1983 WL 182049 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 3, 1983

***1 SUBJECT: Taxation and Revenue—Estate Taxes—Election To Qualify Property As Qualified Terminal Interest Property (QTIP).**
An executor may elect to claim a marital deduction for Qualified Terminal Interest Property (QTIP) for South Carolina estate tax purposes under § 12-15-60 without regard to his election (or lack thereof) made for federal estate tax purposes.

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QUESTION:

May an executor make an election concerning Qualified Terminal Interest Property (QTIP) for South Carolina estate tax purposes without regard to his election for federal estate tax purposes?

APPLICABLE LAW:

§ 12-15-60, South Carolina Code of Laws, 1976, as amended; §§ 2053 and 2056, Internal Revenue Code of 1954, as amended to December 31, 1975 and December 31, 1982, respectively.

DISCUSSION:

Section 2056(b)(7) of the Internal Revenue Code of 1954 (IRC), as such was amended through December 31, 1982, allows a marital deduction to an estate for property which passes from the decedent in which the surviving spouse has a qualifying income interest for life and to which an election to claim the deduction is made on the estate tax return. Section 12-15-60 provides in part:
'For purposes of the tax imposed by § 12-15-10, the value of the taxable estate shall be determined by deduction from the value of the gross estate the exemptions and deductions allowed for Federal Estate Tax purposes pursuant to Section 2051 and Sections 2053 through 2055, inclusive, of the Internal Revenue Code of 1954, as amended through December 31, 1975, and Section 2056 of the Internal Revenue Code of 1954, as amended through December 31, 1982.'

Our Supreme Court has found that § 12-15-60 adopts by reference IRC § 2056. Clark v. South Carolina Tax Commission, 259 S.C. 161, 191 S. E. 2d 23, 24 (1972) and White v. South Carolina Tax Commission, 253 S. C. 79, 169 S. E. 2d 143, 145 and 147 (1969). An adoption by reference:
'* * * is as effectual as though the whole statute were re-enacted verbatim.' (Cites omitted) Santee Mills v. Query, 122 S. C. 158, 115 S. E. 202 (1922).

To the same effect, see 73 Am. Jur. 2d, Statutes, § 28.

The effect of IRC § 2056 being read as though it is re-enacted verbatim is to permit an executor to make an election under adopted IRC § 2056(b)(7) for South Carolina estate tax purposes without regard to the election (or lack thereof) made for federal estate tax purposes.

This view is supported by the longstanding administrative policy of the Tax Commission to permit deductions of IRC § 2053 administrative expenses under § 12-15-60 without regard to the treatment of such expenses by the estate in filing its federal estate tax return. Such longstanding policies should not be overturned without cogent reasons, and where an administrative interpretation of a statute has been applied for a number of years without being changed by the Legislature despite amendments to the statute, a presumption is created that such interpretation is correct. Ryder Truck Lines, Inc. v. South Carolina Tax Commission, 248 S. C. 148, 149 S. E. 2d 435, 437 (1966); Etiwan Fertilizer Co. v. South Carolina Tax Commission, 217 S. C. 354, 60 S. E. 2d 682, 684 (1950). To find that an election for a marital deduction for South Carolina purposes is dependent upon an election for federal purposes would likewise require a reversal in the policy of allowing independent state and federal elections for administrative expenses. There appears to be no cogent reasons to change such interpretation especially in light of the numerous amendments to § 12-15-60 which have not sought to change the administrative interpretation of separate elections.

CONCLUSION:

***2** An executor may elect to claim a marital deduction for Qualified Terminal Interest Property (QTIP) for South Carolina estate tax purposes under § 12-15-60 without regard to his election (or lack thereof) made for federal estate tax purposes.

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