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2601.00-00

RE:

**Department of the Treasury
Washington, DC 20224**

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:04

PLR-117578-21

Date:

February 01, 2022

LEGEND

Date 1 =

Settlor =

Revocable Trust =

Date 2 =

Son's Trust =

Son =

Date 3 =

Son's Revocable Trust =

Date 4 =

Granddaughter =

New Trust =

Date 5 =

Co-Trustees =

State =

State Court =

Citation =

Dear :

This letter responds to your authorized representative's letter dated August 26, 2021, requesting rulings under §§ 2041, 2514, and 2601 of the Internal Revenue Code.

The facts and representations submitted are summarized as follows:

On Date 1, Settlor created a revocable trust, Revocable Trust. Settlor died on Date 2, a date prior to September 25, 1985. Pursuant to Paragraph 1(b) of Article V of Revocable Trust, upon Settlor's death Son's Trust was established for the benefit of Son.

Paragraph 1(c) of Article V of Revocable Trust provides that upon the death of Son, any trust for Son's benefit shall be distributed to one or more of Settlor's descendants (other than Son) in such proportions and subject to trusts, powers and conditions as Son appoints by will specifically referring to this power of appointment (Son's Power of Appointment). To the extent Son does not effectively exercise Son's Power of Appointment, Son's trust is to be distributed *per stirpes* to Settlor's then living descendants, treating Settlor's children as then deceased.

Son died on Date 3. Pursuant to Article III of Son's Will, Son exercised Son's Power of Appointment directing the property of Son's Trust to be distributed to the trustee of Son's Revocable Trust dated Date 4. Son's Revocable Trust is governed under the laws of State. Article VI of Son's Revocable Trust provides that property appointed to Son's Revocable Trust through Son's Power of Appointment shall be administered as a separate trust for the benefit of Granddaughter (New Trust). Under the terms of New Trust, the trustee may distribute net income and principal to or for the benefit of one or more of Granddaughter and Granddaughter's descendants as the trustee from time to time deems advisable for the beneficiaries' best interests. Paragraph 1(b) of Article VI of Son's Revocable Trust also grants Granddaughter a testamentary power of appointment, as follows:

If [Granddaughter] survives me, then upon the death of [Granddaughter] the principal of the trust will be held in trust hereunder or distributed to or in trust for any one or more persons out of a class composed of (i) the descendants of [Granddaughter], (ii) the descendants of my mother, [Settlor] (other than (A) a child of my mother and (B) a *grandchild of my mother if such grandchild does not have at least one then living descendant*), in such proportions and subject to such trusts, powers and conditions as [Granddaughter] may appoint by will, specifically referring to this power of appointment.

(Granddaughter's Power of Appointment) (emphasis added).

Under the language of Granddaughter's Power of Appointment, the Co-Trustees were concerned there may be an ambiguity in Son's Revocable Trust regarding whether the

power of appointment would be considered a general or limited power of appointment. Under the terms of Paragraph 1(b) of Article VI, the permissible appointees of Granddaughter's Power of Appointment are any descendants of Granddaughter and any descendant of Settlor, who is not a child of Settlor, and who is not a grandchild of Settlor who does not have descendants. Granddaughter has two living children, and accordingly is not a grandchild of Settlor who does not have descendants. The Co-Trustees, in fulfilling their fiduciary responsibilities wanted to ensure that they were interpreting the language of Son's Revocable Trust correctly. To address the potential ambiguity in Son's Revocable Trust as to whether Granddaughter's Power of Appointment over New Trust is a general power of appointment, a petition was filed with State Court seeking instruction on the proper construction of New Trust. On Date 5, the State Court issued an Order providing:

[New Trust] shall be construed so that the language of [Granddaughter's] Power of Appointment grants [Granddaughter] a *limited power to appoint* the property remaining in [New Trust] on her death only among [Settlor's] *then-living* descendants, or trusts for their benefit, other than to a child of [Settlor] and a grandchild of [Settlor] if such grandchild does not have at least one then living descendant. (Emphasis added.)

RULINGS REQUESTED

1. Granddaughter does not possess a general power of appointment under § 2041 over New Trust, which therefore remains GST tax exempt pursuant to its grandfathered status.
2. No part of New Trust will be included in Granddaughter's gross estate for federal estate tax purposes under § 2041.
3. Granddaughter does not have a general power of appointment over New Trust, and therefore Granddaughter has neither released a general power of appointment over New Trust for federal gift tax purposes under § 2514, nor made a constructive addition to New Trust under § 26.2601-1(b)(1)(v)(A).

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 that the value of the gross estate includes 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 includable in the decedent's gross estate under §§ 2035 to 2038, inclusive. For purposes of § 2041(a)(2), the power of appointment is considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

Section 2041(b)(1) provides that for purposes of § 2041(a), 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.

Section 20.2041-1(c)(1) of the Estate Tax Regulations provides that the term "general power of appointment" as defined in § 2041(b)(1) means any power of appointment exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. Section 20.2041-1(c)(1)(a) provides that a power of appointment is not a general power of appointment if by its terms it is exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of his estate.

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, shall be deemed a transfer of property by the individual possessing such 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. Section 2514(e) provides that the lapse of a power of appointment created after October 21, 1942, during the life of the person possessing the power is considered a release of the power.

Section 2601 imposes a tax on every generation-skipping transfer (GST) made after October 22, 1986. Section 2611(a) defines a GST to mean (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Under § 1433(b)(2)(A) of the Tax Reform Act of 1986 and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the tax generally does not apply to any GST transfer made under a trust that was irrevocable on September 25, 1985.

However, the tax does apply to a pro rata portion of any GST under an irrevocable trust if additions (actual or constructive) are made to the trust after that date. Under § 26.2601-1(b)(1)(ii)(A), any trust in existence on September 25, 1985, will be considered an irrevocable trust except as provided in §§ 26.2601-1(b)(1)(ii)(B) or (C) (relating to property includable in a grantor's gross estate under §§ 2038 and 2042).

Section 26.2601-1(b)(1)(v)(A) provides, in relevant part, that, except as provided under § 26.2601-1(b)(1)(v)(B), where any portion of a trust remains in the trust after the post-September 25, 1985, release, exercise, or lapse of a power of appointment over that portion of the trust, and the release, exercise, or lapse is treated to any extent as a taxable transfer under chapter 11 or chapter 12, the value of the entire portion of the trust subject to the power that was released, exercised, or lapsed is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise, or lapse.

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 trial 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.

Under State law, the primary rule in construing a trust is that a court must attempt to ascertain the settlor's intent and carry out that intent unless it is in violation of some positive rule of law or against public policy. *Citation*.

The terms of New Trust provide that Granddaughter has a testamentary power to appoint the principal of New Trust for any one or more persons out of a class composed of (i) the descendants of Granddaughter and (ii) the descendants of Settlor (other than (A) a child of Settlor and (B) a grandchild of Settlor if such grandchild does not have at least one then living descendant). The references to the "descendants of Settlor" and a "grandchild of Settlor" are properly viewed as not including Granddaughter's estate or the creditors of Granddaughter's estate. Consistent with this analysis, the Date 5 Order construed the terms of New Trust to provide that Son granted Granddaughter a power to appoint the remainder of New Trust on her death only to Settlor's then-living descendants, or trusts for their benefit, other than to a child of Settlor and a grandchild of Settlor if such grandchild does not have at least one then living descendant.

Granddaughter's power to appoint is not exercisable in favor of Granddaughter, Granddaughter's creditors, Granddaughter's estate, or the creditors of Granddaughter's estate, and accordingly, is not a general power of appointment. Based on an analysis of facts submitted and the representations made, we conclude that the Date 5 State Court Order is consistent with applicable State law as it would be applied by the highest court of State.

Accordingly, based on the facts submitted and the representations made, we conclude that: (1) Granddaughter does not possess a general power of appointment under § 2041 over New Trust, which therefore remains GST tax exempt pursuant to its grandfathered status; (2) no part of New Trust will be included in Granddaughter's gross estate for federal estate tax purposes under § 2041; and (3) Granddaughter does not have a general power of appointment over New Trust, and therefore Granddaughter has neither released a general power of appointment over New Trust for federal gift tax purposes under § 2514, nor made a constructive addition to New Trust under § 26.2601-1(b)(1)(v)(A).

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,

Melissa C. Liquerman

Melissa C. Liquerman
Chief, Branch 4
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosure

Copy for § 6110 purposes

cc: