

Dear _____ :

This letter responds to a letter dated April 13, 2019, requesting rulings on the federal estate and generation-skipping transfer (GST) tax consequences of a judicial reformation of Trust.

The facts and representations submitted are as follows.

On Date 1, Decedent and Spouse established a revocable trust, Trust, which was restated on Date 2, Date 3, and Date 4. Prior to their deaths, Decedent and Spouse resided in State, a community property state. Trust is governed by the laws of State. Trust consists entirely of community property. Decedent retained Attorney 1 to prepare the Date 3 and Date 4 restatements of Trust. Decedent died on Date 5, survived by his wife, Spouse, and one child, Child. Child is the Trustee of Trust and all subtrusts established under its terms.

Article Five, Section 5.02 of Trust, as restated on Date 3, provided that “[U]pon the death of a Grantor, our trust will become irrevocable as it pertains to the administration and distribution of the deceased Grantor’s trust property.” The restatement on Date 4 failed to include this language.

Pursuant to Article Seven of Trust, after Decedent died, Decedent’s interest in community property and his separate trust property was divided into two separate shares, a Marital share (Marital Trust) and a Non-Marital share (Family Trust). Spouse’s interest in community property and her separate trust property was transferred to a revocable trust (Survivor’s Trust). Pursuant to Article Seventeen, Section 17.23, Marital Trust was divided into a GST Exempt Marital Trust and a GST Non-Exempt Marital Trust. Any reference to Marital Trust will include GST Exempt Marital Trust and GST Non-Exempt Marital Trust.

The executor of Decedent’s estate timely filed Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. On Schedule M, the executor made the election under § 2056(b)(7) to treat the property passing to GST Exempt Marital Trust and GST Non-Exempt Marital Trust as qualified terminable interest property (QTIP). On Schedule R, the executor also elected to treat all the property in GST Exempt Marital Trust for GST tax purposes as if the election to be treated as QTIP had not been made (“reverse” QTIP election). The estate allocated Decedent’s available GST exemption to the property transferred to GST Exempt Marital Trust. Further, Decedent’s estate did not incur any estate tax with respect to Family Trust because Decedent’s available basic exclusion amount was applied to the property transferred to Family Trust.

Marital Trust

Article Nine governs Marital Trust. Section 9.01 requires the Trustee to distribute all of the net income of Marital Trust to the surviving Grantor at least monthly during the surviving Grantor's lifetime. Under Section 9.02, an Independent Trustee may distribute as much of the principal of Marital Trust to the surviving Grantor as the Trustee may determine advisable for any purpose. If no Independent Trustee is then serving, then the Trustee shall distribute as much principal to the surviving Grantor as the Trustee determines necessary for the surviving Grantor's health, education, maintenance or support.

Section 9.03 provides that the Trustee shall convert any non-productive property held in Marital Trust to productive property.

Section 9.04 provides as follows:

The surviving Grantor has the testamentary limited power to appoint all or any portion of the principal and undistributed income remaining in Marital Trust among our descendants, their spouses and charities qualified under § 2055 of the Internal Revenue Code. The surviving Grantor may not exercise this power of appointment to appoint trust property to the surviving Grantor, the surviving Grantor's estate, the surviving Grantor's creditors, or the creditors of the surviving Grantor's estate. We intend to create a testamentary power of appointment that is a limited power of appointment and not a general power of appointment as defined in Internal Revenue Code Section 2041.

No other person is granted a power of appointment over Marital Trust property.

Section 9.06 provides that Decedent and Spouse intend that Marital Trust property constitute QTIP for federal estate and state death tax purposes if and to the extent the Trustee or personal representative makes the necessary elections.

Section 9.07 provides that Marital Trust will terminate upon the death of the surviving Grantor. If the surviving Grantor has not fully exercised the testamentary power of appointment, the Trustee shall distribute the unappointed balance of Marital Trust to a Charitable Share and a Non-Charitable Share, pursuant to Article Eleven.

Article Seventeen, Section 17.23 of Trust provides that if any trust created under Trust would be partially exempt from GST tax after the intended allocation of available GST exemption to the trust, then the Trustee may divide the partially exempt trust so that the allocation of available GST exemption can be made to a trust that will be entirely exempt from GST tax.

Family Trust

Article Ten governs Family Trust. The surviving Grantor and Decedent's and Spouse's descendants are the beneficiaries of Family Trust. Section 10.02 provides that an Independent Trustee may distribute as much of the income and principal of Family Trust to the beneficiaries as the Independent Trustee may determine advisable for any purpose. If no Independent Trustee is then serving, then the Trustee shall distribute as much income and principal to the beneficiaries as the Trustee determines necessary for their health, education, maintenance or support.

Section 10.04 provides that Family Trust will terminate upon the death of the surviving Grantor and any remaining trust property will be distributed to a Charitable Share and a Non-Charitable Share, pursuant to Article Eleven.

Survivor's Trust

Article Eight governs Survivor's Trust. Section 8.03 provides that the Trustee must distribute the net income to the surviving Grantor at least monthly. Section 8.04 provides that the Trustee has the discretion to distribute principal to the surviving Grantor as he or she requests in writing or in the Trustee's discretion.

Section 8.07 provides that the surviving Grantor may appoint all or any portion of the principal and undistributed income remaining in Survivor's Trust at the surviving Grantor's death among one or more persons or entities, including the creditors of Spouse's estate. The surviving Grantor has the exclusive right to exercise this general power of appointment. Survivor's Trust does not contain a provision governing the disposition of property in the trust in default of this exercise.

Section 8.08 provides that Survivor's Trust becomes irrevocable upon the death of the surviving Grantor and the Trustee shall administer Survivor's Trust consistent with the provisions of Article Five.

Article Five of Trust

Article Five, Section 5.05 provides that "[i]f our Trustee or the surviving Grantor's Executor waives any right of recovery granted by Section 2207A and corresponding provisions of applicable state law, death taxes may not be apportioned to any property included in the deceased Grantor's gross estate under Internal Revenue Code Section 2044."

Section 5.07(b) provides as follows:

Our Trustee may elect to have any trust property qualify for the federal estate tax marital deduction as qualified terminable interest property under Internal Revenue Code Section 2056(b)(7) (the QTIP election) Our Trustee may make the special election under Internal Revenue Code

Section 2652(a)(3) to treat all of the property of a trust created under this trust for which the QTIP election is made as if that election had not been made, making the deceased Grantor the transferor of the property for purposes of the generation-skipping transfer tax. We desire that our Trustee set apart the property to which the election has been made as a separate trust, so that the inclusion ratio of the separate qualified trust, as defined in the Internal Revenue Code, is zero.

Section 5.07(c) provides that the Trustee may elect to allocate any portion of the available GST exemption to the property of which the deceased Grantor is considered the transferor for GST tax purposes.

Articles Eleven, Twelve, and Thirteen of Trust

Articles Eleven, Twelve, and Thirteen provide that the Trustee shall divide the remaining trust property into a Charitable Share and Non-Charitable Share. The Charitable Share is to be distributed to specific charities outright, free from trust. The Trustee is directed to satisfy the gifts to the Charitable Share first from Marital Trust, second from Survivor's Trust, and then from Family Trust. The Non-Charitable Share provides for distributions to several specific individuals, including Child, outright, free from trust. The Trustee shall divide remaining trust property of the Non-Charitable Share into separate shares for Decedent's and Spouse's descendants, *per stirpes*, as further provided in Article Thirteen (Descendants' Trusts).

Restatement of Survivor's Trust

After Decedent's death, on Date 6, Spouse retained Attorney 2 to amend and restate Survivor's Trust (Restated Survivor's Trust). Section 1.07 provides as follows:

In both the Marital Trust and the *Family Trust* of [Trust] dated Date 1, as restated on Date 4, I [Spouse] was granted by [Decedent] a testamentary power of appointment. I now exercise these powers of appointment and appoint all property subject to the power to *this Survivor's Trust* of [Trust] dated Date 1, as restated on Date 4. [Emphasis added.]

Section 6.08(a) provides as follows:

In addition, my Trustee, in its sole and absolute discretion, may elect to waive, in whole or in part, my right to have my estate reimbursed for any tax paid as a result of the inclusion in my taxable estate of property held in a qualified terminable interest (QTIP) trust created by *my wife*. [Emphasis added.]

Articles Eight, Nine, Ten, and Eleven govern the distribution of Survivor's Trust upon Spouse's death. Article Eight provides for the creation of Charitable and

Non-Charitable Shares. Article Nine provides for the distribution of the Charitable Share. Article Ten provides for the establishment of Survivor's Exempt Trust property, and Article Eleven governs the distribution of Survivor's Non-Exempt property.

Spouse's Will

Attorney 2 also prepared Spouse's will (Will). Spouse's Will did not include any waiver of the right of reimbursement clause under § 2207A. Spouse died on Date 7.

Scrivener's Errors

Attorney 1 and Attorney 2 attest, in sworn affidavits, that the following scrivener's errors were made in Trust, Restated Survivor's Trust, and Spouse's Will.

- (i) Spouse's appointment of Marital Trust property to Survivor's Trust. Decedent granted only a limited power of appointment to Spouse with respect to Marital Trust. Spouse did not intend to appoint Marital Trust property, upon her death, to Survivor's Trust. Attorney 2 explains that Survivor's Trust was a revocable trust that is subject to the creditor's claims, debts, and taxes of Spouse and, as such, Spouse could not appoint the property to herself. Attorney 2 asserts that Spouse intended to appoint Marital Trust property in accordance with the provisions under Restated Survivor's Trust governing the disposition of Survivor's Trust property upon her death. Under Article Eleven, Article Twelve, and Article Thirteen, the property of Survivor's Trust and any property passing to it upon Spouse's death, including Marital Trust property, would be distributed to persons or in further trust to persons, other than Spouse, her estate, her creditors or the creditors of her estate.
- (ii) The reference to "my wife." Decedent predeceased Spouse, and no QTIP trust could be created by Spouse.
- (iii) Spouse's appointment of Family Trust property to Survivor's Trust. Spouse did not possess any powers of appointment over Family Trust property.
- (iv) The failure to provide that both Marital Trust and Family Trust were irrevocable upon the death of Decedent. In the petition and memorandum of law supporting the petition, Attorney 1 asserts that the elimination of the language in Section 5.02 of Trust was a scrivener's error. Attorney 1 attests that Decedent and Spouse never intended to give Spouse the power to revoke either trust because Family Trust

would lose the federal tax benefits of the application of the basic exclusion amount to Family Trust and Decedent's GST exemption to GST Exempt Marital Trust.

- (v) The omission in Spouse's Will of a waiver of the right of reimbursement. Attorney points out that the waiver of the right of reimbursement is expressly authorized under Section 6.08(a) of Restated Survivor's Trust.

State Court Order

After Spouse's death, Child reviewed the trust instruments and Spouse's Will and determined there were various scrivener's errors, described above, in the instruments. On Date 8, Child, as Trustee for the trusts, filed a petition with State Court for construction and interpretation of the trusts, for reformation and modification due to scrivener's errors, for proration of federal estate tax, and for further instruction. On Date 9, State Court issued an order, including the following:

- i. Spouse exercised only the limited power of appointment to appoint Marital Trust property.
- ii. Restated Survivor's Trust Section 1.07 is modified to provide that pursuant to the testamentary limited power of appointment granted in Marital Trust, Marital Trust property is appointed to the Charitable and Non-Charitable Shares created under Article Eight and Article Nine of Restated Survivor's Trust and Spouse's Exempt Trust and Non-Exempt Marital Trust created under Article Ten and Article Eleven of Restated Survivor's Trust.
- iii. No power of appointment was granted or exercisable with respect to Family Trust and, therefore, any purported exercise of power of appointment to appoint Family Trust property is void.
- iv. Section 6.08(a) of the Restated Survivor's Trust is reformed to correctly reference "husband" instead of "wife".
- v. Marital Trust and Family Trust became irrevocable upon Decedent's death.
- vi. The Trustee of Survivor's Trust is directed to pay federal estate tax arising under § 2044 that is attributable to inclusion of GST Exempt Marital Trust in Spouse's gross estate from Survivor's Trust without reimbursement and that the provisions otherwise applicable for such reimbursement under § 2207A are waived and binding upon the Trustee and the beneficiaries of those trusts.

In the petition, Attorney 2 explains that Decedent and Spouse intended to protect their combined GST exemptions to the fullest extent possible in order to increase the value of the trust estate passing to their descendants, for as long as possible. Consistent with this plan, they intended to preserve the value of GST Exempt Marital Trust. They did not intend that GST Exempt Marital Trust bear its share of the federal estate tax which would reduce the value of the trust. Further, if the power of appointment exercised by Spouse is treated as a general power of appointment, then GST Exempt Marital Trust would not qualify as a QTIP for purposes of § 2056(b)(7) and the reverse QTIP election made on Decedent's Form 706 would also be invalid.

Further, Attorney 2 explains that the Spouse's estate's waiver of the right to recover estate taxes due from GST Exempt Marital Trust does not result in a gift for Federal estate tax purposes because § 2207A(a)(2) explicitly allows such a waiver. Accordingly, Attorney 2 asserts that the waiver by Spouse's estate does not cause Spouse to be the transferor for purposes of § 2652(a) of the property held in GST Exempt Marital Trust.

You request the following rulings:

1. Spouse's exercise of her testamentary power of appointment, as reformed by State Court to correct the scrivener's error, does not constitute the exercise of a general power of appointment under § 2041(b) of the Internal Revenue Code over Marital Trust property.
2. The exercise of Spouse's testamentary power of appointment, as reformed, does not disqualify Marital Trust as qualified terminable interest property under § 2056(b)(7)(B).
3. The reverse QTIP election made on Decedent's Form 706 with respect to GST Exempt Marital Trust pursuant to § 2652(a)(3) was valid.
4. Spouse did not possess a testamentary power of appointment over Family Trust and, accordingly, Family Trust is not includible in Spouse's gross estate under § 2041.
5. The Marital Trust was irrevocable upon Decedent's death and, accordingly, GST Exempt Marital Trust continues to be exempt from GST tax as a result of the allocation of Decedent's GST exemption to that trust on Decedent's death.
6. The Family Trust was irrevocable upon Decedent's death and, accordingly, Family Trust is not includible in Spouse's gross estate under § 2033 and 2038.
7. The waiver by the Trustee of Restated Survivor's Trust, of the right of reimbursement for estate taxes due under § 2044 from GST Exempt Marital Trust was valid and, accordingly, Spouse did not make a constructive addition to

GST Exempt Marital Trust for purposes of § 26.2601-1(b)(1)(v) of the Generation-Skipping Transfer Tax Regulations and, therefore, Spouse will not be the transferor with respect to any portion of GST Exempt Marital Trust for GST tax purposes upon her death.

LAW

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 2010(a) provides that a credit of the applicable credit amount shall be allowed to the estate of every decedent against the tax imposed by § 2001. Section 2010(c)(1) provides that the applicable credit amount is the amount of the tentative tax that would be determined under § 2001(c) if the amount with respect to which such tentative tax is to be computed were equal to the applicable exclusion amount.

Section 2010(c)(3) provides the basic exclusion amount available to the estate of every decedent, adjusted for inflation annually after calendar year 2011.

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 2038(a)(1) provides that, in the case of transfers after June 22, 1936, 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.

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 which 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 §§ 2035 through 2038, inclusive.

Section 2041(b)(1) defines the term "general power of appointment" as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate.

Section 20.2041-1(c)(1) of the Estate Tax Regulations provides, in part, that a power of appointment is not a general power if by its terms it is either (a) 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, or (b) expressly not exercisable in favor of the decedent or his creditors, or the decedent's estate or the creditors of his estate.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, for purposes of § 2056(a), such property shall be treated as passing to the surviving spouse, and for purposes of § 2056(b)(1)(A), no part of such property shall be treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines the term "qualified terminable interest property" as property: (I) which passes from the decedent; (II) in which the surviving spouse has a qualifying income interest for life as defined in § 2056(b)(7)(B)(ii); and (III) to which an election under § 2056(b)(7) applies.

Section 2056(b)(7)(B)(ii) provides, in part, that the surviving spouse has a qualifying income interest for life if the surviving spouse is entitled to all of the income from the property payable annually or at more frequent intervals and no person has the power to appoint any part of the property to any person other than the surviving spouse.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Section 20.2056(b)-7(b)(4)(i) provides that, in general, the election referred to in § 2056(b)(7)(B)(i)(III) and (v) is made on the return of tax imposed by § 2001.

Section 2207A(a)(1) provides that if any part of the gross estate consists of property the value of which is includible in the gross estate by reason of § 2044 (relating to certain property for which a marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which the total tax under chapter 11 that has been paid exceeds the total tax under chapter 11 that would have been payable if the value of such property had not been included in the gross estate.

Section 2207A(a)(2) provides that § 2207A(a)(1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under subchapter C with respect to such property.

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 26.2601-1(b)(1)(v)(A) of the Generation-Skipping Transfer Tax Regulations provides that except as provided in paragraph (b)(1)(v)(B) of this section, 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. The creator of the power will be considered the transferor of the addition except to the extent that the release, exercise, or lapse of the power is treated as a taxable transfer under chapter 11 or chapter 12. See § 26.2652-1 for rules for determining the identity of the transferor of property for purposes of chapter 13.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount which may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a)(1) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Under § 26.2652-1(a)(1), the individual with respect to whom property was last subject to federal estate or gift tax is the transferor of that property for purposes of the GST tax imposed under chapter 13.

Section 2652(a)(3) provides that, in the case of any trust with respect to which a deduction is allowed under § 2056(b)(7), the estate of the decedent may elect to treat all of the property in such trust for GST tax purposes as if the election to be treated as qualified terminable interest property had not been made.

The election under § 2652(a)(3) is referred to as the "reverse" QTIP election. The consequence of a reverse QTIP election is that the decedent remains, for GST tax

purposes, the transferor of the QTIP trust for which the election is made. As a result, the decedent's GST exemption may be allocated to that QTIP trust.

Section 2652(a)(1)(A) and (B) provides that in the case of property subject to the estate tax, the decedent, and in the case of any property subject to the gift tax, the donor, is the transferor for GST purposes.

Statute 1 provides that a trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust including determining questions of construction of a trust instrument.

Statute 2 provides that an exercise of a power of appointment is not void solely because it is more extensive than authorized by the power, but it is valid to the extent that the exercise was permissible under the terms of the power.

Statute 3 provides when, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

Statute 4 provides that except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the law of State.

In Case 1, the court stated, “[a] Declaration of Trust, like any other contract, may be reformed and revised under [Statute 3] to correct a drafting error which, if left intact, would conflict [with] the actual expressed intent of the contracting parties... We thus conclude that [Statute 3] recognizes the equitable common law power of a trial court to reform a trust agreement based on mistake... .” In Case 2, the highest court of State opined that a court may reform a will if “a mistake in expression and the testator’s actual and specific intent at the time the will was drafted are established by clear and convincing evidence.”

In *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), the United States 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 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.

ANALYSIS

Ruling 1

In this case, under Section 9.04 of Trust, Spouse possessed a testamentary power of appointment. This power of appointment was a limited power of appointment because the power was expressly exercisable only in favor of one or more designated persons or classes and was not exercisable in favor of the decedent or his creditors, or the decedent's estate or the creditors of his estate. Accordingly, under § 20.2041-1(c)(1), the power of appointment granted to Spouse under Section 9.04 was not a general power of appointment. Spouse exercised this power of appointment to appoint the property of Marital Trust to Survivor's Trust. Survivor's Trust was subject to the creditors of Spouse and the creditors of Spouse's estate and the property of Survivor's Trust was includible in Spouse's estate. Accordingly, but for the reformation of Restated Survivor's Trust, the exercise of the power of appointment would have been made to Spouse's estate and would have constituted a general power of appointment for purposes of § 2041(a)(2).

It has been represented that Decedent and Spouse did not intend for Spouse to exercise a general power of appointment over the property in Marital Trust. Section 9.04 of Trust does not grant Spouse a general power of appointment. Trustee filed a petition to reform Restated Survivor's Trust so that the exercise of Spouse's testamentary power of appointment would be consistent with the express language of Marital Trust, which granted only a limited power of appointment to Spouse. Under Statute 1, an exercise of a power of appointment is not void solely because it is more extensive than authorized by the power, but it is valid to the extent that the exercise was permissible under the terms of the power. Trustee obtained a State Court Order reforming Restated Survivor's Trust to limit Spouse's exercise of the testamentary power of appointment to be consistent with Section 9.04 of Trust.

Moreover, the documentation submitted by the Trustee strongly indicates that Decedent and Spouse did not intend to grant Spouse a general power of appointment over Marital Trust property and that the exercise of the power in Restated Survivor's Trust to appoint Marital Trust property to Survivor's Trust was the result of a scrivener's error. In reforming Restated Survivor's Trust, Court found that the reformation of Restated Survivor's Trust was an equitable reformation of the trust under common law and Statute 1.

Consequently, we conclude that the State Court Order reformed Restated Survivor's Trust to correct the scrivener's error. The Order is consistent with applicable state law that would be applied by the highest court of State. Accordingly, based upon the facts submitted and the representations made, we conclude that Spouse's exercise of her testamentary power of appointment, as reformed by Court to correct the scrivener's error, was an exercise of a testamentary limited power of appointment and does not constitute the exercise of a general power of appointment, within the meaning of § 2041(b) over the property in Marital Trust.

Ruling 2

In this case, Spouse was entitled to all the income from the property in Marital Trust, at least monthly, during Spouse's lifetime. As concluded above, under Section 9.04 of Marital Trust, Spouse possessed a testamentary limited power of appointment and, as reformed, exercised a limited power of appointment at her death. Further, no person had a power to appoint any part of the property in Marital Trust to any person other than the surviving spouse. But for the scrivener's error which was corrected by reformation and pursuant to State Court Order, Marital Trust qualifies as a QTIP. Accordingly, based upon the facts submitted and the representations made, we conclude that the exercise of Spouse's testamentary power of appointment, as reformed, does not disqualify Marital Trust as qualified terminable interest property under § 2056(b)(7)(B).

Ruling 3

In this case, pursuant to the Trustee's authority in Trust to divide Marital Trust into two or more trusts and to allocate Decedent's GST exemption to one of those trusts, Decedent's estate divided Marital Trust into a GST Exempt Marital Trust and a GST Non-Exempt Marital Trust. Decedent's estate made a reverse QTIP election under § 2652(a)(3) for property transferred to GST Exempt Marital Trust on Schedule R of the Form 706. Decedent's estate allocated Decedent's GST exemption to GST Exempt Marital Trust. But for the scrivener's error which was corrected by reformation and pursuant to State Court Order, the reverse QTIP election was valid. Accordingly, based upon the facts submitted and the representations made, we conclude that the reverse QTIP election made on Decedent's Form 706 with respect to GST Exempt Marital Trust qualifies as a valid reverse QTIP election under § 2652(a)(3).

Ruling 4

In Restated Survivor's Trust, Spouse exercised a testamentary power of appointment to appoint the property of Family Trust to Survivor's Trust. However, it is represented that Decedent and Spouse never intended to grant Spouse any powers of appointment over Family Trust property that would cause Family Trust to be includible in Spouse's estate. In this case, the documentation submitted by the Trustee strongly indicates that Decedent and Spouse did not intend to grant Spouse any powers of appointment over Family Trust property. The provisions of Family Trust do not grant Spouse any powers of appointment, general or limited. Under State law, the purported exercise was void. Statute 2. Further, in reforming Restated Survivor's Trust, the State Court Order ruled that the purported exercise was void.

Consequently, we conclude that the State Court Order reforming Restated Survivor's Trust to correct this scrivener's error is consistent with applicable State law that would be applied by the highest court of State. Section 1.07 of Restated Survivor's Trust, as reformed, does not exercise any powers over Family Trust property. Based upon the

facts submitted and the representations made, we conclude that Spouse did not possess a general power of appointment over Family Trust property for purposes of § 2041(b) and, therefore, Family Trust will not be includible in Spouse's gross estate under § 2041(a)(2).

Rulings 5 and 6

Section 5.02 of Trust, as restated on Date 3, provided that “[U]pon the death of a Grantor, our trust will become irrevocable as it pertains to the administration and distribution of the deceased Grantor's trust property.” The restatement on Date 4 failed to include this language.

In the petition and memorandum of law supporting the petition, Attorney 1 asserts that the elimination of the language in Section 5.02 of Trust was a scrivener's error. Attorney 1 attests that Decedent and Spouse never intended to give Spouse the power to revoke either trust because Family Trust would lose the federal tax benefits of the application of the basic exclusion amount to Family Trust and Decedent's GST exemption to GST Exempt Marital Trust.

In Case 3, the court opined that when one spouse dies, the community property of that deceased spouse becomes separate property of the deceased spouse and, accordingly, unless expressly provided for in the trust instrument, the surviving spouse does not have the power to revoke the deceased spouse's trust. In effect, the trust funded with property of the deceased spouse is irrevocable upon death of the deceased spouse, unless the trust instrument provides otherwise.

In this case, while Marital Trust is includible in Spouse's gross estate under § 2044, Decedent's GST exemption was allocated to GST Exempt Marital Trust pursuant to making a reverse QTIP election on Decedent's Form 706. Under § 2652(a)(1), if Marital Trust is includible under § 2038 in Spouse's gross estate, Spouse would become he transferor for GST tax purposes.

In this case, Family Trust was not intended to be includible in Spouse's gross estate under chapter 12. Decedent's basic exclusion amount applied to shield Family Trust property from estate tax in Decedent's estate. But for the reformation, Family Trust would be includible in Spouse's gross estate under § 2033 and 2038. Thus, under § 2010 Spouse's basic exclusion amount would be applied to Family Trust.

The documentation submitted by the Trustee strongly indicates that that Decedent and Spouse intended Marital Trust and Family Trust to become irrevocable upon Decedent's death and that the failure to include such a provision was the result of a scrivener's error. The Date 3 restatement of Trust provided that both Marital Trust and Family Trust would become irrevocable upon Decedent's death. The Date 4 restatement failed to include this language. The State Court found that the reformation to provide that both

trusts were irrevocable upon the death of Decedent was an equitable reformation of Trust under State law.

Consequently, we conclude that the State Court Order, reforming Trust based on a scrivener's error, is consistent with applicable State law that would be applied by the highest court of State. Trust, as reformed, provides that Marital Trust and Family Trust would become irrevocable upon the death of Decedent. Therefore, based on the facts submitted and the representations made, we conclude that Marital Trust and Family Trust became irrevocable upon Decedent's death.

Ruling 7

As stated above in Ruling 3, Decedent's estate made a reverse QTIP election under § 2652(a)(3) for property transferred to GST Exempt Marital Trust on Schedule R of the Form 706. Decedent's estate allocated Decedent's available GST exemption to GST Exempt Marital Trust. Accordingly, Decedent became the transferor of GST Exempt Marital Trust for GST tax purposes. Even though GST Exempt Marital Trust was includible in Spouse's gross estate under § 2044, Decedent remained the transferor for purposes of chapter 13.

Spouse's Will does not include a waiver of the right of reimbursement clause under § 2207A. Attorney 2 attests that the omission was a scrivener's error. Under § 2207A(a)(2), the decedent in his will (or a revocable trust) specifically may indicate an intent to waive any right of recovery. Section 6.08 of Restated Survivor's Trust, Spouse's revocable trust, expressly authorizes the Trustee to waive the Spouse's estate's right of reimbursement from GST Exempt Marital Trust, and allocates the obligation of payment to Restated Survivor's Trust, which is includible in Spouse's gross estate. Accordingly, the failure to include this language in the Will, while a scrivener's error, did not result in the failure to waive the right of reimbursement because Restated Survivor's Trust contains express language authorizing the Trustee to waive Decedent's estate's right of reimbursement.

The State Court Order instructs the Trustee of Restated Survivor's Trust to pay the estate tax arising from § 2044 inclusion of GST Exempt Marital Trust in Spouse's gross estate. The State Court Order specifies that Restated Survivor's Trust will not be reimbursed under § 2207A(a)(1) and such Order is binding upon the Trustee of the trusts and the beneficiaries. Accordingly, pursuant to the State Court Order, the estate's right under § 2207(A)(a)(1) to recover the estate tax owed due to the inclusion of GST Exempt Marital Trust in Spouse's gross estate under § 2044 from the individuals and/or trusts receiving GST Exempt Marital Trust property on Spouse's death, was waived.

Such a waiver is allowed under § 2207A(a)(2). The executor of a decedent's estate or the trustee of a revocable trust may waive the right of recovery. The waiver of the right of recovery is not made by the decedent, in this case, Spouse. Accordingly, the waiver

of the right of recovery does not constitute a power of appointment for purposes of § 2514 or 2041. Under § 26.2601-1(b)(1)(v), a donor or decedent must exercise, release, or let lapse a power of appointment. Further, that section requires that the exercise, release, or lapse over that property be treated as a taxable transfer for purposes of chapter 11 or 12. In this case, the provision in Restated Survivor's Trust waiving the estate's right to recover the estate taxes paid with respect to the inclusion of the property in GST Exempt Marital Trust from the latter is not a power of appointment for purposes of §§ 2514 and 2041 and, therefore, does not cause Spouse to be treated as making a constructive addition to GST Exempt Marital Trust. Further, since we conclude that Spouse did not make a constructive addition to GST Exempt Marital Trust, Spouse is not a transferor of any property to GST Exempt Marital Trust for purposes of § 2652 because the property in that trust consists of Decedent's share of community property and his separate property.

Accordingly, based on the facts presented and the representations made, we conclude that the waiver by the Trustee of Restated Survivor's Trust, of the right of reimbursement for estate taxes due under § 2044 from GST Exempt Marital Trust was valid and, accordingly, Spouse did not make a constructive addition to GST Exempt Marital Trust for purposes of § 26.2601-1(b)(1)(v) and, therefore, Spouse will not be the transferor with respect to any portion of GST Exempt Marital Trust for GST tax purposes upon her death.

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, we have sent a copy of this letter to your authorized representatives.

Sincerely,

Lorraine E. Gardner

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

Enclosures (2)

Copy for § 6110 purposes

Copy of this letter

cc: