



American Institute of CPAs  
1455 Pennsylvania Avenue, NW  
Washington, DC 20004-1081

July 30, 2013

The Honorable Max Baucus, Chairman  
Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Dave Camp, Chairman  
House Committee on Ways & Means  
1102 Longworth House Office Building  
Washington, DC 20515

The Honorable Orrin G. Hatch  
Ranking Member  
Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Sander M. Levin  
Ranking Member  
House Committee on Ways & Means  
1236 Longworth House Office Building  
Washington, DC 20515

RE: Request for Legislation Permitting Administrative Relief for Certain Late Lifetime Qualified Terminable Interest Property Elections and Certain Late Qualified Revocable Trust Elections

Dear Chairmen Baucus and Camp, and Ranking Members Hatch and Levin:

As we stated in letters submitted to Congress on [November 18, 2011](#) and [November 16, 2010](#) and included in the AICPA compendium of legislative proposals in [February 2013](#) and [November 2010](#), the American Institute of Certified Public Accountants (AICPA) is pleased to provide our strong support for what we believe is a bipartisan measure to make needed technical changes to permit administrative relief (i.e., granting the Internal Revenue Service (IRS) permission to grant section 9100 relief) for certain late or defective lifetime (i.e., inter vivos) qualified terminable interest property (QTIP) elections and for late elections by certain qualified revocable trusts (QRTs) to be treated as part of a decedent's estate.

The AICPA is the world's largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America's largest businesses.

## **Present Law**

### Section 9100 Relief

The IRS has the authority to provide taxpayers with relief from certain late elections by granting extensions of time to make those elections. This relief, known as section 9100 relief, requires the taxpayer to establish to the satisfaction of the IRS Commissioner that the taxpayer acted reasonably and in good faith and that the grant of relief will not prejudice the

The Honorable Max Baucus  
The Honorable Dave Camp  
The Honorable Orrin G. Hatch  
The Honorable Sander M. Levin  
July 30, 2013  
Page 2 of 7

interests of the government. Section 9100 relief is available for elections, the timing of which is prescribed by regulation, rather than by statute.

#### QTIP Election

Transfers of property interests that meet the requirements to be a QTIP are eligible for the marital deduction for gift and estate tax purposes if the QTIP election is made. For QTIP transfers made when an individual dies in a year other than 2010, the QTIP election must be made by the decedent's executor on the Federal estate tax return. For an inter vivos QTIP transfer, the QTIP election must be made on the Federal gift tax return for the calendar year in which the interest is transferred. A QTIP election, once made, is irrevocable.

Section 9100 relief has been available for failures to make a QTIP election on a Federal estate tax return for over two decades, since the deadline for making that election is prescribed by regulation (Treas. Reg. § 20.2056(b)-7(b)(4)(i)). For an inter vivos QTIP, Internal Revenue Code (IRC or "Code") section 2523(f)(4)(A) provides that the QTIP election shall be made on or before the date prescribed by IRC section 6075(b) for filing a gift tax return with respect to the transfer. Because the statutory language of the gift tax and estate tax QTIP provisions is different, the IRS has determined that the deadline for making the gift tax QTIP election is statutory, and, therefore, section 9100 relief is not available. See PLR 9641023 (July 10, 1996). The present situation imposes a hardship on taxpayers as it provides no remedy – other than a malpractice action – for a taxpayer who loses the gift tax marital deduction due to an error on the part of the taxpayer's advisor.

#### QRT Election

Effective with respect to estates of decedents who die after August 5, 1997, an election may be made to have certain revocable trusts treated and taxed as part of the decedent's estate. If both the executor (if any) of an estate and the trustee of a QRT elect the treatment provided in IRC section 645 (originally enacted as section 646), the trust is treated and taxed for income tax purposes as part of the estate (and not as a separate trust) during the election period. Section 645(c) provides that the election to treat a QRT as part of the decedent's estate shall be made not later than the time prescribed for filing the return of tax imposed for the first taxable year of the estate (determined with regard to extensions).

Because the time for making the election to treat the QRT as part of the estate is prescribed by statute, we believe that the IRS would take the position that it does not have the authority to grant relief for late elections. Decedent's estates that fail to make a timely election have no recourse to cure the problem and are disadvantaged because of the errors committed by their advisors.

The Honorable Max Baucus  
The Honorable Dave Camp  
The Honorable Orrin G. Hatch  
The Honorable Sander M. Levin  
July 30, 2013  
Page 3 of 7

## **Description of Proposal**

The IRS should be authorized to grant section 9100 relief for certain late or defective lifetime (i.e., inter vivos) QTIP elections and for late elections by certain QRTs to be treated as part of a decedent's estate. This authority could be accomplished by revising the IRC to provide that the due dates for (1) the inter vivos QTIP election, and (2) the QRT election to be part of the estate are treated as if not prescribed by statute. This proposal would make the same type of statutory change in section 2523(f)(4) and section 645(c) as the change made to IRC section 2642(g)(1)(B) by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) with respect to generation skipping transfer tax (GSTT) (and extended through 2012 by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, and extended permanently by the American Taxpayer Relief Act of 2012). The provisions would apply to requests for relief pending on or filed after the date of enactment with respect to elections due before, on, or after such date. These proposed prospective effective dates are similar to the prospective effective date provision applicable to the GST exemption relief in EGTRRA.

## **Analysis**

The problems for late QTIP and QRT elections are similar to the problem that existed with the allocation of the GST exemption prior to EGTRRA. The time for making an allocation of GST exemption was fixed by statute, and numerous taxpayers were being penalized for the failures of their lawyers and accountants to properly make the allocation. EGTRRA added section 2642(g)(1)(B) of the Code, which states “[f]or purposes of determining whether to grant relief under this paragraph, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.” That language opened up the possibility of section 9100 relief for failed allocations of GST exemption. Given that statutory authority, the IRS has granted 9100 relief in hundreds of cases.

This proposal would make the same type of statutory change in section 2523(f)(4) and section 645(c) as was made by EGTRRA in section 2642(g)(1)(B) (and extended through 2012 by the 2010 Act), so that taxpayers would not be penalized for the errors of their lawyers or accountants in failing to make a QTIP election on the Federal gift tax return or a QRT election to be part of an estate on the estate's first Federal income tax return.

We note that legislation to provide administrative relief for inter vivos QTIP elections has been introduced previously and was even reported by the Senate. Specifically, in the 109<sup>th</sup> Congress, on June 28, 2006, [S. 1321](#), the Telephone Excise Tax Repeal Act of 2005, as reported by the Senate, included Section 713, Administrative Relief for Certain Late Qualified Terminable Interest Property Elections (see [Report 109-336](#) and [JCX-28-06](#)).<sup>i, ii, iii</sup> In addition, on July 25, 2006, [H.R. 5884](#), was introduced in the House of Representatives to

The Honorable Max Baucus  
The Honorable Dave Camp  
The Honorable Orrin G. Hatch  
The Honorable Sander M. Levin  
July 30, 2013  
Page 4 of 7

authorize the Secretary of the Treasury to extend the date for making a gift tax QTIP election.<sup>iv</sup>

It should be noted that a QTIP election does not forgive estate or gift tax, it merely defers imposition of the tax until the death of the donee spouse; therefore, the proposal regarding QTIP elections would be of minimal cost (estimated in 2006 at \$2 million over 10 years per JCX-29-06). Similarly, the QRT election does not forgive tax, it just treats the trust during the election period as part of the estate for income tax purposes, rather than as a separate trust, so we expect this proposal as well would be of minimal cost.

### **Conclusion/Recommendation**

We urge the enactment of legislative provisions stating that the due dates for the inter vivos QTIP election and for the QRT election to be part of the estate are treated as if not prescribed by statute, thus allowing the IRS to grant administrative relief for certain late QTIP and QRT elections.

\* \* \* \* \*

We thank you for the opportunity to present our support for this legislative proposal. Please feel free to contact me at (304) 522-2553, or [jporter@portercpa.com](mailto:jporter@portercpa.com); Frances Schafer, Chair of the AICPA Trust, Estate, and Gift Tax Technical Resource Panel, at [fran.schafer@us.gt.com](mailto:fran.schafer@us.gt.com), or (202) 521-1511; or Eileen R. Sherr, AICPA Senior Technical Manager, at (202) 434-9256, or [esherr@aicpa.org](mailto:esherr@aicpa.org), to discuss the above comments or if you require any additional information.

Sincerely,



Jeffrey A. Porter, CPA  
Chair, AICPA Tax Executive Committee

---

<sup>i</sup> [S. 1321](#) (109<sup>th</sup> Congress) SEC. 713. ADMINISTRATIVE RELIEF FOR CERTAIN LATE QUALIFIED TERMINABLE INTEREST PROPERTY ELECTIONS. (<http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c109vlduDi>)

(a) Extension of Time to Make Elections- Section 2523(f)(4)(A) (relating to time and manner of election with respect to life estate for donee spouse) is amended by adding at the end the following new sentence: `Such regulations shall provide circumstances and procedures under which extensions of time will be granted to make the election under this subparagraph. For purposes of the preceding sentence, the time for making the election shall be treated as if not prescribed by statute.'.

---

(b) Effective Date- The modifications to the regulations required by the amendment made by subsection (a) shall apply to requests for extension of time pending on or after the date of the enactment of this Act with respect to transfers made before, on, or after such date.

<sup>ii</sup> [Report 109-336](#), [To accompany S. 1321], TITLE VII--MISCELLANEOUS PROVISIONS,

#### **M. PERMIT ADMINISTRATIVE RELIEF FOR CERTAIN LATE QUALIFIED TERMINABLE INTEREST PROPERTY ELECTIONS**

*(Sec. 713 of the bill and sec. 2523 of the Code)*

##### ***PRESENT LAW***

A 100-percent marital deduction generally is permitted for the value of property transferred between spouses. Transfers of 'qualified terminable interest property' also are eligible for the marital deduction. 'Qualified terminable interest property' (or 'QTIP') is property: (1) that passes from the decedent, (2) in which the surviving spouse has a 'qualifying income interest for life,' and (3) with respect to which a timely election has been made. A 'qualifying income interest for life' exists if: (1) the surviving spouse is entitled to all the income from the property (payable annually or at more frequent intervals) or has the right to use the property during the spouse's life, and (2) no person has the power to appoint any part of the property to any person other than the surviving spouse.

A QTIP transfer may occur by way of a lifetime gift (i.e., an inter vivos QTIP transfer) or at death. In the event of a QTIP transfer made at a decedent's death, the QTIP election must be made by the decedent's executor on the estate tax return. In the event of an inter vivos QTIP transfer, the QTIP election generally must be made on the gift tax return for the calendar year in which the interest is transferred, and the election must be made within the time prescribed for filing such return. A QTIP election, once made, is irrevocable.

##### ***REASONS FOR CHANGE***

The IRS, under certain circumstances, has granted relief for late QTIP elections for estate tax purposes by granting an extension of time to make such an election. In the event a taxpayer fails to make a QTIP election for an inter vivos QTIP transfer within the prescribed timeframe, the extent of the IRS's authority to grant similar relief is unclear.

##### ***EXPLANATION OF PROVISION***

The provision directs the Secretary to issue regulations prescribing the circumstances and procedures under which extensions of time will be granted to make a QTIP election for an inter vivos QTIP transfer, including elections with respect to transfers that occurred prior to the effective date of the provision. For this purpose, the due date of the election is treated as if not prescribed by statute. In determining whether to grant an extension of time, it is intended that the Secretary shall take into account all circumstances the Secretary deems relevant.

##### ***EFFECTIVE DATE***

The provision applies to requests for relief pending on or after the date of enactment with respect to transfers made before, on, or after such date.

The Honorable Max Baucus  
The Honorable Dave Camp  
The Honorable Orrin G. Hatch  
The Honorable Sander M. Levin  
July 30, 2013  
Page 6 of 7

---

<sup>iii</sup> [JCX-28-06](#), **DESCRIPTION OF THE CHAIRMAN’S MODIFICATION TO THE PROVISIONS OF S. 1321, THE “TELEPHONE EXCISE TAX REPEAL ACT OF 2005” AND S. 832, THE “TAXPAYER PROTECTION AND ASSISTANCE ACT OF 2005”** Scheduled for Markup By the SENATE COMMITTEE ON FINANCE on June 28, 2006, Prepared by the Staff of the JOINT COMMITTEE ON TAXATION, June 28, 2006

p. 116, VI. MISCELLANEOUS,  
**M. Permit Administrative Relief for Certain Late Qualified Terminable Interest Property Elections**

#### **Present Law**

A 100-percent marital deduction generally is permitted for the value of property transferred between spouses. Transfers of “qualified terminable interest property” also are eligible for the marital deduction. “Qualified terminable interest property” (or “QTIP”) is property: (1) that passes from the decedent, (2) in which the surviving spouse has a “qualifying income interest for life,” and (3) with respect to which a timely election has been made. A “qualifying income interest for life” exists if: (1) the surviving spouse is entitled to all the income from the property (payable annually or at more frequent intervals) or has the right to use the property during the spouse’s life, and (2) no person has the power to appoint any part of the property to any person other than the surviving spouse.

A QTIP transfer may occur by way of a lifetime gift (i.e., an *inter vivos* QTIP transfer) or at death. In the event of a QTIP transfer made at a decedent’s death, the QTIP election must be made by the decedent’s executor on the estate tax return. In the event of an *inter vivos* QTIP transfer, the QTIP election generally must be made on the gift tax return for the calendar year in which the interest is transferred, and the election must be made within the time prescribed for filing such return. A QTIP election, once made, is irrevocable.

The IRS, under certain circumstances, has granted relief for late QTIP elections for estate tax purposes by granting an extension of time to make such an election. In the event a taxpayer fails to make an *inter vivos* QTIP election within the prescribed timeframe, the extent of the IRS’s authority to grant similar relief is unclear.

#### **Description of Proposal**

The proposal directs the Secretary to issue regulations prescribing the circumstances and procedures under which extensions of time will be granted to make an *inter vivos* QTIP election, including elections with respect to transfers that occurred prior to the effective date of the proposal. The proposal provides that in determining whether to grant an extension of time, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the proposal provides that the time specified in the Code for making an *inter vivos* QTIP election shall be disregarded.

#### **Effective Date**

The proposal applies to requests for relief with respect to transfers made before, on, or after the date of enactment.

<sup>iv</sup> [HR 5884 IH](#) (<http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c109cGZvOZ>)

The Honorable Max Baucus  
The Honorable Dave Camp  
The Honorable Orrin G. Hatch  
The Honorable Sander M. Levin  
July 30, 2013  
Page 7 of 7

---

2d Session

**H. R. 5884**

To amend the Internal Revenue Code of 1986 to authorize the Secretary of the Treasury to extend the date for making a gift tax qualified terminable interest property election.

**IN THE HOUSE OF REPRESENTATIVES**

**July 25, 2006**

Mr. RAMSTAD introduced the following bill; which was referred to the Committee on Ways and Means

---

**A BILL**

To amend the Internal Revenue Code of 1986 to authorize the Secretary of the Treasury to extend the date for making a gift tax qualified terminable interest property election.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. AUTHORITY TO EXTEND PERIOD FOR MAKING QTIP ELECTION UNDER THE GIFT TAX.**

(a) In General- Paragraph (4) of section 2523(f) of the Internal Revenue Code of 1986 (relating to qualified terminable interest property election) is amended by adding at the end the following new subparagraph:

**`(C) AUTHORITY TO EXTEND PERIOD FOR MAKING ELECTION-**

**`(i) IN GENERAL-** The Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an election under this subsection. Such regulations shall include procedures for requesting comparable relief with respect to transfers made before the date of the enactment of this subparagraph.

**`(ii) BASIS FOR DETERMINATIONS-** In determining whether to grant relief under this subparagraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief under this subparagraph, the time for making the election shall be treated as if not expressly prescribed by statute.'

(b) Effective Date- Section 2523(f)(4)(C) of the Internal Revenue Code of 1986 (as added by subsection (a)) shall apply to requests pending on, or filed after, the date of the enactment of this Act.