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Department of the Treasury

Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:EEE:EOET:EO1

PLR-112285-21

Date:

November 03, 2021

Legend

Foundation =
State =
City =
Trust =

Art Collection =
X =
Y =

Dear :

This letter responds to your letter dated June 1, 2021, submitted on behalf of the Foundation, requesting certain rulings concerning the application of sections 4941 and 4942 of the Internal Revenue Code¹ to the Foundation.

FACTS

The Foundation is organized under the State Nonprofit Corporation Law and is exempt from federal income tax under section 501(a) and recognized as described in section 501(c)(3) and classified as a private foundation under section 509(a). The Foundation is organized for educational, religious, scientific, literary, and charitable purposes, and historically has focused its activities in five broad categories, including supporting the arts.

¹ The Internal Revenue Code of 1986, as amended, to which all subsequent "section" references are made unless otherwise indicated.

X serves on the Foundation's Board of Directors and has previously served as its Chairman. X is also the settlor of the Trust, which becomes irrevocable upon X's death. The Trust owns the Art Collection. The Art Collection is not encumbered by any debt nor subject to any known liens. The terms of the Trust provide that upon X's death the Art Collection will be distributed to one or more organizations described in sections 170(c) and 2055(a) as determined by an art advisor, currently designated as X's son, Y. Y is a director and Chairman of the Board of the Foundation. The Foundation represents that the Trust will distribute the Art Collection to the Foundation free of any encumbrances or liens. The Trust also provides that substantial cash gifts be made to the Foundation to be used to pay for curatorial expenses and for building appropriate gallery space to display the Art Collection. X, Y, and the Trust are all disqualified persons within the meaning of section 4946 with respect to the Foundation.

After X's death, the Trust will distribute the Art Collection and cash to the Foundation. Following its receipt of the Art Collection, the Foundation will enter into one or more long-term artwork loan arrangements for purposes of publicly exhibiting the artwork in the Art Collection (Loan Arrangements) with one or more museums, galleries, libraries, foundations, universities or other not-for-profit institutions, most of which it is expected will be located in the greater City area (Art Institutions).

The Foundation anticipates hiring, or funding the hiring of, a curator to manage the Art Collection, including determining objects appropriate for loan to Art Institutions. The Foundation's responsibilities with respect to the Loan Arrangements will include: (i) selecting the Art Institutions for public exhibition of artwork in the Art Collection; (ii) evaluating and funding the acquisition of additional artwork for inclusion in the Art Collection; (iii) arranging for the packing, shipping and eventual return or extension of any loan of the artwork in the Art Collection; (iv) overseeing the insurance, care, maintenance and preservation of artwork in the Art Collection; (v) supporting costs associated with providing adequate space for exhibition of artwork in the Art Collection; and (vi) helping the Art Institutions publicize their exhibition of artworks in the Art Collection.

When entering into a Loan Arrangement with an Art Institution, the Foundation will consider: (i) the Art Institution's ability to safeguard the artwork while on exhibition and in transit; (ii) the facilities that the Art Institution will have to exhibit artwork in the Art Collection; (iii) the cultural and artistic value that the Art Collection will have to that Art Institution and its greater community; and (iv) the Art Institution's ability to maximize the general public's exposure to the Art Collection. During the term of each Loan Arrangement, it is expected that most of the artwork in the Art Collection will be under the management of the Art Institutions. This will include being on public exhibition, in the Art Institution's storage, or, for selected artwork subject to the Foundation's consent, on temporary loan to or exhibition by other museums, universities, and similar not-for-profit institutions to enhance the reputation of and maximize public exposure to the Art Collection.

When the artwork in the Art Collection is not in the custody of or under the management of an Art Institution, the artwork will be in transit, in storage for future exhibitions, subject to restoration or reconditioning as appropriate, or available for study and analysis by scholars and art experts, the expenses of which will be paid by the Foundation. The Foundation also anticipates monitoring and protecting copyright and legal ownership of the Art Collection, and from time to time entering into licensing agreements related to use of the likeness or images of artwork in the Art Collection.

The Foundation also expects that whenever artwork in the Art Collection is exhibited at an Art Institution, the exhibition will include a recognition or acknowledgment of the gift by X of the Art Collection to the Foundation and/or of the family for which the Foundation is named (Family) that made it possible for that artwork to be exhibited. The Foundation will take appropriate steps to ensure that use of the Art Collection will not violate the self-dealing rules of section 4941 or otherwise result in private benefit or inurement.

RULINGS REQUESTED

1. The distribution of the Art Collection from the Trust to the Foundation and any subsequent recognition in name only of X and/or the Family in connection with the donation and use of the Art Collection will not be considered acts of self-dealing under section 4941.
2. All the artwork in the Art Collection that will be subject to the Loan Arrangements will be assets used (or held for use) directly in carrying out the Foundation's exempt purpose under section 4942(e)(1)(A) and thus the value of the Art Collection will be excludable in computing the Foundation's minimum investment return for purposes of section 4942.

LAW AND ANALYSIS

Ruling Request 1

Section 4941 imposes an excise tax on each act of self-dealing between a disqualified person and a private foundation. There is also an excise tax imposed on the participation of any foundation manager, knowing that it is such an act.

Section 4941(d)(1)(C) defines self-dealing, in part, as including any direct or indirect furnishing of goods, services, or facilities between a private foundation and a disqualified person.

Section 4941(d)(1)(E) defines self-dealing, in part, as including any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation.

Section 4941(d)(2)(C) specifies that the furnishing of goods, services, or facilities by a disqualified person to a private foundation shall not be an act of self-dealing if the furnishing is without charge and if the goods, services, or facilities so furnished are used exclusively for purposes specified in section 501(c)(3).

Section 4946(a)(1) provides, in part, that the term “disqualified person” means, with respect to a private foundation, a person who is –

- (A) a substantial contributor to the foundation,
- (B) a foundation manager (within the meaning of section 4946(b)(1)),
- (C) an owner of more than 20 percent of –
 - (i) the total combined voting power of a corporation,
 - (ii) the profits interest of a partnership, or
 - (iii) the beneficial interest of a trust or unincorporated enterprise, which is a substantial contributor to the foundation,
- (D) a member of the family (as defined in section 4946(d)) of any individual described in subparagraph (A), (B), or (C),
- (E) a corporation of which persons described in subparagraph (A), (B), (C), or (D) own more than 35 percent of the total combined voting power,
- (F) a partnership in which persons described in subparagraph (A), (B), (C), or (D) own more than 35 percent of the profits interest, and
- (G) a trust or estate in which persons described in subparagraph (A), (B), (C), or (D) hold more than 35 percent of the beneficial interest.

Section 4946(d) provides that, for purposes of section 4946(a)(1), the family of any individual includes only the individual’s spouse, ancestors, children, grandchildren, great grandchildren, and the spouses of children, grandchildren, and great grandchildren.

Treas. Reg. § 53.4941(d)-2(f)(2) provides that the fact that a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets will not, by itself, make such use an act of self-dealing. Thus, the public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a substantial contributor, does not in itself result in an act of self-dealing because generally the benefit is incidental and tenuous.

Treas. Reg. § 53.4941(d)-2(f)(9), Example 4 concludes that a private foundation naming a neighborhood recreation center after the disqualified person who donated real estate the private foundation used to build the recreation center provides only an incidental and tenuous benefit to the disqualified person and, by itself, is not an act of self-dealing.

Rev. Rul. 73-407, 1973-2 C.B. 383, holds that a contribution by a private foundation to a public charity made on the condition that the public charity change its name to that of a substantial contributor to the foundation and agree not to change the name again for 100 years does not constitute an act of self-dealing under section 4941(d)(1)(E). The ruling states that the public recognition that the disqualified person receives from the

charitable act of the private foundation is an incidental and tenuous benefit within the meaning of the regulations.

Section 4941 imposes an excise tax on each act of self-dealing between a disqualified person and a private foundation, including any direct or indirect furnishing of goods, services, or facilities between a private foundation and a disqualified person. Section 4941(d)(1)(C). The distribution of the Art Collection from the Trust to the Foundation without charge and free of any encumbrances or liens so that the Foundation may use the Art Collection exclusively for purposes specified in section 501(c)(3), however, is not an act of self-dealing under section 4941(a)(1). See section 4941(d)(2)(C).

The use of the income or assets of a private foundation by, or for the benefit of, a disqualified person generally constitutes an act of self-dealing. Section 4941(d)(1)(E). The fact that a disqualified person receives an incidental or tenuous benefit from the use by a foundation of its income or assets will not, by itself, make such use an act of self-dealing. Treas. Reg. § 53.4941(d)-2(f)(2). Several members of the Family, including Y, will be disqualified persons with respect to the Foundation. See section 4946(a)(1)(A), (B), and (D) and section 4946(d). When the artwork in the Art Collection is exhibited at an Art Institution, it is anticipated that the display will include a recognition or acknowledgment of the gift to the Foundation made by X and/or of the Family that made it possible for that artwork to be exhibited. The public recognition a person may receive, arising from the charitable activities of a private foundation to which such person is a disqualified person (including family members of disqualified persons defined in section 4946(d)), does not in itself result in an act of self-dealing, since generally the benefit is incidental and tenuous. See Treas. Reg. § 53.4941(d)-2(f)(2).

Example 4 of Treas. Reg. § 53.4941(d)-2(f)(9) provides that a disqualified person who contributes real estate to a private foundation to build a neighborhood recreation center receives only an incidental and tenuous benefit and it is not an act of self-dealing where, as a condition of the gift, the private foundation agrees to name the recreation center after the disqualified person. Rev. Rul. 73-407 provides that where a private foundation makes a distribution to a public charity and the private foundation imposes the condition that the public charity change its name to that of a disqualified person of and substantial contributor to the private foundation, the public recognition the disqualified person receives is an incidental and tenuous benefit and the distribution does not constitute an act of self-dealing. Similarly, therefore, recognition or acknowledgement of X and/or the Family, members of which are disqualified persons with respect to the Foundation, in connection with the donation and use of the Art Collection is an incidental or tenuous benefit and will not constitute an act of self-dealing under section 4941(a)(1).

Ruling Request 2

Section 4942(a) generally imposes an excise tax on the undistributed income of a private foundation.

Section 4942(c) provides that “undistributed income” is the amount by which the distributable amount for such taxable year exceeds the qualifying distributions made out of such distributable amount.

Section 4942(d) defines “distributable amount” as an amount equal to the sum of the minimum investment return plus the amounts described in section 4942(f)(2)(C), reduced by the sum of the taxes imposed on the private foundation for the taxable year under subtitle A and section 4940.

Section 4942(e)(1) defines the term “minimum investment return” as five percent of the excess of (A) the aggregate of fair market value of all assets other than those which are used (or held for use) directly in carrying out the foundation’s exempt purposes, over (B) the acquisition indebtedness with respect to such assets.

Treas. Reg. § 53.4942(a)-2(c)(2)(v) excludes from the assets taken into account in determining the minimum investment return any asset used (or held for use) directly in carrying out the foundation’s exempt purpose.

Treas. Reg. § 53.4942(a)-2(c)(3)(i) provides that an asset is used (or held for use) directly in carrying out the foundation’s exempt purpose only if the asset is actually used by the foundation in carrying out its exempt purpose or the foundation establishes that its immediate use for such exempt purpose is not practical and that definite plans exist to commence such use within a reasonable period of time. Assets held for the production of income or for investment are not used (or held for use) directly in carrying out the foundation’s exempt purpose.

Treas. Reg. § 53.4942(a)-2(c)(3)(ii)(c) provides that physical facilities used in charitable, educational, or other similar exempt activities, such as works of art owned by the foundation which are on public display, are examples of assets “used or held for use directly in carrying out the foundation’s exempt purpose.”

Rev. Rul. 74-498, 1974-2 CB 387 holds that a collection of paintings owned by a foundation formed to further the arts that is loaned under an active loan program for exhibition in museums, universities, and similar institutions, is being used directly in carrying out the foundation’s exempt purposes within the meaning of section 4942(e)(1)(A), and the value of the paintings is excluded in computing the foundation’s minimum investment return.

Section 4942 generally imposes an excise tax on a private foundation’s undistributed income, as determined for any taxable year by the calculation of the foundation’s distributable amount, which includes its minimum investment return. Assets used, or held for use, in furtherance of a private foundation’s exempt purposes are generally excluded from determining the minimum investment return. See section 4942(e)(1) and Treas. Reg. § 53.4942(a)-2(c)(2)(v). The regulations list works of art owned by a foundation that are on public display as an example of assets used or held for use

directly in carrying out a foundation's exempt purpose. Treas. Reg. § 53.4942(a)-2(c)(3)(ii)(c).

The Foundation has a long history of furthering its exempt educational and charitable purposes by supporting, through grantmaking and other efforts, the arts in the greater City area. The Foundation represents that, upon receipt of the Art Collection, it will engage in an active art loan program whereby the Art Collection will be loaned out to suitable Art Institutions under the terms of the Loan Arrangements. The active role the Foundation will assume in making the Loan Arrangements, managing the Art Collection, and providing for its exhibition and display, and holding it for exhibition, is similar to the active loan program managed by the foundation described in Rev. Rul. 74-498. See also Treas. Reg. § 53.4942(a)-2(c)(3)(i). Similarly, therefore, the Art Collection will be used, or held for use, directly to carry out the exempt purposes of the Foundation and may be excluded from the minimum investment return calculation as described in section 4942. See Treas. Reg. § 53.4942(a)-2(c)(2)(v).

RULINGS

Based on the foregoing, and assuming the accuracy of the facts and representations submitted by the Foundation, we rule as follows:

1. The distribution of the Art Collection from the Trust to the Foundation and any subsequent recognition in name only of X and/or the Family in connection with the donation and use of the Art Collection will not be considered acts of self-dealing under section 4941.
2. All the artwork in the Art Collection that will be subject to the Loan Arrangements will be assets used (or held for use) directly in carrying out the Foundation's exempt purpose under section 4942(e)(1)(A) and thus the value of the Art Collection will be excludable in computing the Foundation's minimum investment return.

This ruling letter is based on information and representations submitted on behalf of the Foundation and accompanied by a penalties of perjury statement executed by an individual with the authority to bind the Foundation, and on the understanding that there will be no material changes in the facts. This office has not verified any of the supporting materials submitted with this ruling request, and such materials are subject to verification on examination.

The Associate office will revoke or modify a letter ruling retroactively if there has been a misstatement or omission of controlling facts; if the facts at the time of the transaction are materially different from the controlling facts on which the ruling letter was based; or, in the case of a transaction involving a continuing action or series of actions, the controlling facts change during the course of the transaction. See Rev. Proc. 2021-1, 2021-1 IRB 1, § 11.05.

This letter does not address the applicability of any section of the Code or Regulations to the facts submitted, other than those sections specifically described. Further, except as expressly provided in this letter, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction discussed or referred to in this letter.

Because it could help resolve questions concerning federal income tax status, this letter should be kept in the Foundation's permanent records.

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 representatives.

Sincerely,

Matthew Giuliano
Branch Chief, Exempt Organizations Branch 1
(Employee Benefits, Exempt Organizations, and
Employment Taxes)

cc: