



Qualified Domestic Trust (“QDOT”)

Estate Tax Marital Deduction

IRC § 2056 allows an unlimited estate tax marital deduction for qualified interests that pass to a decedent’s surviving spouse. The estate tax marital deduction essentially defers estate taxes until the death of the surviving spouse. All of the assets of the deceased spouse that are left outright or in a marital trust for the surviving spouse are potentially available for the needs of the surviving spouse and are not reduced by estate tax at the first death. Deferring the estate tax is advantageous because of the increasing estate tax exemption amount available to the surviving spouse, and because the surviving spouse, with careful planning, can reduce the size of his or her taxable estate.

EXAMPLE: H died in 2000 leaving \$500,000 to a QTIP trust for W, all of which qualifies for the estate tax marital deduction in H’s estate. No estate tax was due at H’s death. W died in 2009 when the estate tax exemption amount was \$3,500,000, and the QTIP trust was worth \$600,000. Estate tax would have been payable by W’s estate only if W’s other assets exceeded \$2,900,000.

Requirements. An interest transferred to a surviving spouse must meet all of the following requirements in order to qualify for the estate tax marital deduction.

(1) Interest Must be Includible in Decedent’s Gross Estate. It would not make sense to apply a deduction if the property against which the deduction is to apply were not included in the gross estate.

(2) Decedent is Survived by a Surviving Spouse Who is a U.S. Citizen. If the surviving spouse is not a U.S. citizen, the marital deduction is available only for transfers to a qualified domestic trust under IRC §§ 2056(d) and 2056A.

(3) Interest Must “Pass” to the Surviving Spouse. Under IRC § 2056(c), an interest in property “passes” to the surviving spouse if it passes to the surviving spouse by bequest or devise, inheritance, dower or curtesy, *inter vivos* transfer, joint tenancy with right of survivorship, the exercise or nonexercise of a power of appointment or life insurance.

(4) Interest Must be Deductible (Not a Nondeductible Terminable Interest). The terminable interest rule provides that the marital deduction is not available for interests that terminate or fail upon a lapse of time or the occurrence or nonoccurrence of an event if a person other than the surviving spouse receives the property after the termination of the surviving spouse’s interest. IRC § 2056(b)(1).

Estate Tax Marital Deduction for Non-U.S. Citizen Surviving Spouse

Generally, the estate tax marital deduction is not allowed for transfers to a non-U.S. citizen surviving spouse. IRC § 2056(d)(1). The rationale is to make sure that the



property for which the marital deduction is allowed will later be subject to federal estate tax in the surviving spouse's estate. There are two exceptions to this rule:

(1) Resident Spouse Becomes Citizen Prior to Due Date of Estate Tax Return. The estate tax marital deduction is allowed if the non-U.S. citizen surviving spouse was a U.S. resident at all times after the decedent's date of death and before becoming a U.S. citizen, and if the surviving spouse becomes a U.S. citizen before the federal estate tax return is due (including extensions). IRC § 2056(d)(4).

(2) Qualified Domestic Trust ("QDOT"). The estate tax marital deduction is allowed for property transferred to a QDOT for the non-U.S. citizen surviving spouse's benefit. IRC § 2056(d)(2).

QDOT Requirements

IRC § 2056A(a) provides that a trust is a QDOT that qualifies for the estate tax marital deduction if all of the following requirements are met:

- At least one trustee is a U.S. citizen or a domestic corporation.
- No distribution (other than income) may be made from the trust unless the trustee who is a U.S. citizen or domestic corporation has the right to withhold from the distribution the tax imposed by IRC § 2056A on such distributions.
- The decedent's executor makes an irrevocable election to treat the trust as a QDOT on the decedent's federal estate tax return.
- The trust separately meets the requirements of IRC § 2056(b) (e.g., a general power of appointment trust, QTIP trust).

Tax on Distributions From QDOT

Under IRC § 2056A(b), certain distributions from a QDOT (other than income or hardship distributions) before the surviving spouse's date of death and any property remaining in the QDOT at the surviving spouse's death may be subject to estate tax at the rate described in IRC § 2056A(b)(2).