

Internal Revenue Service

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

Telephone Number:

Refer Reply To:
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PLR-138340-15

Date:
May 17, 2016

Legend

Taxpayer =

Trustor =

Trust =

A =

B =

C =

D =

Bank =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

State Court =

Dear _____ :

This responds to the letter dated November 19, 2015, and subsequent correspondence, submitted on your behalf by your authorized representative concerning the generation-skipping transfer (GST) tax consequences of the proposed modification of a trust.

The facts and representations submitted are summarized as follows. On Date 1, a date prior to September 25, 1985, Trustor created Trust, an irrevocable inter vivos trust for the benefit of Taxpayer and Taxpayer's issue. Trust named as initial trustees, A and B, who are unrelated to Taxpayer, and C, who is Taxpayer's mother. It is represented that no additions, actual or constructive, have been made to Trust since September 25, 1985.

Paragraph 7 of Trust provides, in part, that if any trustee fails or ceases to act, Trustor, or if Trustor is not then living, D, will appoint a successor trustee. If neither Trustor nor D is then living, Bank shall become trustee in place of the trustee who failed or ceased to serve. Thereafter, no successor trustee is to be appointed to act in the place of the next individual trustee who fails or ceases to act. The remaining individual trustee may thereafter appoint a trustee to act in his or her place and may also revoke that appointment. If there is no individual trustee able and willing to act, Bank may appoint an individual as a co-trustee. If at any time there is no trustee willing and able to act, one or more trustees may be appointed by or on behalf of the beneficiary or beneficiaries of at least two thirds of the current Trust income.

Paragraph 2 of Trust provides, in part, for discretionary distributions of the income and principal to Taxpayer and Taxpayer's issue during Taxpayer's life. Paragraph 3 provides that upon the death of Taxpayer, the trust estate will be distributed to the issue of Trustor's parents and/or the spouses of such issue, but if none of such issue is then living, to such one or more persons and corporations, all in such shares, manner and proportions as Taxpayer may appoint by will; provided, however that no such appointment may be made in favor of Taxpayer, Taxpayer's estate, the creditors of Taxpayer, or the creditors of Taxpayer's estate. Any portion of the trust estate not effectively appointed will be distributed to Taxpayer's issue, but if none of Taxpayer's issue is then living, to Trustor's issue, but if none of Trustor's issue is then living, to Taxpayer's heirs-at-law.

Paragraph 19 of Trust provides, in part, that any discretionary distribution to be made to or for the benefit of any individual who is acting as a trustee (including distributions to such individual's spouse and distributions in discharge of any legal obligation of such individual) must be made in the discretion of a trustee for whom

distributions may not be made. If no such trustee is then acting, such distribution will not be made.

On Date 2, A resigned his position as co-trustee, and Trustor appointed Taxpayer as successor co-trustee to serve with B and C.

On Date 3, Bank declined to serve as successor trustee, and on Date 4, B resigned his position as co-trustee. It is represented that, in accordance with Paragraph 7 of Trust, for so long as Taxpayer and C continue to serve, no additional co-trustee may be appointed to serve with them, and furthermore, no successor trustee can be appointed for or by Taxpayer or C. It is further represented that Paragraph 7 only authorizes a corporate trustee to appoint a co-trustee in the event that no individual trustee is then serving and only permits a sole trustee to appoint one or more successor trustees with no provision for the appointment of a co-trustee. In addition, in accordance with Paragraph 19, if any beneficiary of Trust (including Taxpayer) serves as a sole trustee of Trust, that beneficiary will be unable to make distributions to him or herself.

On Date 5, Taxpayer, in his capacity as co-trustee of Trust, petitioned State Court for an order approving modifications to Paragraph 7 (Trustee Succession Modifications), and Paragraphs 2 and 19 (Distribution Modifications) of Trust. On Date 6, State Court approved the modifications. State Court's order is contingent upon receipt of a favorable ruling from the Internal Revenue Service.

As a result of the modifications to Paragraph 7 (Trustee Succession Modifications): (i) each of the current co-trustees may appoint a successor at any time and may revoke the appointment, with or without cause, at any time until the appointment becomes effective; (ii) once a successor trustee's appointment becomes effective, the successor trustee may appoint his or her successor only if authorized to do so in the appointment made by his or her predecessor; (iii) the trustee or co-trustees may appoint as a co-trustee any person or entity, may remove that co-trustee, with or without cause and without appointing a successor, and may restrict the powers of that co-trustee; (iv) Taxpayer may remove any trustee or co-trustee, provided Taxpayer simultaneously appoints another trustee, who must be an Independent Trustee (as defined in the Distribution Modifications) to succeed the removed trustee or co-trustee; and (v) Taxpayer may transfer Taxpayer's removal and appointment power, as well as Taxpayer's power to transfer these powers, to any one or more of Trustor's issue.

As a result of the modifications to Paragraphs 2 and 19 (Distribution Modifications): (i) a beneficiary serving as a sole trustee may make discretionary distributions of trust income and principal, subject to a standard of health, education, maintenance and support, to or for the beneficiary's own benefit; (ii) such distributions cannot be in discharge of any legal obligation of the beneficiary; (iii) no trustee can make a distribution in satisfaction of any legal obligation of such trustee (or in

satisfaction of any legal obligation of a person who appointed the trustee); and (iv) a trustee or co-trustee appointed by a beneficiary cannot make distributions to the beneficiary appointing the trustee or co-trustee unless the distributions are subject to a standard of health, education, maintenance and support, or unless the trustee is an Independent Trustee. An Independent Trustee means any trustee who is not Trustor, a descendant of Trustor, any beneficiary or possible distributee of Trust, any parent or spouse of any such person, or any related or subordinate party to any of such persons or entities, as such terms are used in § 672(c) of the Code.

Rulings Requested

1. The Trustee Succession Modifications will not cause a beneficial interest in Trust to be shifted to a beneficiary who occupies a lower generation (as defined in § 2651) than the beneficiaries who held the interests prior to the modifications and will not extend the time for vesting of any beneficial interest in Trust beyond the period provided for in the original trust agreement. Accordingly, Trust will remain exempt from the GST tax under § 2601.
2. The Distribution Modifications will not cause a beneficial interest in Trust to be shifted to a beneficiary who occupies a lower generation (as defined in § 2651) than the beneficiaries who held the interests prior to the modifications and will not extend the time for vesting of any beneficial interest in Trust beyond the period provided for in the original trust agreement. Accordingly, Trust will remain exempt from the GST tax under § 2601.
3. The powers given to Taxpayer under the Trustee Succession Modifications and the Distribution Modifications do not result in Taxpayer having a general power of appointment under § 2041(b)(1) or § 2514(c).

Law and Analysis

Rulings 1 and 2

Section 2601 imposes a tax on every generation-skipping transfer (GST), which is defined under § 2611 as a taxable distribution, a taxable termination, and a direct skip.

Under § 1433 of the Tax Reform Act of 1986 (the Act), GST tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the provisions of chapter 13 do not apply to a transfer under a trust that was irrevocable on September 25, 1985, except to the extent the transfer is made out of corpus added to the trust by an actual or constructive addition after September 25, 1985.

Section 26.2601-1(b)(4)(i) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax under § 26.2601-1(b) will not cause the trust to lose its exempt status. These rules are applicable only for purposes of determining whether an exempt trust retains exempt status for GST tax purposes. The rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(D) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy § 26.2601-1(b)(4)(i)(A), (B), or (C)) by judicial reformation, or nonjudicial reformation that is valid under applicable state law will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. A modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST or the creation of a new GST.

In the present case, Trust was irrevocable on September 25, 1985. It is represented that no additions, actual or constructive, were made to Trust after that date. Based upon the facts submitted and the representations made, we conclude that neither the Trustee Succession Modifications nor the Distribution Modifications will cause a beneficial interest to be shifted to a beneficiary who occupies a generation lower than the beneficiaries who held the interests prior to the termination, or extend the time for vesting of any beneficial interest in Trust beyond the period provided for in the original trust agreement. Accordingly, we rule that Trust will remain exempt from the GST tax under § 2601.

Ruling 3

Section 2041(a)(2) provides 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 his 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 to 2038, inclusive.

Section 2041(b)(1)(A) provides that the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or

the creditors of his estate; except that a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Section 20.2041-1(b)(1) of the Estate Tax Regulations provides, in part, that a power in a donee to remove or discharge a trustee and appoint himself may be a power of appointment. For example, if under the terms of a trust instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment.

Section 20.2041-1(c)(2) provides, in part, that a power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of section 2041(b)(1)(A), not a general power of appointment.

Section 2514(c)(1) provides that, for purposes of that section, the term “general power of appointment” means a power which is exercisable in favor of the individual possessing the power (the “possessor”), his estate, his creditors, or the creditors of his estate; except that a power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor shall not be deemed a general power of appointment.

Section 25.2514-1(b)(1) provides, in part, that a donee may have a power of appointment if he has the power to remove or discharge a trustee and appoint himself. For example, if under the terms of a trust instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and A has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, A is considered as having a power of appointment.

Section 25.2514-1(c)(2) of the Gift Tax Regulations provides that a power to consume, invade, or appropriate income or corpus, or both, for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor is, by reason of section 2514(c), not a general power of appointment.

In Rev. Rul. 95-58, 1995-2 C.B. 191, the Internal Revenue Service ruled that a decedent/grantor’s reservation of an unqualified power to remove a trustee and to appoint an individual or corporate successor trustee that is not related or subordinate to

the decedent within the meaning of § 672, is not considered a reservation of the trustee's discretionary powers of distribution over the property transferred by the decedent/grantor to the trust. Accordingly, the trust corpus is not included in the decedent's gross estate under § 2036 or 2038.

Section 672(c) defines the term "related or subordinate party" to mean any nonadverse party who is (1) the grantor's spouse if living with the grantor; or (2) any one of the following: the grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in the which the grantor is an executive.

In the present case, the power of Taxpayer (if and when serving as trustee of Trust) to make distributions to, or for the benefit of, Taxpayer is limited by an ascertainable standard relating to the health, education, support, and maintenance of Taxpayer. In addition, although Taxpayer may remove and replace a trustee or co-trustee, any trustee or co-trustee appointed by Taxpayer pursuant to the removal and replacement power cannot be related or subordinate to Taxpayer within the meaning of § 672(c).

Based on the facts submitted and the representations made, we rule that the powers given to Taxpayer under the Trustee Succession Modifications and the Distribution Modifications do not result in Taxpayer having a general power of appointment under § 2041(b)(1) or § 2514(c).

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.

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.

Sincerely,

Leslie H. Finlow

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

Enclosures (2)

Copy of letter
Copy for § 6110 purposes

cc: