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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-137243-16

Date:
May 25, 2017

Legend

Grantor	=
Trust	=
Son	=
Daughter	=
Spouse	=
Friend	=
Relative 1	=
Relative 2	=
Relative 3	=
Grantor's Wife	=
Relative 4	=
x	=
y	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Court	=
State	=
Case	=
Statute	=

Dear _____ :

This responds to the letter dated November 29, 2016, and subsequent correspondence, submitted on your behalf by your authorized representative, concerning the generation-skipping transfer (GST) tax consequences of modifications and a judicial construction of a trust that is exempt from the application of GST tax imposed under § 2601 of the Internal Revenue Code (Code).

The facts and representations submitted are summarized as follows.

On Date 1, a date prior to September 25, 1985, Grantor created Trust, an irrevocable inter vivos trust for the primary benefit of Son and Son's issue. Grantor and Son died prior to September 25, 1985. Son was survived by Spouse and Daughter (the granddaughter of Grantor). It is represented that no additions have been made to Trust since its inception.

Pursuant to a power to amend Trust, Committee amended Trust x times over a y-year period prior to September 25, 1985. Trust as amended, restated, and in effect on September 25, 1985, provides that the trustees shall distribute one-half of the net income of Trust to Son's issue by right of representation and one-half of the net income of Trust to Spouse during her lifetime or until she remarries. Upon Spouse's death or remarriage, the trustees shall pay the entire net income of Trust to Son's issue then living by right of representation. Upon termination of Trust, the trustees shall distribute the principal and all undistributed income to Son's then living issue by right of representation.

Trust as in effect on September 25, 1985, further provides that Trust shall terminate at the expiration of 21 years after the death of the last survivor of the following measuring lives: Son; Spouse; all issue of Friend who were living on the date preceding Date 1; and, "the three individuals who are designated as contingent beneficiaries in [Clause 2(d) of Trust] and all their issue who were living on [the date preceding Date 1]." However, if all issue of Son die prior to the expiration of 21 years after the death of the above-designated measuring lives, Trust will terminate upon the death of Son's last surviving issue; provided, however, that if Spouse is then living and has not remarried, Trust shall terminate upon her subsequent death or remarriage.

Clause 2(d) of Trust as in effect on September 25, 1985, designates the contingent beneficiaries of Trust, providing that in the event that Trust is terminated by the death of Son's last surviving issue, all undistributed income and principal shall be distributed to Relative 1, Relative 2, and Relative 3, as contingent beneficiaries; provided, however, that if any designated contingent beneficiary is not then living, that beneficiary's share of undistributed income and principal shall be distributed to his or her surviving issue by right of representation. Relative 1, Relative 2, and Relative 3 are

either descendants of Grantor's grandfather or the father of Grantor's Wife and are persons born before Date 1.

Committee as constituted on September 25, 1985, consisted of three individuals unrelated to any beneficiary of Trust. Trust as in effect on September 25, 1985, grants Committee a joint power exercisable at any time or from time to time by a majority of the members of Committee and by the last survivor of them to change and alter any or all of the trusts declared in Trust, provided that this power as created or as amended by the Committee must not extend to or be used to give any benefit in the trust property, either direct or indirect, except to the issue of the grandfather of Grantor; to the issue of the father of Grantor's Wife; or to any wife of Son. Trust as in effect on September 25, 1985, further provides Committee with the power to appoint successor trustees.

Pursuant to Committee's power to amend, Committee amended Trust again on Date 2, Date 3, and Date 4. Trust as amended on Date 2 provides that the trustees shall distribute one-half of the net income of Trust to Son's issue by right of representation and one-half of the net income of Trust to and among Spouse or Son's issue, in the discretion of the trustees. Trust as amended on Date 2 further provides that upon termination of Trust, the trustees shall distribute the principal and all undistributed income to Son's then living issue by right of representation.

Trust as amended on Date 2 includes a termination provision similar to that of Trust as in effect on September 25, 1985. Trust as amended on Date 2 provides that trust will terminate upon the expiration of the 21-year period after the death of the last-surviving designated measuring life. The termination provision includes the same language to describe the measuring lives as provided in Trust as in effect on September 25, 1985, except that the measuring lives formerly referred to as the "three individuals who are designated as contingent beneficiaries in [Clause 2(d) of Trust]" are referred to as the "three individuals who are designated as contingent beneficiaries in [Clause 2(c) of Trust]," which reflects the revised paragraph order of Trust as amended on Date 2. Similar to the termination provision of Trust as in effect on September 25, 1985, Trust as amended on Date 2 provides that Trust will terminate earlier if all issue of Son die prior to the expiration of 21 years after the death of the named measuring lives. However, Trust as amended on Date 2 does not provide for Trust to continue until Spouse's death or remarriage.

Clause 2(c) of Trust as amended on Date 2 designates two contingent beneficiaries of Trust. This is inconsistent with the reference to Clause 2(c) in the termination provision of Trust as amended on Date 2, which refers to three (not two) contingent beneficiaries of Trust. Specifically, Clause 2(c) of Trust as amended on Date 2 provides that in the event that Trust is terminated by the death of Son's last surviving issue, all undistributed income and principal shall be distributed to Relative 3 and Relative 4, as contingent beneficiaries; provided, however, that if either designated contingent beneficiary is not then living, that beneficiary's share of undistributed income

and principal shall be distributed to his or her surviving issue by right of representation. Relative 4 is a descendant of the grandfather of Grantor and is a person born after Date 1.

The instrument amending Trust on Date 2 states that Committee intends that the amendment shall not be treated as a constructive addition to Trust for purposes of chapter 13 and further states that: "To that end, this amendment shall not be interpreted in a manner that would postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property held under the Deed of Trust for a period, measured from the date of creation of [Trust], extending beyond any life in being at the date of creation of [Trust] plus a period of 21 years."

The amendment to Trust on Date 3 amended only the termination provision of Trust. Trust as amended on Date 3 provides that Trust shall terminate at the expiration of 21 years after the death of the last survivor of the following measuring lives: Son; Spouse; all issue of Friend who were living on the date preceding Date 1; and "Relative 1, Relative 2, and Relative 3 and all their issue who were living on [the date preceding Date 1]." Trust as amended on Date 3 continues to provide that Trust will terminate earlier if all issue of Son die prior to the expiration of 21 years after the death of the named measuring lives.

The instrument amending Trust on Date 3 states that, with respect to the amendment to Trust on Date 2, Clause 2(c) was amended by Committee with the sole intent of modifying the contingent beneficiaries of Trust, and not the intent of modifying the measuring lives to be used in determining the duration of Trust. The instrument amending Trust on Date 3 also includes the same statement as in the prior instrument amending Trust on Date 2 regarding the intention that the amendment not be construed or treated as a constructive addition to Trust for GST tax purposes.

From September 25, 1985, through Date 4, members of Committee and the trustees of Trust serving from time to time have been individuals unrelated and not subordinate to any beneficiary of Trust. On Date 4, Committee amended Trust to provide that: (1) Committee may not amend Trust to benefit a Committee member who may also be a Trust beneficiary or to benefit any person whom any Committee member may be legally obligated to support, and (2) with regard to Committee's power to appoint trustees, a successor to any trustee who is removed shall not be a related or subordinate party (within the meaning of § 672(c) of the Code) with respect to any Committee member who may also be a Trust beneficiary or may be legally obligated to support any such beneficiary.

On Date 5, the trustees of Trust sought judicial construction by Court of the effect of the Date 2 amendment to Trust under applicable State law. In support of the trustees' Complaint for Declaratory Judgment, the trustees contend: (1) the express terms of Trust as amended on Date 2, together with the express terms of the instrument

amending Trust on Date 2, support a construction that the addition of Relative 4 as a contingent beneficiary did not add Relative 4 as a measuring life in determining the duration of Trust; (2) under the State common law rule against perpetuities the Date 2 amendment was void *ab initio* (see Case); and (3) Statute, the State statutory rule against perpetuities in effect on Date 2, also prohibited and thereby prevented a violation of the rule by preventing an improper measuring life from being used to extend the duration of Trust.

On Date 6, Court issued an order construing Trust as amended on Date 2. Court determined that the termination provision as amended on Date 2 did not extend the duration of Trust beyond any life in being at the date of the creation of Trust plus a period of 21 years. In addition, Court determined that to the extent the termination provision of Trust as amended on Date 2 purported to add a new measuring life for purposes of determining the duration of Trust, the provision was ineffective and invalid at the time of the amendment to Trust on Date 2.

RULING REQUESTED

You have requested a ruling that the amendments to Trust on Date 2, Date 3, and Date 4, and the judicial construction of Trust as amended on Date 2 did not cause Trust to lose its status as exempt from the application of GST tax imposed under § 2601.

LAW AND ANALYSIS

Section 2601 provides that a tax is imposed on every GST (within the meaning of subchapter B).

A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip. Section 2612(a) provides that the term taxable termination means a termination (by death, lapse of time, release of a power or otherwise) of an interest in property held in trust where the property passes to a skip person with respect to the transferor of the property. Section 2612(b) provides that the term taxable distribution means any distribution from a trust to a skip person other than a taxable termination or a direct skip. Under § 2612(c)(1), a direct skip is a transfer subject to federal estate or gift tax made by a transferor to a skip person.

Section 1433(a) of the Tax Reform Act of 1986 (Act), provides that the GST tax is generally applicable to GSTs made after October 22, 1986. Under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the GST tax does not apply to a transfer from a trust if the trust was irrevocable on September 25, 1985, and no addition (actual or constructive) was made to the trust after that date.

Section 26.2601-1(b)(1)(iv) provides that, if an addition is made after September 25, 1985, to an irrevocable trust, a pro rata portion of subsequent distributions from (and terminations of interests in property held in) the trust is subject to the provisions of chapter 13. When an addition is made, the trust shall be deemed to consist of two portions, a portion not subject to chapter 13 and a portion subject to chapter 13.

Section 26.2601-1(b)(1)(v)(B) provides that the release, exercise, or lapse of a power of appointment (other than a general power) is not treated as an addition to a trust if (1) the power was created in an irrevocable trust that is not subject to the GST tax because it was irrevocable on September 25, 1985, and (2) in the case of an exercise, the power was not exercised in such a way that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (the perpetuities period). If a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised.

A “general power of appointment” is defined in § 2514(c) as a power that is exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate. Section 25.2514-1(c)(1) of the Gift Tax Regulations provides, in part, that a power of appointment is not a general power of appointment if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the possessor or his creditors, or the possessor's estate or the creditors of his estate, or (b) expressly not exercisable in favor of the possessor or his creditors, the possessor's estate or the creditors of the possessor's estate. Under § 25.2514-1(b)(1), a “power of appointment” includes all powers that are in substance and effect powers of appointment received by the donee of the power from another person, regardless of the nomenclature used in creating the power and regardless of local property law connotations. A power given to a donee to affect the beneficial enjoyment of a trust property or its income by altering, amending or revoking the trust instrument or terminating the trust is a power of appointment.

Section 26.2601-1(b)(4)(i) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax under § 26.2601-1(b)(1), (2), or (3) (hereinafter referred to as an exempt trust) will not cause the trust to lose its exempt status. In general, unless specifically provided otherwise, the rules contained in this paragraph are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes. Thus (unless specifically noted), the rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(A) provides that the distribution of trust principal from an exempt trust to a new trust or retention of trust principal in a continuing trust will not cause the new or continuing trust to be subject to the provisions of chapter 13, if— (1) either—(i) the terms of the governing instrument of the exempt trust authorize distributions to the new trust or the retention of trust principal in a continuing trust, without the consent or approval of any beneficiary or court; or (ii) at the time the exempt trust became irrevocable, state law authorized distributions to the new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court; and (2) the terms of the governing instrument of the new or continuing trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus a period of 21 years, plus if necessary, a reasonable period of gestation. If a distributive power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

Section 26.2601-1(b)(4)(i)(C) provides that a judicial construction of a governing instrument to resolve an ambiguity in the terms of the instrument or to correct a scrivener's error will not cause an exempt trust to be subject to the provisions of chapter 13 if—(1) the judicial action involves a bona fide issue; and (2) the construction is consistent with applicable state law that would be applied by the highest court of the state.

In Commissioner v. Estate of Bosch, 378 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 the present case, Trust was irrevocable on September 25, 1985. Under the terms of Trust as in effect on and after September 25, 1985, Committee possesses a joint power to amend Trust that cannot be exercised to give any benefit in the trust property except to the issue of the grandfather of Grantor; to the issue of the father of Grantor's Wife; or to any wife of Son. The power to amend Trust is a power of appointment and is not a general power of appointment. See § 25.2514-1(b).

Committee exercised its power to amend on Date 2, Date 3, and Date 4. Under § 26.2601-1(b)(1)(v)(B), Committee's exercises of the power will be treated as an

addition to Trust if the exercise of the power may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period beyond the perpetuities period measured from the date of creation of Trust.

The Date 2 amendment to Trust created an ambiguity regarding the termination date of Trust. On Date 6, Court issued an order construing the Date 2 amendment. Court's construction of the effect of the termination provision of Trust as amended on Date 2 involved a bona fide issue. Court's determination that the Date 2 amendment to Trust was void *ab initio*, to the extent it purported to add Relative 4 as a measuring life for purposes of determining the duration of Trust, is consistent with applicable State law that would be applied by the highest court of State. See Case; Statute.

Based on the above, we conclude that Committee's joint exercise of the power to amend Trust as exercised on Date 2 amended the contingent beneficiaries of Trust but did not amend the termination provision of Trust to postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property beyond the perpetuities period measured from the date of creation of Trust. Accordingly, Committee's exercise of the power to amend Trust on Date 2 is not treated as an addition to Trust under § 26.2601-1(b)(1)(v)(B).

In addition, Committee's joint exercise of the power to amend Trust on Date 3 and Date 4 did not postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period beyond the perpetuities period measured from the date of creation of Trust. Accordingly, Committee's exercises of the power to amend Trust on Date 3 and Date 4 are not treated as additions to Trust under § 26.2601-1(b)(1)(v)(B).

The requirements of § 26.2601-1(b)(4)(i)(A) and (C) apply to determine whether Trust retains its exempt status for GST tax purposes following the exercises of the discretionary power to amend Trust on Date 2, Date 3, and Date 4 and Court's construction of the Date 2 amendment of Trust.

Under the governing instrument of Trust as in effect on September 25, 1985, Committee is granted a broad discretionary power to amend Trust. Based on the above analysis of the effect of the Date 2 amendment on the termination provision of Trust, we conclude that Committee's exercises of the power to amend Trust on Date 2, Date 3, and Date 4 do not extend the time for vesting of any beneficial interest in Trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from Date 1 (the date Trust became irrevocable), extending beyond any life in being on Date 1, plus a period of 21 years. Accordingly, we rule under § 26.2601-1(b)(4)(i)(A) that Committee's exercises of the power to amend Trust on Date 2, Date 3, and Date 4 do not cause Trust to be subject to the GST tax provisions.

Further, because Court's construction of the Date 2 amendment of Trust involved a bona fide issue and is consistent with applicable state law that would be applied by the highest court of State, we rule under § 26.2601-1(b)(4)(i)(C) that the Date 6 order of Court construing the termination provision of Trust does not cause Trust to be subject to the GST tax provisions.

Accordingly, we rule that the amendments to Trust on Date 2, Date 3, and Date 4, and the judicial construction of Trust as amended on Date 2, do not cause Trust to be subject to the provisions of chapter 13 and, therefore, Trust does not lose its status as exempt from the application of GST tax imposed under § 2601.

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,

Karlene Lesho

Karlene Lesho
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)

Copy of letter
Copy for § 6110 purposes

cc: