

INTERNAL REVENUE SERVICE
NATIONAL OFFICE RECONSIDERATION OF TECHNICAL ADVICE MEMORANDUM

July 16, 1999

Index (UIL) Nos.: 2511.00-00, 2038.00-00, 2036.00-00
CASE MIS No.: TAM-108828-99/CC:DOM:P&SI:B7
Number: **199944005**
Release Date: 11/5/1999

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference:

LEGEND:

Daughter =

Decedent =

State =

a =

Spouse =

b =

c =

QPRT =

Trust =

d =

e =

f =

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- g =
- h =
- i =
- j =
- k =
- l =
- m =
- n =
- o =
- p =
- q =

ISSUE:

Are the gifts made by Daughter on behalf of Decedent under authority of a power of attorney includible in Decedent's gross estate for federal estate tax purposes?

CONCLUSION:

Under the facts of this case, the gifts that Daughter made on behalf of Decedent under authority of a power of attorney are not subject to the estate tax.

FACTS:

On a, Decedent executed a durable power of attorney designating Spouse as her agent. In the event of Spouse's death or Spouse's inability or unwillingness to serve, Daughter would become Decedent's agent.

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The powers of Spouse, or Daughter, as Decedent's agent, are summarized as follows:

1. The authority to enter upon and take possession of any lands, leases, and property that may belong to Decedent, or to the possession of which Decedent may be entitled.
2. The authority to execute any and all deeds, assignments, oil and gas leases, surface leases, mineral conveyances, royalty deeds, division orders, transfer orders, pooling agreements, unitization agreements, and any and all other title papers required in handling the property and interests belonging to Decedent and full power to manage, maintain, and operate the property and to make such contracts in relation to the property as the agent deemed necessary or proper for the best interests and welfare of the property.
3. The authority to ask for, collect, and receive any rents, profits, issue, or income of any and all of the property, or any part or parts thereof.
4. The authority to endorse, deposit, and collect any check, note, or other instrument payable to Decedent, in particular checks or vouchers issued for the proceeds of production from Decedent's oil and gas leases, to convert the same into cash, and deposit that cash into the accounts the agent maintains.
5. Complete authority over Decedent's bank accounts, with the right to draw and issue any and all checks thereon.
6. The authority to pay all debts and accounts incurred by the agent or under the agent's authority in the operation and maintenance of Decedent's property and interests and to pay all debts and accounts incurred by Decedent or by the agent for Decedent's benefit in maintaining and caring for Decedent personally.
7. The authority to file such suits as may be necessary for the protection of Decedent or Decedent's property, to defend any suits against Decedent or Decedent's property, to employ attorneys necessary to prosecute or defend such suits, and to compromise or settle any and all claims or suits that may be prosecuted or defended.
8. The authority to invest and reinvest the funds that Decedent might have from time to time, to sell, exchange, or mortgage any and all shares of stocks, bonds, or other securities belonging to Decedent, and to make, execute, and deliver an assignment or assignments of any such shares of stock, bonds, or other securities, either absolutely or as collateral security.
9. The authority to hire accountants, attorneys, clerks, workmen, nurses, and others, to remove them and appoint others in their place, and to pay their salaries,

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wages, or other remuneration.

10. Without in anywise limiting the foregoing, the authority generally to do, execute and perform any other act, deed, matter or thing whatsoever, that ought to be done, executed and performed, or that, in the opinion of the agent ought to be done, executed or performed in and about the premises, of every nature and kind whatsoever, as fully and effectually as the Decedent could do if personally present.

Spouse died in b, and pursuant to the power of attorney, Daughter became Decedent's agent. In c, Daughter, acting under the power of attorney, created two trusts on Decedent's behalf: (1) the QPRT, and (2) the Trust. The QPRT was executed on d and had a term of e years. Daughter, acting under the power of attorney, conveyed Decedent's residence to the QPRT. In accordance with the terms of the QPRT, the trustee conveyed the residence to Daughter on the termination of the trust.

The Trust for the benefit of Decedent's great-grandchildren was executed in f, and was funded with a g cash contribution from Decedent's funds.

Both of these transfers were reported on federal gift tax returns and the applicable gift tax was paid.

Decedent died testate on h. Decedent had a taxable estate of i and paid federal estate taxes of j.

Article II of Decedent's will devises and bequeaths to Daughter all of Decedent's interest in real estate, including the residence that was placed in the QPRT, together with mineral interests owned by Decedent.

Article III of Decedent's will gives and bequeaths property with a fair market value of k to Decedent's grandchildren who are living, share and share alike. Article IV bequeaths Decedent's residuary estate to Daughter. If Daughter had not survived Decedent, then under Article IV, Decedent's residuary estate would have passed to Decedent's surviving grandchildren and the descendants of a deceased grandchild.

It is represented that Decedent had a history, extending over several years, of making gifts. On l occasions prior to c, Decedent and Spouse made gifts in excess of the annual exclusion amount under §2503(b) of the Internal Revenue Code. At least e of the gifts (the m gift in the amount of n and the o gift in the amount of p), were not only in sizable dollar amounts, but when adjusted for inflation to their dollar equivalent in c, had values far in excess of the transfers made by Daughter.

LAW AND ANALYSIS:

Section 2033 provides that the value of the gross estate includes the value of all

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property to the extent of the interest therein of the decedent at the time of his death.

Section 2038(a)(1) provides that with respect to transfers after June 22, 1936, the value of the gross estate includes the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired the power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent's death.

Section 2501(a) imposes a tax for each calendar year on the transfer of property by gift during the taxable year by any individual, resident or nonresident.

Section 2511(a) provides that the tax imposed by § 2501 applies 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 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or any 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 for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case.

Generally the power to make gifts must be specifically authorized under a power of attorney. The State Supreme Court has never considered whether an agent has the power to make gifts when that power is not specifically granted under the terms of the power of attorney. State courts have distinguished a special power of attorney from a general power of attorney. See, e.g., Elliot Valve Repair Company v. B.J. Valve and Fitting Company, 675 S.W. 2d 555 (Tex. Civ. App. 1984), *rev'd on other grounds*; First National Bank in Dallas v. Kinabrew, 589 S.W. 137 (Tex. Civ. App. 1979) *writ ref'd n.r.e.*; and Great American Casualty Co. v. Eichelberger, 37 S.W. 2d 1050 (1931) *writ ref'd w.o.m.* The courts have noted that a "general agent" is empowered to transact all the business of the principal of a particular kind or in a particular place. A general

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agent has the power to do anything that the principal could do in the premises. The authority of a “special agent,” on the other hand, is limited to a particular thing or a particular class of work. A special agent has authority only to do those things entrusted to the agent and those things that are apparently necessary to accomplish that end. Given the broad authority of an agent under a general power of attorney, it is uncertain whether under State law an express grant of authority to make gifts is necessary in the case of a general power of attorney.

Several factors, however, lead us to believe that in this case a State court likely would determine that the gifts made by Daughter on behalf of Decedent were authorized under the power of attorney. First, the language of the power of attorney is sufficiently broad to make it a general power of attorney, which as discussed above may itself be determinative that the Daughter had authority to make gifts. Second, the value of the gifts made by Daughter on behalf of Decedent was only about 9 percent of the value of Decedent’s taxable estate. Thus, the value of the gifts was very small relative to value of Decedent’s estate. Third, unlike the cases in which an agent’s actions have been challenged by the principal, Decedent was not economically or otherwise disadvantaged by the gifts made by Daughter. Fourth, the gifts made by Daughter on behalf of Decedent were consistent with Decedent’s intent, as expressed in Decedent’s will. Fifth, the facts indicate that over the years, Decedent made a number of gifts, several of which were rather substantial. Thus, the gifts made by Daughter on behalf of Decedent were consistent with Decedent’s history of gift giving.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.