

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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2601.00-00

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:4
PLR-121323-17
Date:
January 05, 2018

Re:

Legend

- Grantor =
- Trust =
- Trust 1 =

- Trust 2 =
- Child =
- Grandchild 1 =
- Grandchild 2 =
- Husband =
- Brother-in-law =
- Accountant =
- Date 1 =
- Date 2 =
- State =
- State Statute =

Dear :

This letter responds to your authorized representative's letter dated June 27, 2017, requesting rulings regarding the gift and generation-skipping transfer (GST) tax consequences of a proposed addition of a Co-Trustee to Trust 1.

The facts and representations submitted are as follows.

On Date 1, Grantor created an irrevocable trust, Trust, for the benefit of Child and her children, Grandchild 1 and Grandchild 2, and their issue. Date 1 is a date prior to September 25, 1985. Grantor died on Date 1 and Child died on Date 2. At the death of Child, Trust was divided into two trusts, Trust 1 for the benefit of Grandchild 1 and Trust 2 for the benefit of Grandchild 2. It is represented that there have been no additions to Trust after September 25, 1985.

This letter ruling pertains to Trust 1. All of the initial trustees of Trust 1 are deceased, and Husband, Brother-in-law and Accountant currently serve as Trustees of Trust 1. Trustees propose to appoint Grandchild 1 or one of her issue as a Co-Trustee.

Article II, Paragraph I, of Trust requires trustees to pay or apply for the benefit of Child, her children, and grandchildren, the net income and principal as the trustees may deem necessary for the reasonable support, care, education, and maintenance of Child, her children, and grandchildren.

Article II, Paragraph 2, provides that upon the death of Child, Trust is to be divided into equal shares for the benefit of Child's children, Grandchild 1 and Grandchild 2.

Article II, Paragraph 3, provides that the trustees shall have the discretion to pay to or apply for the benefit of Grandchild 1 and her issue, the net income and principal as the trustees may deem necessary for the reasonable support, care, education, and maintenance of the beneficiaries.

Article II, Paragraph 4, provides that the trust created under Paragraph 2, shall continue until twenty-one years after the death of the last to die of all the issue of Grantor living on the date of Trust's creation. At termination, the corpus of Trust 1 shall be distributed *per stirpes* to the then living issue of Grandchild 1. If all the issue of Grandchild 1 die prior to the termination of Trust 1, the corpus of the trust for the benefit of those issue will be added to the trust created for the benefit of Grandchild 2, if Grandchild 2 has living issue. If prior to the termination of Trust, all the issue of Child are deceased, then the remaining corpus of Trust 1 shall be distributed one-half each to the then living issue *per stirpes* of Child's two siblings or all to the issue *per stirpes* of one sibling, if at that time the other sibling's issue are all deceased. If none of the issue of either sibling is then living, corpus of Trust 1 is to be distributed to the legal heirs of Child.

Article VII, Paragraph VII provides that all questions relating to the validity or construction and administration of Trust shall be determined in accordance with the laws of State.

Article IV, Paragraph A, requires that there will always be three trustees of Trust. The current Trustees have a duty to appoint a successor trustee so that at all times there are three trustees. Paragraph B, provides that any successor trustee will have the same

rights, privileges, powers and discretions, and be subject to the same duties, as the original trustees. Any action by a majority of the trustees will be binding on the trust.

Article VI, Paragraph 15, provides that while a beneficiary is also a Co-Trustee of Trust, such beneficiary Co-Trustee shall not have any right to participate in any manner which would shift any beneficial interest in the trust to or from such beneficiary Co-Trustee. All such discretionary power shall be exercised solely by the other trustees.

State Statute provides, in part, that unless a settlor or a testator clearly indicates that a broader power is intended by express reference to this section, a person who is a beneficiary of a trust that permits the person, as trustee or co-trustee, to make discretionary distributions of income or principal to or for the benefit of himself or herself, may exercise that power in his or her favor only to provide for his or her health, education, support, or maintenance within the meaning of sections 2041 and 2514 of the Internal Revenue Code.

State Statute further provides, in part, that it applies to any irrevocable trust created under a document executed before January 1, 1997, unless the parties in interest elect affirmatively not to be subject to the application of subdivision (c) through a written instrument delivered to the trustee. The election shall be made on or before the latest of January 1, 1998, or three years after the date on which the trust became irrevocable. It is represented that none of the interested parties elected out of this provision by January 1, 1998 with respect to Trust 1.

You have requested the following rulings:

1. If Grandchild 1 or any of her issue act as a Co-Trustee of Trust 1, these persons will not possess a general power of appointment under sections 2041 or 2514 of the Internal Revenue Code with respect to the Trust 1.
2. If Grandchild 1 or her issue act as a Co-Trustee of Trust 1, it will not cause Trust 1 to lose its exempt status under § 1433(b)(2)(A) of the Tax Reform Act of 1986 and § 26.2601-1(b)(4)(i) of the generation-skipping transfer tax regulations.

Ruling 1

Section 2501 of the Code imposes a tax on the transfer of property by gift by an individual. Section 2511 provides that the tax imposed by section 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 2514(b) provides that, for gift tax purposes, 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 the power.

Section 2514(c)(1) provides the term “general power of appointment” means a power that is exercisable in favor of the individual possessing the power (possessor), his estate, his creditors, or the creditors of his estate. However, a power to consume, invade or appropriate property for the benefit of the possessor that is limited by an ascertainable standard relating to the health, education, support or maintenance of the possessor is not a general power of appointment.

Section 2514(e) provides that the lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of the power to the extent that the property that could have been appointed by exercise of the lapsed power during the calendar year exceeds the greater of \$ 5,000 or 5 percent of the aggregate value of the assets out of which the exercise of the lapsed powers could be satisfied.

Section 25.2514-1(b)(1) of the Gift Tax Regulations provides that the term “power of appointment” includes all powers that are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. If a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment. Similarly, a power given to a donee to affect the beneficial enjoyment of trust property or its income by altering, amending or revoking the trust instrument or terminating the trust is a power of appointment. Further, a power in a donee to remove or discharge a trustee and appoint himself may be a power of appointment. For example, if the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself and another person has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, that person is considered as having a power of appointment.

Section 25.2514-1(c)(2) provides that a power to consume, invade, or appropriate income or corpus, or both, for the benefit of the possessor of the power that is limited by an ascertainable standard relating to health, education, support or maintenance of the possessor is, by reason of section 2514(c)(1) not a general power of appointment. A power to use property for the comfort, welfare, or happiness of the holder is not limited by the requisite standard.

Section 25.2514-3(c)(4) provides that, if a trustee has, in his capacity as trustee, a power that is considered a general power of appointment, the trustee’s resignation or removal as trustee will be considered a lapse of his power for purposes of section 2514(e).

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has at the

time of 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 that is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive.

Section 2041(b)(1)(A) provides that a general power of appointment is a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; however, a power to consume, invade, or appropriate property for the benefit of the decedent that is limited to the health, education, support, or maintenance of the decedent is not deemed to be a general power of appointment. Section 2041(b)(2) provides that the lapse of a power of appointment created after October 21, 1942, is considered a release of the power.

State Statute provides generally, that a person who is a beneficiary of a trust that permits the person, as trustee or co-trustee, to make discretionary distributions of income or principal to or for the benefit of himself or herself, may exercise that power in his or her favor only to provide for his or her health, education, support, or maintenance within the meaning of sections 2041 and 2514 of the Code.

Rev. Proc. 94-44, 1994-2 C.B. 683, sets forth the Service's position regarding the transfer tax consequences of the enactment of Florida Statutes Annotated section 737.402(4)(a)(1). Under this statute, any fiduciary power conferred upon a trustee to make discretionary distributions of either principal or income to or for the trustee's own benefit cannot be exercised by the trustee, except to provide for that trustee's health, education, maintenance, or support, as described in sections 2041 and 2514. The statute was effective with respect to trusts that were irrevocable on or after July 1, 1991. Pursuant to the revenue procedure, the Service will not treat the statute as causing the lapse of a general power of appointment for purposes of sections 2041 and 2514, where the scope of a fiduciary power held by a beneficiary was restricted as a result of the statute.

Consistent with Rev. Proc. 94-44, State Statute restricts the scope of fiduciary powers of a fiduciary. Accordingly, we conclude that under State Statute, if Grandchild 1 or her issue becomes a Co-Trustee of Trust 1, Grandchild 1 or her issue will not possess a general power of appointment with respect to Trust 1 for purposes of sections 2041 and 2514, as a result of the trustee invasion power.

Ruling 2

Section 2601 imposes a tax on every GST made after October 26, 1986. A GST is defined under section 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 a trust unless (A) immediately after such termination, a non-skip person has an interest in such property, or (B) at no time after such termination may a distribution (including distributions on termination) be made from such trust to a skip person.

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 of an interest in property to a skip person.

Under § 1433(a) of the Tax Reform Act of 1986 (Act) and § 26.2601-1(a), the GST tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i), the GST tax does not apply to a transfer under a trust that was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985 (or out of income attributable to corpus so added). Under § 26.2601-1(b)(1)(ii), any trust in existence on September 25, 1985, will be considered irrevocable unless the settlor had a power that would have caused inclusion of the trust in his or her gross estate under § 2038 or 2042, if the settlor had died on September 25, 1985.

Section 26.2601-1(b)(4)(i) of the Generation-Skipping Transfer Tax Regulation 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)(D)(1) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraph § 26.2601-1(b)(4)(i)(A), (B), or (C) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

Section 26.2601-1(b)(4)(i)(D)(2) provides that for purposes of this section, a modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer. To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification. A modification that is administrative in nature that only indirectly increases the amount transferred (for example, by lowering administrative costs or income taxes) will not be considered to shift a beneficial interest in the trust.

In § 26.2601-1(b)(4)(i)(E), *Example 10* considers the following situation. In 1980, Grantor established an irrevocable trust for the benefit of Grantor's issue, naming a bank and five other individuals as trustees. In 2002, the appropriate local court approves a modification of the trust that decreases the number of trustees which results in lower administrative costs. The modification pertains to the administration of the trust and does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification. In addition, the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust will not be subject to the provisions of chapter 13.

The proposed appointment of Grandchild 1 or her issue as a successor Co-Trustee as described above, is administrative in nature under § 26.2601-1(b)(4)(i)(D)(2), and will not be considered to shift a beneficial interest to a lower generation in the trust. See *Example 10* of § 26.2601-1(b)(4)(i)(E). Neither Grandchild 1, nor any of her issue, will possess a general power of appointment. Thus, the changes will not result in a shift in any beneficial interest to a lower generation nor do the changes extend the time for vesting of any beneficial interest in Trust. Accordingly, based upon the facts submitted and the representations made, we conclude that the appointment of Grandchild 1 or her issue as a Co-Trustee of Trust 1 will not cause Trust 1 to lose its exempt status, and will not subject it to GST tax.

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 specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

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 yours,

Associate Chief Counsel
Passthroughs & Special Industries

Melissa C. Liquerman

By: _____
Melissa C. Liquerman
Chief, Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2)

Copy of this letter
Copy for § 6110 purposes

cc: