

contingent nonperiodic payments. Some commentators have argued that CDSs with periodic payments, among other features, meet the definition of a notional principal contract; however, commentators disagree about the scope of CDSs that may fall within the definition of notional principal contract. Payments with respect to a notional principal contract generally are not subject to withholding. Trading in such notional principal contracts may not give rise to a trade or business within the United States. Special timing rules may apply to notional principal contracts.

A CDS has been analogized to a guarantee. Guarantee fees have been analogized to commissions for letters of credit, which are sourced in the same manner as interest. See *Centel Communications Co. v. Commissioner*, 920 F.2d 1335, 1343–1344 (7th Cir. 1990) (citing *Bank of America*). In addition, guaranteeing obligations and issuing standby letters of credit from within the United States could constitute engaging in a trade or business within the United States. Some commentators have distinguished CDSs from guarantees on the basis that a credit event under a CDS requires performance by the protection seller without regard to whether the protection buyer sustains an actual loss. A relevant factor in this regard may be how much of the CDS protection-buying market consists of persons who do not have or expect to be exposed to credit risk.

A CDS has been analogized to a form of insurance. Insurance premiums paid to a foreign person with respect to a U.S. risk are subject to excise tax. Moreover, insuring risks from within the United States could constitute engaging in a trade or business within the United States. Some commentators have distinguished CDSs from insurance on the basis, as described above, that no actual loss need be sustained in order to give rise to an obligation under a CDS. Some commentators have noted the Supreme Court's opinion in *Helvering v. LeGierse*, 312 U.S. 531 (1941), that the essence of insurance activity is the shifting and distribution of insurance risk. These commentators have suggested that many protection sellers do not shift or distribute risk with respect to CDSs in this way, and that it is not clear how a protection buyer could know how its counterparty manages risk with respect to a particular CDS.

Some commentators have suggested consideration of an approach to determine the tax treatment of CDSs other than classification by analogy to other types of financial transaction. Instead, they have proposed that the tax treatment of payments with respect to a CDS could be determined by analyzing various elements of the CDS transaction, including the nature of the reference obligation and whether a party to the CDS provides financial services to customers.

IV. REQUEST FOR COMMENTS

The foregoing brief overview indicates that the economic similarity of a CDS to various financial transactions tends to blur the distinctions between possible analogies and that the various analogies correspond to significantly different tax treatment.

Treasury and the IRS believe that additional information is needed in order to respond to taxpayer requests for specific guidance regarding the appropriate tax treatment of amounts paid and received with respect to a CDS. Treasury and the IRS are particularly interested in information regarding:

- CDS contractual terms, both standard and negotiated, particularly with respect to credit events, subrogation rights, security interests in collateral, and collateralization requirements in general;
- CDS pricing, particularly with respect to guarantees, contingent options, and insurance;
- operation of the CDS market, particularly with respect to price quotation and dissemination;
- market practice regarding hedging, the management of basis risk, and the timing of CDS transactions relative to the assumption and disposition of analogous risks; and
- the regulatory capital, GAAP, and internal booking treatment of CDSs by various market participants.

Treasury and the IRS also welcome any other information that market participants believe may be relevant.

V. SUBMISSION OF COMMENTS

Taxpayers may submit written comments to: CC:PA:LPD:PR (Notice 2004–52), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2004–52), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by submitting comments electronically via the following e-mail address: Notice.Comments@irs.counsel.treas.gov. Please include: Notice 2004–52 in the subject line of any electronic communications.

DRAFTING INFORMATION

The principal authors of this notice are Paul Epstein, Theodore Setzer, and Steven Jensen of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Mr. Epstein, Mr. Setzer, or Mr. Jensen at (202) 622–3870 (not a toll-free call).

26 CFR 601.201: Rulings and determination letters. (Also, Part I, §§ 2056, 2652; 26.2632–1, 26.2652–1, 26.2652–2, 301.9100–3.)

Rev. Proc. 2004–47

SECTION 1. PURPOSE

This revenue procedure provides a simplified alternate method for certain executors of estates and trustees of trusts to request relief to make a late reverse qualified terminable interest property (QTIP) election under § 2652 of the Internal Revenue Code. This alternate method may be used in lieu of the normal letter ruling process. No user fee is charged for requests filed under this revenue procedure.

SECTION 2. BACKGROUND

.01 Under § 2001(a), the estate tax is imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States. Section 2056(a) provides that for purposes of § 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 the value of any interest in property that passes or has passed from the decedent to the decedent's surviving spouse. Section 2056(b) generally provides that no deduction is allowed for an interest passing to the surviving spouse 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, the interest will terminate or fail. Section 2056(b)(7) provides an exception for property meeting the QTIP requirements in § 2056(b)(7)(B).

.02 Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" as property: (1) that passes from the decedent; (2) in which the surviving spouse has a qualifying income interest for life; and (3) to which an election under § 2056(b)(7) applies. Property for which a QTIP election is made is treated as passing to the surviving spouse for purposes of determining the decedent's taxable estate. The value of any property that was deducted under § 2056(b)(7) from the decedent's gross estate and that remains on the surviving spouse's death will be included in the surviving spouse's gross estate under § 2044. If the surviving spouse makes a lifetime disposition of all or a portion of the qualifying income interest, § 2519 provides that the surviving spouse is treated for estate and gift tax purposes as transferring all interests in the property other than the qualifying income interest. Furthermore, the transfer of the qualifying income interest is subject to the gift tax under § 2511 and § 25.2511-2.

.03 Chapter 13 imposes a generation-skipping transfer (GST) tax on all transfers, whether made directly or indirectly, to skip persons. Under § 2613(a), a skip person is a person who is two or more generations younger than the transferor or is a trust if all of the interests are held by skip persons. Under § 2652, the transferor generally is the individual who transfers property in a transaction subject to the federal gift or estate tax. Under § 2611(a), transfers that are subject to the GST tax include direct skips, taxable distributions, and taxable terminations.

.04 Section 2631 allows every transferor a GST tax exemption of \$1,000,000 that may be allocated by the individual (or the individual's executor) to any property

with respect to which the individual is the transferor. For calendar years after 1998, this exemption amount has been indexed for inflation. For transfers made between January 1, 2004, and December 31, 2009 (inclusive), the GST exemption will equal the amount that is exempted from transfer tax by the applicable credit amount described in § 2010. With respect to transfers made at death, the allocation of a decedent's GST tax exemption is made on the decedent's Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*. A decedent's unused GST tax exemption is automatically allocated on the due date for filing the decedent's Form 706 to the extent not otherwise allocated by the decedent's executor on or before that date.

.05 Section 2632(e) and § 26.2632-1(d)(2) of the Generation-Skipping Transfer Tax Regulations supply the method for the automatic allocation of any unused GST tax exemption. The exemption is first allocated *pro rata* to direct skips treated as occurring on death on the basis of the value of property as finally determined for federal estate tax purposes. The balance, if any, is then allocated *pro rata*, on the basis of estate tax value, to trusts with respect to which a taxable termination may occur or from which a taxable distribution may be made. In the case of trusts that are not included in the gross estate, the GST tax exemption is allocated on the basis of the date of death value of the trust. No automatic allocation is made to a trust that will have a new transferor with respect to the entire trust prior to the occurrence of any GST with respect to the trust. The automatic allocation of GST tax exemption is irrevocable.

.06 With respect to QTIP, the decedent's surviving spouse will become the new transferor with respect to the entire trust before the occurrence of any GST from the trust. Accordingly, a decedent's GST tax exemption is not automatically allocated to property for which a QTIP election was made. Section 2652(a)(3) provides, however, that if an election is made to treat property as QTIP under § 2056(b)(7), the person making the election may, for purposes of chapter 13, elect to treat the property as if the QTIP election had not been made (reverse QTIP election). As a result of the reverse QTIP election, the decedent remains, for GST

tax purposes, the transferor of the QTIP trust or property. The decedent's GST tax exemption, accordingly, may be allocated to the QTIP trust or property, either by an affirmative allocation or by the automatic allocation of the decedent's remaining GST tax exemption. The reverse QTIP election is made on the same return on which the QTIP election is made.

.07 To date, the Internal Revenue Service has issued several private letter rulings providing relief to taxpayers who failed to make a reverse QTIP election on a timely filed Form 706 and who have satisfied the requirements of § 301.9100-3 of the Procedure and Administration Regulations. Section 301.9100-3(a) generally provides that requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

SECTION 3. SCOPE

.01 *In General*. Except as otherwise provided in sections 3.02 and 3.03 of this revenue procedure, the alternate simplified procedure authorized in this revenue procedure for obtaining permission to file a late reverse QTIP election is available if the requirements of sections 4.02 and 4.03 of this revenue procedure are met.

.02 *Certain Late Reverse QTIP Elections*. This revenue procedure does not apply to *intervivos* transfers to or for the benefit of a spouse, or to transfers to or for the benefit of a non-citizen spouse in the form of a qualified domestic trust. Relief under this revenue procedure does not include or grant permission to make a late severance of a trust included in the gross estate or to allocate GST exemption. Accordingly, permission to file a late reverse QTIP election in conjunction with a late severance or an allocation of GST exemption must be requested through the letter ruling process as described in section 3.03 of this revenue procedure.

.03 *Failure to Qualify for Relief Under This Revenue Procedure*. An executor who is denied relief or is otherwise outside the scope of this revenue procedure may request relief under § 301.9100-3 by requesting a letter ruling. The procedural

requirements for requesting a letter ruling are described in Rev. Proc. 2004-1, 2004-1 I.R.B. 1 (or its successor). If a letter ruling is requested after relief has been denied under this revenue procedure, the letter ruling request must indicate that relief was requested and denied under this revenue procedure. Rev. Proc. 2004-1, Appendix C, 2004-1 I.R.B. 1, 70.

SECTION 4. RELIEF FOR UNTIMELY REVERSE QTIP ELECTIONS

.01 Definitions.

(1) *Executor.* Solely for purposes of this revenue procedure, the term executor includes: an executor of an estate as defined in § 2203 and §§ 20.2203-1 and § 20.2056(b)-7(b)(3) of the Estate Tax Regulations; the trustee of the QTIP trust; or any other person in actual or constructive possession of the property, for which the reverse QTIP election will be made.

(2) *Decedent.* For purposes of this revenue procedure, the term decedent refers to the individual for whose estate the reverse QTIP election was not timely made.

(3) *Reverse QTIP Election.* For purposes of this revenue procedure, a reverse QTIP election refers to the affirmative indication on Schedule R of Form 706 by the executor to treat the decedent as the transferor for GST purposes of the QTIP trust or property to which the election pertains. As a result of this election, the decedent's GST tax exemption may be allocated to the QTIP trust or property. This is the case even though the surviving spouse or the surviving spouse's estate will be subject to the gift or estate tax with respect to the property before the property passes to a skip person.

(4) *Due Date of the Reverse QTIP Election.* Section 26.2652-2(b) provides that the reverse QTIP election is made on the return on which the QTIP election is made. Section 20.2056(b)-7(b)(4)(i) provides that the QTIP election under § 2056(b)(7) must be made on the last estate tax return filed by the executor on or before the due date of the return, including extensions (if any). If a timely return is not filed, the election must be made on the first estate tax return filed by the executor after the due date. Estate tax returns must be filed within 9 months after the date of the decedent's death, not including extensions.

.02 *Eligibility for Relief.* Relief is available under section 4.02 of this revenue procedure if, on the date of the filing of the request described in 4.03 of this revenue procedure, the following requirements are met:

(1) A valid QTIP election under § 2056(b)(7) was made for the property or trust on the federal estate tax return filed for the decedent's estate;

(2) The reverse QTIP election was not made on the estate tax return as filed because the taxpayer relied on the advice and counsel of a qualified tax professional and that qualified tax professional failed to advise the taxpayer of the need, advisability, or proper method to make a reverse QTIP election;

(3) The decedent has a sufficient amount of unused GST exemption, after the automatic allocation of the GST exemption under § 2632(e) and § 26.2632-1(d)(2), to result in a zero-inclusion ratio for the reverse QTIP trust or property;

(4) The estate is not eligible under § 301.9100-2(b) for an automatic 6-month extension;

(5) The surviving spouse has not made a lifetime disposition of all or any part of the qualifying income interest for life in the QTIP trust or property;

(6) The surviving spouse is alive or no more than 6 months have passed since the death of the surviving spouse; and

(7) Relief is requested by the executor in accordance with section 4.03 of this revenue procedure.

.03 Procedural Requirements for Relief.

(1) The estate must file with the Internal Revenue Service a request for an extension of time to make a reverse QTIP election. The request should have a cover sheet requesting relief that states at the top of the document "REQUEST FOR EXTENSION FILED PURSUANT TO REV. PROC. 2004-47." The following items must be attached to the request for relief:

(a) Copies of Parts 1 through 5 and Schedule M of the original estate tax return filed with the Service;

(b) A properly completed Schedule R as required to make the reverse QTIP election;

(c) A statement describing why the reverse QTIP election was not made on the estate tax return as filed;

(d) A statement affirming that all of the requirements in section 4.02 of this revenue procedure have been met;

(e) A dated declaration, signed by the executor of the estate (as defined above), that states: "Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented in support of this election are true, correct, and complete. In addition, all attachments provided in support of this request for relief are true and correct copies of the original documents."; and

(f) A signed statement from the qualified tax professional on whom the taxpayer relied when preparing the original estate tax return. The statement should establish the tax professional's qualifications as a qualified tax professional and must include a dated declaration that states: "Under penalties of perjury, I declare that, to the best of my knowledge and belief, the facts presented in support of this request for relief are true, correct, and complete."

(2) Subject to any contrary instructions in future forms, instructions, or guidance published by the Service, the request should be sent to the Cincinnati Service Center for processing.

(a) If a private delivery service is used, the request should be sent to:

Internal Revenue Service Center
201 W. Rivercenter Blvd.
Covington, KY 41012;

(b) If a private delivery service is not used, the request should be sent to:

Internal Revenue Service Center
Cincinnati, OH 45999.

.04 *Relief for Late Reverse QTIP Election.* Upon receipt of a request for relief under section 4.03 of this revenue procedure, the Service Center will determine whether the requirements for granting additional time to file the reverse QTIP election under this revenue procedure have been satisfied and will notify the executor of the result of this determination.

.05 *Effect of Relief.* An extension of time to make the reverse QTIP election under § 2652(a)(3) does not extend the time to make an allocation of any remaining GST exemption. However, once the election is made, the decedent remains, for GST tax purposes, the transferor of the

QTIP trust or property. As a result, the decedent's remaining GST tax exemption will be automatically allocated pursuant to § 2632(e) and § 26.2632-1(d)(2) to the QTIP trust or property for which the reverse QTIP election was made, based on the value of the trust or property as finally determined for federal estate tax purposes. The relief provided by this revenue procedure does not include or grant permission to allocate retroactively the decedent's remaining GST exemption or to make a late severance of a trust included in the gross estate.

SECTION 5. EFFECTIVE DATE

.01 *In General.* This revenue procedure is effective August 9, 2004.

.02 *Transition Rule for Pending Letter Ruling Requests.* If an executor has filed a request for a letter ruling seeking relief to file a reverse QTIP election under § 301.9100-3 and that letter ruling request is pending in the national office on August 9, 2004, the executor may withdraw the letter ruling request and receive a refund of its user fee if prior to September 23, 2004, the executor notifies the national office that it will withdraw the letter ruling request. If the executor does not so notify the national office by September 23, 2004, the national office will process letter ruling requests pending on August 9, 2004, and will retain the user fee paid.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1898.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in section 4. This information is required to be submitted to the applicable service center in order to obtain an extension of time to make a late reverse QTIP election. This information will be used to determine whether the eligibil-

ity requirements for obtaining relief have been met. The collection of information is required to obtain a benefit. The likely respondents are estates and trusts.

The estimated total annual reporting burden is 54 hours.

The estimated average annual burden per respondent is 9 hours to complete the statements required under this revenue procedure. The estimated number of respondents is 6.

There is no estimated annual frequency of responses as the reverse QTIP election is a one-time election.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal author of this revenue procedure is DeAnn K. Malone of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact DeAnn K. Malone at (202) 622-7830 (not a toll-free call).

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement.

(Also §§ 1361, 1362; 301.7701-1, 301.7701-2, 301.7701-3, 301.9100-1, 301.9100-3.)

Rev. Proc. 2004-48

SECTION 1. PURPOSE

This revenue procedure provides a simplified method for taxpayers to request relief for a late S corporation election and a late corporate classification election which was intended to be effective on the same date that the S corporation election was intended to be effective. Generally, this revenue procedure provides that certain eligible entities may be granted relief if the entity satisfies the requirements of section 4 of this revenue procedure.

SECTION 2. BACKGROUND

.01 *S Corporation Elections.*

(1) *In general.* Section 1361(a)(1) of the Internal Revenue Code provides that

the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for that year.

Section 1362(b)(1) provides that a corporation may make an election to be treated as an S corporation for any taxable year (A) at any time during the preceding taxable year, or (B) at any time during the taxable year and on or before the 15th day of the 3rd month of the taxable year.

Section 1362(b)(3) provides that if (A) a small business corporation makes an election under § 1362(a) for any taxable year, and (B) the election is made after the 15th day of the 3rd month of the taxable year and on or before the 15th day of the 3rd month of the following taxable year, then the election shall be treated as made for the following taxable year.

(2) *Late S corporation elections.* Section 1362(b)(5) provides that if (A) an election under § 1362(a) is made for any taxable year (determined without regard to § 1362(b)(3)) after the date prescribed by § 1362(b) for making the election for the taxable year or no election is made for any taxable year, and (B) the Secretary determines that there was reasonable cause for the failure to timely make the election, the Secretary may treat the election as timely made for the taxable year (and § 1362(b)(3) shall not apply).

.02 *Entity Classification Elections.*

(1) *In general.* Section 301.7701-2(a) of the Procedure and Administration Regulations defines a "business entity" as any entity recognized for federal tax purposes that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Code.

Section 301.7701-3(a) provides that a business entity that is not classified as a corporation under § 301.7701-2(b)(1), (3), (4), (5), (6), (7), or (8) (an "eligible entity") can elect its classification for federal tax purposes as provided in this section.

Section 301.7701-3(b)(1) provides that, except as otherwise provided in paragraph (b)(3) of that section, unless the entity elects otherwise, a domestic eligible entity is (i) a partnership if it has two or more members; or (ii) disregarded as an entity separate from its owner if it has a single owner.

Section 301.7701-3(c)(1) provides that an eligible entity may elect to be classified other than as provided in § 301.7701-3(b)