

**Internal Revenue Service**

Department of the Treasury  
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Person To Contact: \_\_\_\_\_, ID No.

Telephone Number:

Refer Reply To:  
CC:PSI:B04  
PLR-104372-07

Date:  
May 22, 2007

In Re:

**Legend:**

Decedent	=
Spouse	=
Trust	=
Court	=
Date 1	=
Date 2	=

Dear \_\_\_\_\_ :

This is in response to a letter dated January 10, 2007, submitted by your personal representative, and subsequent correspondence, requesting rulings under §§ 61, 643, 661, 662, 1001, 1015, 1223, 2036, 2037, 2038, 2501, and 2601 of the Internal Revenue Code.

The facts submitted and the representations made are as follows. Decedent died on Date 1, a date prior to September 25, 1985. Pursuant to the terms of his Will, a testamentary trust (Trust) was established for the benefit of his spouse (Spouse) and issue.

Article Seventh of the Will provides that one-half of the residue of Decedent's estate is to be held in trust. Article Seventh, Paragraph A provides that net income is to be distributed to Spouse for her lifetime.

Article Seventh, Paragraph B provides that upon Spouse's death, net income is to be distributed in quarterly installments to Decedent's children in equal shares for their lifetimes. Article Seventh, Paragraph C provides that upon the death of one of Decedent's children leaving lawful issue, the net income payable to the deceased child is to be paid to the child's lawful issue equally, per stirpes, for the remaining trust term.

Article Seventh, Paragraph D provides that if a child dies and is not survived by lawful issue or if the surviving lawful issue of a deceased child dies prior to the termination of Trust, then the net income to which such child or lawful issue of a deceased child would have been entitled shall be paid to Decedent's surviving children and the lawful issue of any deceased children, per stirpes, in equal shares for the remaining trust term. If Decedent is not survived by children or descendants or all of the surviving children and descendants die prior to the termination of Trust then the trust estate is to be paid one-half to Decedent's next of kin, per stirpes, and one-half to Spouse's nieces and nephews and the lawful issue of any of Spouse's deceased nieces and nephews, per stirpes.

Article Seventh, Paragraph F provides that Trust is to terminate 21 years after the death of the last to die of Decedent's children. Upon termination, the trust estate is to be paid free of trust to Decedent's then lawful issue, in equal shares, per stirpes.

Article Eighth provides that Trust shall have three trustees, two individual trustees and one corporate trustee.

On Date 2, Court entered an order contingent upon the Internal Revenue Service issuing favorable rulings with respect to the issues presented in this request. The order stated that Trust would be divided into three trusts, one each for the benefit of Decedent's three children and their respective issue. The order provided that each asset of Trust will be divided pro-rata among the three separate trusts in accordance with the fractional interest of each trust, except to the extent necessary to avoid fractional shares or unreasonably small interests. The trustees of Trust have represented that the order will be modified to provide that each asset of Trust will be divided pro-rata among the three separate trusts in accordance with the fractional interest of each trust. The terms of each successor trust are substantially the same as the terms of Trust.

Trustees have requested the following rulings:

1. The proposed division of Trust will not result in a loss of exempt status for generation-skipping transfer (GST) tax purposes for Trust or any successor trusts.

2. The proposed division of Trust will result in the successor trusts being treated as separate trusts under § 643(f).
3. The proposed division of Trust will not result in Trust, the successor trusts, or any beneficiary thereof realizing income, gain or loss under §§ 661 or 662.
4. The proposed division of Trust will not result in Trust, the successor trusts, or any beneficiary thereof realizing gain or loss under §§ 61 and 1001.
5. The adjusted basis of the assets received by the successor trusts from Trust will be the same as the adjusted basis of the assets when held by Trust pursuant to § 1015.
6. The holding periods for the assets received by the successor trusts from Trust will be the same as the holding periods for such assets by Trust pursuant to § 1223(2).
7. The proposed division of Trust will not cause any portion of Trust's assets to be includible in the gross estate of the beneficiaries of Trust or the successor trusts pursuant to §§ 2036, 2037, or 2038.
8. The proposed division of Trust will not constitute a transfer by any beneficiary of Trust or the successor trusts that will be subject to tax under § 2501.

#### Law and Analysis:

##### Ruling 1:

Ruling request 1 falls within the purview of § 3.01(58) of Revenue Procedure 2007-3, 2007-3 I.R.B. 1, which states, in relevant part, that a ruling will not be issued under § 2601 in a factual scenario similar to a factual scenario set forth in one or more of the examples contained in § 26.2601-1(b)(4)(i)(E) of the Generation-Skipping Transfer Tax Regulations. Accordingly, a ruling on this request will not be issued.

##### Ruling 2:

Section 643(f) provides that two or more trusts shall be treated as one trust if (1) such trusts have substantially the same grantor or grantors and substantially the same primary beneficiary or beneficiaries, and (2) a principal purpose of such trusts is the avoidance of federal income tax.

Upon division of Trust into the successor trusts each of the successor trusts will have different primary beneficiaries. Therefore, based on the facts submitted and the representations made, we conclude that the successor trusts will be treated as separate trusts for federal income tax purposes under § 643(f).

##### Ruling 3:

Section 661(a) provides that in any taxable year a deduction is allowed in computing the taxable income of a trust (other than a trust to which subpart B applies), for the sum of (1) the amount of income for such taxable year required to be distributed currently, and (2) any other amounts properly paid or credited or required to be distributed for such taxable year, but such deduction shall not exceed the distributable net income (DNI) of the estate or trust.

Section 1.661(a)-2(f) of the Income Tax Regulations provides that gain or loss is realized by the trust or estate (or the other beneficiaries) by reason of a distribution of property in kind if the distribution is in satisfaction of a right to receive a distribution of a specific dollar amount, of specific property other than that distributed, or of income as defined under § 643(b) and the applicable regulations, if income is required to be distributed currently.

Section 662(a) provides that there shall be included in the gross income of a beneficiary to whom an amount specified in § 661(a) is paid, credited, or required to be distributed (by an estate or trust described in § 661), the sum of the following amounts: (1) the amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not; and (2) all other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year.

Based upon the facts submitted and the representations made, we conclude that because the creation of the successor trusts is a modification of Trust for Federal income tax purposes, the successor trusts are treated as a continuation of Trust. Therefore, the transfer of assets from Trust to the successor trusts will not be treated as a distribution or termination under § 661, and will not result in the realization by Trust, the successor trusts, or by any beneficiary of Trust or the successor trusts of any income, gain, or loss.

#### Ruling 4:

Section 61(a)(3) provides that gross income includes gains derived from dealings in property.

Section 1001(a) provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in § 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in § 1011 for determining loss over the amount realized.

Section 1001(b) states that the amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. Under § 1001(c), except as otherwise provided

in subtitle A, the entire amount of gain or loss, determined under § 1001, on the sale or exchange of property shall be recognized.

Section 1.1001-1(a) provides that the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or loss sustained.

A partition of jointly owned property is not a sale or other disposition of property where the co-owners of the joint property sever their joint interests but do not acquire a new or additional interest as a result of the transaction. Thus, neither gain nor loss is realized on a partition. See Rev. Rul. 56-437, 1956-2 C.B. 507.

Cottage Savings Ass'n v. Commissioner, 499 U.S. 554 (1991), concerns the issue of when a sale or exchange has taken place that results in the realization of gain or loss under § 1001. In Cottage Savings, a financial institution exchanged its interests in one group of residential mortgage loans for another lender's interests in a different group of residential mortgage loans. The two groups of mortgages were considered "substantially identical" by the agency that regulated the financial institution.

The Supreme Court of the United States in Cottage Savings, 499 U.S. at 560-61, concluded that § 1.1001-1 reasonably interprets § 1001(a) and stated that an exchange of property gives rise to a realization event under § 1001(a) if the properties exchanged are "materially different." In defining what constitutes a "material difference" for purposes of § 1001(a), the Court stated that properties are "different" in the sense that is "material" to the Code so long as their respective possessors enjoy legal entitlements that are different in kind or extent. Cottage Savings, 499 U.S. at 564-65. The Court held that mortgage loans made to different obligors and secured by different homes did embody distinct legal entitlements, and that the taxpayer realized losses when it exchanged interests in the loans. Cottage Savings, 499 U.S. at 566.

Based upon the facts submitted and the representations made and provided Court revises the order to provide for the pro-rata division and distribution of each and every Trust asset to the successor trusts, we conclude that it is consistent with the Supreme Court's opinion in Cottage Savings to find that when Trust is divided into three successor trusts and the assets distributed into the successor trusts on a pro-rata basis, the division does not result in the realization or recognition of gain or loss. Moreover, even though the modified order will change the terms governing who will serve as trustees, the legal entitlements and interests of the beneficiaries of each of the separate successor trusts will not differ materially in kind or extent from their interests in Trust. Accordingly, no gain or loss is recognized on the partition of Trust for purposes of § 61(a)(3) or § 1001(a) by Trust, by any of the three successor trusts, or by any beneficiary of those trusts. See Rev. Rul. 56-437.

#### Rulings 5:

Section 1015 provides that the basis in property acquired by a transfer in trust is the same as it would be in the hands of the grantor, with adjustments for gain and loss recognized.

Section 1.1015-2(a)(1) provides that, in the case of property acquired after December 31, 1920, by transfer in trust (other than by a transfer in trust by gift, bequest, or devise) the basis of property so acquired is the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer is made.

In this case, based upon the facts submitted and the representations made and provided the Court order is modified to provide that all of Trust's assets are divided pro-rata among the successor trusts, we conclude that because neither § 61 nor § 1001 applies to the proposed transaction, the basis of the assets for each of the successor trusts will be the same as Trust's basis in the assets at the time of the transfer.

#### Ruling 6:

Under §§ 1223(2) and 1.1223-1(b), in determining the period for which the taxpayer has held property however acquired, there shall be included the period for which such property was held by any other person, if under chapter 1 of subtitle A such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Therefore, because under § 1015 the basis of the assets received by the successor trusts is the same as the basis of those assets in the hands of Trust at the time of the transfer, we conclude, based upon the facts submitted and the representations made and provided the Court order is modified to provide that all of Trust's assets are divided pro-rata among the successor trusts, that, pursuant to § 1223(2), the holding periods of the assets held by the successor trusts will include the holding periods of the assets when the assets were held by Trust.

#### Ruling 7:

Section 2031(a) provides that the value of the gross estate of the decedent shall be determined by including the value at the time of death of all property, real or personal, tangible or intangible, wherever situated.

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death – (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2037 provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time after September 7, 1916, made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, if – (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and (2) the decedent has retained a reversionary interest in the property (but in the case of a transfer made before October 8, 1949, only if such reversionary interest arose by the express terms of the instrument of transfer), and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

Section 2038(a)(1) provides that to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period on the date of the decedent's death.

In this case, Trust was irrevocable on the date it was created. Decedent did not retain a reversionary interest in Trust and did not retain any power to change the disposition of the trust estate. Accordingly, based upon the facts submitted and the representations made, we conclude that the proposed division of Trust will not cause any portion of Trust's assets to be includible in the gross estate of the beneficiaries of Trust or the successor trusts pursuant to §§ 2036, 2037, or 2038, except to the extent of property that is distributed to a beneficiary and remains in the beneficiary's estate at the date of death.

Ruling 8:

Section 2501 imposes a tax on the transfer of property by gift by an individual.

Section 2511 provides that the tax imposed by § 2501 applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2512(a) provides that, if a gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

In this case, the interest of each beneficiary will remain the same after the proposed division as it was prior to the division. Accordingly, based on the facts submitted and the representations made and provided the Court order is modified to provide that all of Trust's assets are divided pro-rata among the successor trusts, we conclude that the proposed division and pro-rata distribution of Trust into three successor trusts will not constitute a transfer of property by the beneficiaries of Trust or any successor trust subjecting them to the gift tax under § 2501.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Melissa C. Liquerman

Melissa C. Liquerman  
Senior Technician Reviewer  
(Passthroughs & Special Industries)

Enclosures: Copy for § 6110 purposes

cc: