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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:B04  
PLR-103693-15

Date:  
June 19, 2015

In Re:

Legend

- Grantor A =
- Grantor B =
- Trust =
- Date 1 =
- Date 2 =
- Date 3 =
- Date 4 =
- Year 1 =
- Year 2 =
- Year 3 =
- Court =
- Case 1 =
- Case 2 =
  
- Case 3 =
- Statute =
- State =

Dear :

This letter responds to your personal representative's letter of December 8, 2014, requesting gift and estate tax rulings with respect to Trust.

On Date 1, Husband (Grantor A) and wife (Grantor B), collectively "Grantors", created a trust (Trust) for the benefit of their two children. Article 6, paragraph 6.1 provides that the trustee shall distribute from time to time as much of the trust income and principal for the "well-being" of each child, prior to age 25. In making distributions, the trustee shall emphasize education, health, and personal development of the beneficiary or beneficiaries.

Article 6, paragraph 6.3 provides that after the oldest child reaches age 25, the trustee shall pay the entire net income of his or her trust to the child. The trustee may withhold all or any portion of the income for any child who is under the age of 25. If the trustee considers the income to be insufficient, the trustee may also pay to the child as much of the principal of the trust as the trustee, in the trustee's discretion, considers necessary for proper health, education, support, and maintenance. When the eldest child reached age 25, Trust was divided into two subtrusts (Subtrusts).

Article 6, paragraph 6.3(b) provides that if the child dies before becoming entitled to a full distribution from his or her trust, the trustee shall preserve the remaining balance of the trust for the sole benefit of the surviving child or children. If all children of the Grantors are deceased, then the trustees shall distribute the remaining balance of Trust to the Grantors.

Article 5 provides that Trust is irrevocable.

Article 9 provides that the Grantors (or the survivor) have the power to amend the trust to increase the benefits of this trust going to their children, but not to detract therefrom and have the power to amend the trust to name additional trustees from time to time.

In Year 1 and Year 2, Grantors transferred real property and certain other property to Trust. Grantors filed Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Returns, reporting the gifts to Trust.

Grantors were the trustees of Trust. However, while serving as trustees, the Grantors never made any distributions from Trust to the beneficiaries.

Grantors became aware that the trust provisions above in Articles 6 and 9 failed to reflect Grantors' intent to have the transfers to Trust treated as completed gifts and to exclude the Trust assets from the Grantors' gross estates. In Year 3, Grantors filed a petition with Court seeking reformation of the trust to correct these scrivener's errors.

On Date 2, the court reformed the trust language as follows:

Article 6, paragraph 6.1 provides that until the Grantors children reach age 25, the trustee shall distribute from time to time as much of the income and principal of Trust as the trustee consider necessary for health, education, maintenance, and support of the children. Article 6, paragraph 6.3 provides that after the child reaches age 25, the trustee shall pay to each child the entire net income of his or her trust. The trustee may withhold all or any portion of the income for any child who is under age 25 if the trustee, in the trustee's discretion, determines that such income is not necessary for such child's health, education, support, and maintenance. If the trustee considers the income to be insufficient, the trustee may also pay to the child as much of the principal of the trust as the trustee, in the trustee's discretion, considers necessary for proper health, education, support, and maintenance.

Article 9 provides that the Grantors (or the survivor) shall have the power to amend the trust to name additional trustees from time to time.

On Date 4, Grantors obtained a second Court order reforming Article 6.3(b) as follows:

Article 6, paragraph 6.3(b) provides that if the child dies before becoming entitled to a full distribution from his or her trust, the trustee shall preserve the remaining balance of the trust for the sole benefit of the surviving child or children, if any, or, if none, the trustee shall distribute the remaining balance to the deceased child's estate.

In declarations to the State Court, Grantors declared that each intended that Trust be drafted in a manner that would ensure the transfers were completed gifts and that each did not direct the attorney to include the stated language in Trust. In an affidavit, the attorney who drafted Trust swore that Grantors intended the transfers to Trust to be completed gifts and that the trust provisions, prior to reformation, were scrivener's errors and were not consistent with the Grantors' intent. Grantors resigned as trustees, effective Date 3. It is represented that Grantors established Trust for the main purpose to leverage Grantors' unified credit and transfer the maximum amount to their children. One exhibit in the state court proceeding was a letter from the attorney indicating that the "purpose of this trust is to set aside property for your children" and "[a]n irrevocable trust . . . ."

You have requested the following rulings: (1) as a result of the State Court reformations of Trust to correct several scrivener's errors, the original transfers to Trust and future transfers to the Subtrusts are and will be completed gifts for federal gift tax purposes; and (2) the assets of Trust and the Subtrusts will not be includable in Grantor B's gross estates under § 2036 or 2038.

Ruling # 1:

Section 2501 of the Internal Revenue Code imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 2511(a) 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 25.2511-2(b) of the Gift Tax Regulations provides, in part, that a gift is complete where 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.

Section 25.2511-2(c) provides, in part, that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interest of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Supreme Court held that where the issue involved is the determination of property interests for federal estate tax purposes, and the determination is based on state law, the highest court of the state is the best authority on its own law. The Service, however, is not bound by a lower court decision. If there is a decision by a lower 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.

In Case 1, the scrivener gave a surviving spouse the power to revoke a credit shelter trust which would have caused the assets to be included in the surviving spouse's gross estate. Due to ambiguities in the trust instrument, the court allowed extrinsic evidence to determine the grantors' intent, citing Case 2 for the proposition that where a trust instrument contains some expression of the trustor's intention, but as a result of a drafting error that expression is made ambiguous, a trial court may consider extrinsic evidence to resolve the ambiguity and give effect to the trustor's intention. This evidence indicated that the grantors intended to create the credit shelter trust to minimize their overall estate tax liability and exclude the credit shelter trust from the surviving spouse's gross estate. The court concluded that the provision was a scrivener's error and reformed the trust to eliminate the power. The court stated that the court had ample authority, founded in common law and under statutory law, to reform the trust to accomplish the purposes of the grantors. The court cited Case 3 for the proposition that state courts have the power to modify the terms of a trust to serve the original intentions of the grantor. The court applied State Statute which recognizes

the equitable common law power of a trial court to reform a trust agreement based on mistake.

In this case, Article 5 provides that Trust is irrevocable. However, Article 9 gives Grantors the power to amend Trust. These provisions are inconsistent and create an ambiguity. Under State law, a state court would allow extrinsic evidence to determine the Grantors' intent. In this case, it is represented that Grantors intent was to leverage the grantors' unified credit and transfer the maximum amount to their children. Retaining a reversionary interest or a distribution power not limited by an ascertainable standard was contrary to this intention. Further, the attorney who drafted Trust has sworn in an affidavit that Grantors intended the transfers to Trust to be completed gifts and that the trust provisions, prior to reformation, were scrivener's errors and were not in line with the Grantors' intent. In addition, Grantors filed Forms 709 reporting the transfers to Trust and treating the transfers as completed gifts. Grantors submitted declarations to Court of their intent to make completed gifts to Trust.

Therefore, we conclude that State Court's orders on Date 2 and Date 4 reforming Trust based upon scrivener's errors are consistent with State law as applied by the highest court of State. The reformations of Trust are effective as of Date 1.

Accordingly, based upon the facts submitted and representations made, we conclude that as a result of the State Court reformations of Trust, the original transfers to Trust and future transfers to the Subtrusts are and will be completed gifts for federal gift tax purposes.

Ruling # 2:

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of the decedent's death.

Section 2036(a) provides that the value of the gross estate shall include 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 case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—(1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2038(a)(1) provides that, the value of the gross estate shall include 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 case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of 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 such power) to alter, amend, revoke, or terminate, or when any such power is relinquished during the 3-year period ending on the date of the decedent's death.

In the present case, the reformation of Trust is effective as of Date 1. The reformed trust provisions do not give Grantor an income interest in Trust or the divided trusts or the right to designate the persons who will possess or enjoy the property or have an interest in the income of the property for purposes of § 2036. Further, the reformed Trust does not give the Grantor the power to alter, amend, revoke, or terminate Trust or the divided trusts for purposes of § 2038. Accordingly, based upon the facts submitted and representations made, we conclude that the assets of Trust and the Subtrusts will not be includable in the Grantor's gross estates under § 2036 or 2038.

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.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) 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,

Lorraine E. Gardner  
Senior Counsel, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2)