

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Janice B. Geier
Associate Area Counsel, Portland
(Small Business/Self-Employed)

from: Holly Porter
Associate Chief Counsel
(Passthroughs & Special Industries)

subject: Estate tax deductions under §§ 2055 and 2056 for discretionary interests

ISSUE

Whether a decedent's estate is entitled to an estate tax charitable deduction under § 2055 of the Internal Revenue Code or an estate tax marital deduction under § 2056 for the value of the portion of the unitrust interest of a testamentary charitable remainder unitrust that may be distributed between charity and the decedent's spouse at the discretion of a trustee.

CONCLUSION

A decedent's estate is not entitled to an estate tax deduction under § 2055 or § 2056 for the portion of the unitrust interest that may be distributed either to charity or decedent's spouse at the discretion of a trustee.

FACTS

Decedent died, survived by Spouse, leaving a portion of his estate to a testamentary trust that is a charitable remainder unitrust described in § 664 ("CRUT"). CRUT provides for annual unitrust payments of five percent for the term of Spouse's life. CRUT provides that the trustee must distribute 25 percent of the unitrust amount (i.e., 1.25 percent of CRUT) to Spouse. The trustee may distribute the remaining 75 percent

of the unitrust amount (i.e., 3.75 percent of CRUT) to either Charity or Spouse at Trustee's complete discretion. Upon Spouse's death, the trustee must distribute the remainder of CRUT to Charity.

LAW AND ANALYSIS

Section 2055(a) provides an estate tax charitable deduction where, 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 the amount of all bequests, legacies, devises, or transfers to or for the use of certain qualifying charitable organizations.

Section 2055(e)(2) restricts the estate tax charitable deduction where an interest in property (other than an interest described in § 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in § 2055(a) and an interest in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in § 2055(a). In the case of a remainder interest, § 2055(e)(2)(A) provides that no deduction is allowed for such interest unless the interest is in a trust that is a charitable remainder annuity trust or a charitable remainder unitrust described in § 664 or a pooled income fund described in § 642(c)(5). In the case of any other interest, § 2055(e)(2)(B) provides that no deduction is allowed for such interest unless the interest is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly).

Section 20.2055-2(a) of the Estate Tax Regulations provides that if a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest.

Section 2056(a) provides an estate tax marital deduction where, for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), 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 a limitation in the case of a terminable interest, where, if 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, then no deduction shall be allowed under § 2056 with respect to such interest.

Section 2056(b)(8) provides that if the surviving spouse of the decedent is the only beneficiary of a qualified charitable remainder trust who is not a charitable beneficiary, the terminable interest rule of § 2056(b)(1) shall not apply to any interest in such trust that passes or has passed from the decedent to such surviving spouse.

Section 20.2056(b)-8(a)(1) provides that if the surviving spouse of the decedent is the only noncharitable beneficiary of a charitable remainder unitrust, the value of the unitrust interest passing to the spouse qualifies for an estate tax marital deduction under § 2056(b)(8) and the value of the remainder interest qualifies for an estate tax charitable deduction under § 2055.

Section 20.2056(c)-2(a) provides, in part, that a property interest is treated as passing to the surviving spouse only if it passes to the spouse as beneficial owner. For this purpose, where a property interest passed from the decedent in trust, such interest is considered to have passed from the decedent to the surviving spouse to the extent of the surviving spouse's beneficial interest therein.

In this case, the terms of CRUT create two charitable interests: a discretionary interest in a portion of the unitrust amount and a remainder interest. Decedent's estate may claim an estate tax charitable deduction for the value of the remainder interest under § 2055(a), because CRUT is a charitable remainder unitrust described in § 664. See § 2055(e)(2)(A). However, Decedent's estate may not claim an estate tax charitable deduction under § 2055(a) for the value of any portion of the unitrust interest that may be distributed to Charity in the discretion of the trustee because Charity's interest is not in the form of a fixed unitrust amount to be distributed annually and no part of the unitrust interest is ascertainable or severable from Spouse's noncharitable interest. See § 2055(e)(2)(B) and § 20.2055-2(a).

With regard to the marital interests in CRUT, because the interest in the 25 percent portion of the unitrust amount must be distributed to and will be received by Spouse pursuant to the terms of CRUT, this interest is considered to pass from Decedent to Spouse as beneficial owner for purposes of § 2056(a). Under § 2056(b)(8), because Spouse is the only beneficiary of CRUT who is not a charitable beneficiary the interest in the 25 percent portion of the unitrust amount is not subject to the terminable interest rule in § 2056(b)(1). Accordingly, Decedent's estate may claim an estate tax marital deduction for the value of this interest under § 2056.

In contrast, the extent of Spouse's interest in the remaining 75 percent portion of the unitrust amount cannot be established as of Decedent's date of death and, therefore, is not considered to pass from Decedent to Spouse as beneficial owner for purposes of § 2056(a). The extent of Spouse's interest cannot be established because the amount to be distributed to Spouse annually is within the sole and complete discretion of the trustee. It is not possible to ascertain as of the date of death whether spouse will receive any of the 75 percent portion of the unitrust amount each year since all of such portion of the unitrust interest may be distributed to charity. Because the interest is not treated as passing to Spouse for purposes of § 2056(a), Decedent's estate may not claim an estate tax marital deduction for the value of this interest under § 2056(a).¹ See

¹ The analysis and conclusion would be the same under § 2523 for a completed gift transfer to a CRUT with similar terms. In PLR 200813006, PLR 200832017, PLR 201117005, and PLR 201845014, this office ruled that taxpayers were entitled to an estate tax marital deduction under § 2056 or a gift tax

§ 20.2056(c)-2(a). *See also Estate of Turner v. Commissioner*, 138 T.C. 306, 316 (2012) (“property that passed to a person other than a surviving spouse cannot also be considered as passing to the surviving spouse”).

Section 6110(k)(3) provides that this document may not be used or cited as precedent.

Please call Daniel J. Gespass (202) 317-4632 if you have any further questions.

Sincerely,

Associate Chief Counsel
(Passthroughs & Special Industries)

By: _____
Karlene M. Lesho
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

marital deduction under § 2523 for a unitrust interest in a CRUT that can be distributed between charity and spouse at the trustee’s discretion. The position in these earlier rulings no longer reflects the position of this office.