



The facts and representations submitted are as follows. On Date 1, Trustor 1, Trustor 2, Trustor 3, Trustor 4 and Trustor 5 (collectively, Trustors 1-5) created Trust, an irrevocable trust. Trustors 1-5 each made an initial contribution of \$x to Trust.

Section 2.D. of Trust Agreement granted Beneficiary a testamentary power of appointment. The terms of Section 2.D., however, did not specifically limit Beneficiary's exercise of the testamentary power of appointment to persons other than Beneficiary's estate, Beneficiary's creditors, or creditors of Beneficiary's estate. Section 7 of Trust Agreement provides that Trust shall be construed according to the laws of State.

Trustors 1-5 learned that Trust Agreement did not conform to their intent on Date 1 to grant Beneficiary a limited power of appointment, and on Date 2, Trustor 2 filed with Court a Petition to Reform Trust Agreement. Documentation was submitted evidencing the intention of Trustors 1-5 that Section 2.D. of Trust Agreement provide Beneficiary with only a limited power of appointment. On Date 3, Court entered an order modifying, as of Date 1, Section 2.D. of the Trust Agreement to specifically provide that in no event may Beneficiary's testamentary power of appointment over the Trust estate be exercised in favor of Beneficiary, his estate, his creditors, or the creditors of his estate.

You have requested the following rulings:

- (1) The testamentary power of appointment granted to Beneficiary by Section 2.D. of Trust Agreement, as reformed by Court, does not constitute a general power of appointment under I.R.C. § 2041(b) over the assets of Trust, and Trust assets will not be included in Beneficiary's gross estate under § 2041(a)(2) at his death.
- (2) The reformation of Section 2.D. of Trust Agreement does not constitute the exercise or release of a general power of appointment under § 2514 so as to constitute a gift by Beneficiary for federal gift tax purposes.

## LAW AND ANALYSIS

Section 2001(a) of the Internal Revenue Code provides that a tax is imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2031(a) provides that the value of the gross estate of the decedent shall be determined by including to the extent provided for in §§ 2031 through 2046, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

Section 2041(a)(2) provides, in relevant part, that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has at the time of death a general power of appointment created after

October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 through 2038, inclusive.

Section 2041(b)(1) defines the term "general power of appointment" as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate.

Section 2041(b)(2) provides, in relevant part, that the lapse of a power of appointment created after October 21, 1942, during the life of the person possessing the power shall be considered the release of such power.

Section 2501(a) imposes a gift tax for each calendar year on the transfer of property by gift during the year by an individual.

Section 2511 provides that the gift tax shall apply 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 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, is deemed a transfer of property by the individual possessing the power.

Section 2514(c) provides that the term "general power of appointment" means a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate.

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Supreme Court considered whether a state trial court's characterization of property rights conclusively binds a federal court or agency in a federal estate tax controversy. The Court concluded that the decision of a state trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter. If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving "proper regard" to the state court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

The law of State allows judicial reformation of a trust upon proof that the language used in the instrument does not reflect the parties' original drafting intention. Cite 1. See Cite 2, citing Cite 3. In this case, the documentation submitted indicates that the original drafting intention of Trustors 1-5 was to provide Beneficiary with a limited power of appointment. Based on the facts submitted and the representations made, we conclude that Court reformed Section 2.D. of Trust Agreement to correct a

scrivener's error. The order is consistent with applicable state law that would be applied by the highest court of State.

Accordingly, we conclude that the power of appointment granted to Beneficiary by Section 2.D. of Trust Agreement, as reformed by Court, does not constitute a general power of appointment under § 2041(b) over the assets of Trust, and Trust assets will not be included in Beneficiary's gross estate under § 2041(a)(2) at his death. Further, we conclude that the reformation of Section 2.D. of Trust Agreement was not the exercise or release of a general power of appointment under § 2514(b) so as to constitute a gift by Beneficiary for federal gift tax purposes.

A copy of this letter should be attached to any gift, estate, or generation-skipping transfer tax returns that you may file relating to these matters.

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) of the Code 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,

Leslie H. Finlow  
Senior Technician Reviewer, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2)

Copy for § 6110 purposes  
Copy of this letter

cc: