of an interest passing to the surviving spouse pursuant to Item II of the Decedent's will whereby the spouse has complete use of the decedent's property for as long a period as she desires with full right to sell and convey, if such becomes necessary or desirable.

Facts:

Mr. X died leaving a will which devised a life estate in all realty and personality to his wife, Mrs. X. The provisions of Item II of the will are as follows:

I devise and bequeath unto my beloved wife, Mrs. X, all of the property which I possess, both realty and personalty, of every kind whatsoever and wherever situated for and during the term of her natural life, with the right to use any and all of the personalty as her own for her living expenses and in whatever manner she desires. And the further right to sell and convey by way of fee simple title any of the real estate which I own without permission of the Court or anyone else. It being my intention that my wife shall have the complete use of my property for as long a period as she desires with full right to sell and convey, if such becomes necessary or desirable.

Discussion:

Pursuant to 12-15-60, South Carolina has adopted Internal Revenue Code Section 2056. Section 2056(b)(1) of the Code provides that no deduction is allowed if a nondeductible terminable interest passes from the decedent to the surviving spouse. Generally, an interest in property is a non-deductible terminable interest where, on the occurrence of an event, an interest passing to the surviving spouse will terminate and an interest in the property passes (for less than an adequate and full consideration in money or money's worth) from the decedent to another person.

Under Section 2056(b)(7) of the Code, an executor can elect to treat property as qualified terminable interest property. If the election is made, an otherwise nonqualifying terminable interest will qualify for the marital deduction. Qualified terminable interest property is property which passes from the decedent, in which the spouse has a qualifying income interest for life, and to which an election applies. The surviving spouse has a qualifying income interest for life if:

- (1) The surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals.
- (2) No person has a power to appoint, during the spouse's lifetime, any part of the property to any person other than the surviving spouse.

In the Estate of Mr. X the second requirement disqualifies the wife's interest as qualified terminable interest property due to the fact that she has the authority to appoint the property to other than herself during her lifetime.

In IRS Private Letter Ruling 8325056 used as support for the position that the X Estate qualifies for a QTIP election, no person including the spouse, under either the terms of the will or provisions of state law, had a power to appoint any part of the property, to any person other than the spouse during his lifetime.

The testamentary language "my wife shall have the complete use of my property for as long a period as she desires with full right to sell and convey" indicates that she can dispose of her life estate by inter vivos gift. Common law creates a general prohibition against inter vivos gifts by persons holding a life estate since to do such would defeat the interests of the remaindermen. (51 Am Jur 2d Section 74) However, it has been held that where the life estate has been gifted to the remaindermen, no claims exist and the testamentary intent has been served.

Therefore, the QTIP election is not available to the X Estate.

Conclusion:

The wife's interest in the X Estate is not eligible for the Qualified Terminable Interest election because the wife has the authority to appoint the property to other than herself during her lifetime.

SOUTH CAROLINA TAX COMMISSION

s/S. Hunter Howard Jr
S. Hunter Howard, Jr., Chairman

s/John M. Rucker
John M. Rucker, Commissioner

s/A. Crawford Clarkson Jr.
A. Crawford Clarkson, Jr., Commissioner

Columbia, South Carolina
December 15, 1987