

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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subject: Gift Tax Examination

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer	=
Foundation	=
Country	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Year	=
Spouse	=
Sibling 1	=
Sibling 2	=
Sibling 3	=
Individual	=

x =
Bank 1 Account =
Bank 2 Account =

ISSUES

1. Whether Taxpayer, a United States resident (as defined in § 25.2501-1(b) of the Gift Tax Regulations) and primary beneficiary of Foundation (a Country Stiftung), is treated as having received Foundation assets and thereafter transferred such assets by gift when, upon the dissolution of Foundation, assets are transferred at Taxpayer's direction to an account over which Taxpayer had no ownership or control.
2. Alternatively, whether the transfer of Foundation assets to an account over which Taxpayer had no ownership or control is the result of a qualified disclaimer described in § 2518(b) of the Internal Revenue Code (Code), so that the assets are treated as if they had never been transferred to Taxpayer and Taxpayer is not treated as making a gift.

CONCLUSIONS

1. The dissolution of Foundation and subsequent transfer at Taxpayer's direction of Foundation assets to an account over which Taxpayer had no ownership or control is a release of dominion and control over the assets thereby constituting a completed gift for gift tax purposes.
2. The transfer of the Foundation's assets to an account in which Taxpayer had no ownership interest under applicable local law is not a qualified disclaimer under § 2518 because Taxpayer directed the transfer to the account.

FACTS

On Date 1, in a document entitled Statutes, Foundation (also referred to as Stiftung) was established. The Statutes do not identify the founding member or founding members. Pursuant to Section 4 of the Statutes, the objectives of the Foundation include "the defrayal of expenses for the upbringing and education, the fitting out and furtherance, the livelihood in general and the economic furtherance in the widest sense of the relatives of certain families." Under Article 3 of the Statutes, Foundation is governed under Country law.

Article 6 of the Statutes provides that the initial Foundation fund was x (a monetary amount denoted in a foreign currency).

Article 7, paragraph a, of the Statutes provides that upon establishment of the Foundation, the Founder and thereafter the Foundation Council (also referred to as the Foundation Board), has the authority to determine the beneficiaries, the conditions for such beneficial interest as well as such content, and to revoke such on the other hand at discretion.

Article 8, paragraph f, of the Statutes provides that the Foundation Council passes all resolutions with a simple majority of all Foundation Council Members or substitutes without exception, unless otherwise especially determined in these Statutes.

Article 15 of the Statutes governs the Statute amendments, issuance and amendment of By-Statutes. Paragraph a provides, in part, that upon formation of the Foundation the Founder shall be entitled, and thereafter the Foundation Council, to issue By-Statutes. Such requires the written form and shall be signed by the Founder or Foundation Council. Such By-Statutes have the same legal effect as the Statutes. Article 15, paragraph b, of the Statutes provides that the Foundation Council may, at its own discretion, supplement and amend the Statutes including the envisaged objects and organization of the Foundation and any contingent By-Statutes. Article 15, paragraph c, provides that the resolutions mentioned under paragraph a and paragraph b require unanimity.

Article 18, paragraph a, of the Statutes provides that, inasmuch as the circumstances under which the Foundation was formed so change, that the Foundation objects may no longer be sensibly achieved, the Foundation Council shall be authorized to wholly or partly dissolve the Foundation. Article 18, paragraph b provides that upon dissolution, the Foundation assets shall be distributed to the beneficiaries pursuant to the provisions in the Statutes and contingent By-Statutes. Article 18, paragraph c provides that such resolution by the Foundation Council requires unanimity.

On Date 2, under the authority of Article 7 and Article 15 of the Statutes, the Foundation Council executed Supplementary Statutes. Article 1 of the Supplementary Statutes provides that the primary beneficiary shall be Taxpayer, to which the benefit shall pertain to all of the assets of the Foundation, its earnings and any potential liquidation revenues.

Article 2 of the Supplementary Statutes provides that in the event of the passing of the primary beneficiary (Taxpayer), the secondary beneficiaries are Sibling 1; Sibling 2; and Sibling 3. The secondary beneficiaries shall receive an annual non-transferable and non-estate eligible pension in the amount of twice the respective annual salary of Individual (Pension Benefit).

Article 3 of the Supplementary Statutes provides that in the event that the primary beneficiary (Taxpayer) should pass, primary beneficiary's spouse (Spouse) and each child of the primary beneficiary shall receive the Pension Benefit. The children's Pension Benefits shall be funded with the earnings of the Foundation assets. In the event that the earnings should not suffice to pay the Pension Benefits, the assets of the

Foundation may be used as supplements. Articles 4 through 6 of the Supplementary Statutes provide for successor beneficiaries in the event of a predeceased parent.

Article 7 of the Supplementary Statutes provides that the Foundation shall be dissolved in Year. At that time, the Foundation assets shall be distributed among the then-living beneficiaries in compliance with their benefit quotas.

Article 10 of the Supplementary Statutes provides that during the lifetime of the primary beneficiary (Taxpayer), the Statutes and the Supplementary Statutes may be modified, completed or voided at any time and the benefit may at any time be revoked in part or in its entirety.

On Date 3, under the authority of Article 7 and Article 15 of the Statutes, the Foundation Council executed Amendment to the By-Laws (Amendment). Paragraph 1 of the Amendment provides that the primary beneficiary is Taxpayer. The Amendment reiterates that the benefits of the primary beneficiary relate to the entire assets of the Foundation, which includes all of the income and the potential revenue from liquidation. The Amendment identifies the interest of secondary beneficiaries, upon the death of the primary beneficiary. The details of the Amendment as to the secondary beneficiaries is redacted under a tax treaty disclosure agreement.

On Date 4, the Foundation Council, by unanimous resolution, executed Circular Resolution of the Foundation Board of Foundation, in accordance with Article 8, paragraph f, of the Statutes requiring a simple majority for resolutions, and in accordance with Article 1, paragraph a, of the Amendment acknowledging Taxpayer as the sole first beneficiary of the Foundation. The Circulation Resolution states as follows: "IT IS HEREBY RESOLVED to distribute the total net assets of the [F]oundation to the first beneficiary of the [F]oundation and to bring such assets in alignment in accordance with his wishes." In an email correspondence to the Foundation Council on the same date, Taxpayer directed the transfer of all Foundation assets held in the Bank 1 Account (which held the primary assets of Foundation) to the Bank 2 Account. Thereafter, the assets held in the Bank 1 Account were transferred to the Bank 2 Account.

By unanimous resolution in Circular Resolution of the Foundation Board of Foundation, dated Date 5, Foundation was dissolved.

Taxpayer is not designated as an account owner of the Bank 2 Account. Based on an affidavit from Sibling 2 and an affidavit from Taxpayer, Taxpayer has never had signature authority or control or access to the funds in the Bank 2 Account from the time the assets initially were transferred to the Bank 2 Account at Taxpayer's request.

LAW AND ANALYSIS

Section 2501(a)(1) of the Code imposes a tax for each calendar year on the transfer of property by gift during the calendar year. Section 25.2501-1(a)(1) provides, in part, that

the tax applies to all transfers by gift of property, wherever situated, by an individual who is a citizen or resident of the United States.

Section 2511(a) provides in part that the tax imposed by § 2501 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 and tangible or intangible.

Section 25.2511-2(a) provides that the gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

Section 25.2511-2(b) provides that as to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or the benefit of another, the gift is complete.

Section 2518(a) provides that if a person makes a qualified disclaimer with respect to any interest in property, subtitle B shall apply with respect to such interest as if the interest had never been transferred to such person.

Section 2518(b) provides that the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if (1) the refusal is in writing, (2) the writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date that is nine months after the later of (A) the date on which the transfer creating the interest in the person is made, or (B) the day on which the person attains age 21, (3) the person has not accepted the interest or any of its benefits, and (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either (A) to the spouse of the decedent, or (B) to a person other than the person making the disclaimer.

Section 25.2518-1(b) provides, in relevant part, that if a person makes a qualified disclaimer as described in § 2518(b) and § 25.2518-2, for purposes of the federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer. Accordingly, a person making a qualified disclaimer is not treated as making a gift.

In this case, the Foundation Council resolved on Date 4 “to distribute the total net assets of the [F]oundation to the first beneficiary of the [F]oundation and to bring such assets in alignment in accordance with his wishes.” Taxpayer is identified as the

“primary,” “first,” or “sole first” beneficiary in the Supplementary Statutes, Amendment, and Circular Resolution. The Foundation Council acted within its authority under Article 18 of the Statutes to dissolve the Foundation and to distribute the assets of Foundation to or for the benefit of Taxpayer as the primary and sole first beneficiary. The transfer of the Foundation’s assets held in the Bank 1 Account to the Bank 2 Account was completed at Taxpayer’s request and direction. The fact that Taxpayer has no signature authority or ownership interest in the Bank 2 Account indicates Taxpayer has released dominion and control over the Foundation’s assets held in the Bank 1 Account and constitutes a completed gift for gift tax purposes.

Moreover, the transfer of the Foundation’s assets to an account in which Taxpayer had no ownership interest under applicable local law is not a qualified disclaimer under § 2518 because Taxpayer directed the transfer to the Bank 2 Account. Therefore, the Foundation’s assets in the Bank 1 Account are treated as if the Foundation’s assets had been transferred to Taxpayer and then transferred by gift to the owner of the Bank 2 Account.

As a resident of the United States (as defined in § 25.2501-1(b)) at the time of the transfer, Taxpayer is subject to gift tax on the gift transfer of the assets from the Bank 1 Account to the Bank 2 Account.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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Please call (202) 317-6859 if you have any further questions.