

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact: _____, ID No.

Telephone Number:

In Re:

Refer Reply To:
CC:PSI:B04
PLR-119185-19
Date:
February 04, 2020

Legend

Decedent: =

Mother: =

Father: =

Bank: =

Trust 1: =

Trust 2: =

Date 1: =

Date 2: =

Date 3: =

State A: =

State B: =

Year 1: =

Year 2: =

Statute 1: =

Statute 2: =

Dear _____ :

This letter responds to your authorized representative's letter dated August 15, 2019,

and subsequent correspondence, requesting rulings concerning the federal gift, estate and generation-skipping transfer (GST) tax treatment of Trust 1 and Trust 2.

FACTS

The facts submitted and the representations made are summarized as follows:

Decedent's mother (Mother) died testate a resident of State A on Date 1 (a date before September 25, 1985 and after October 21, 1942). Under Article Fifth of Mother's will, Mother established Trust 1 for the benefit of Decedent and his family.

Decedent's father (Father) died testate a resident of State A on Date 2 (a date before September 25, 1985 and after October 21, 1942). Under Article Sixth of Father's will, Father established Trust 2 for the benefit of Decedent and his family.

Trust 1 and Trust 2 have substantially similar terms. It is represented that no additions were made to the trusts after the initial funding and that neither trust has been amended.

Article Fifth of Mother's will and Article Sixth of Father's will provide that after the death of Mother and Father, the entire net income of Trust 1 and Trust 2, respectively, is payable to or for the benefit of Decedent during Decedent's lifetime. After the death of Decedent, the net income of Trust 1 and Trust 2 is payable to or for the benefit of Decedent's surviving lawful issue upon the principle of representation. Trust 1 terminates and is to be distributed proportionally to the then income beneficiaries twenty-one years after the death of the survivor of Father and the children and grandchildren of Father and Mother who are living at the time of Mother's death. Trust 2 terminates and is to be distributed proportionally to the then income beneficiaries twenty-one years after the death of the survivor of Mother and the children and grandchildren of Father and Mother who are living at the time of Father's death.

Article Sixth of Mother's will and Article Seventh of Father's will provide that if the trustee deems the net income of the respective trusts not sufficient to provide for the proper support, maintenance, comfort, education and recreation of any income beneficiary, taking into consideration other income and financial resources of such beneficiary, so far as known to the trustee, the trustee may as often as it deems necessary pay to or apply for the use and benefit of such beneficiary such additional part of the corpus of the trust estate (including the whole thereof) as the trustee in its sole and absolute discretion believes will be in the best interest of and tend to promote the welfare of such beneficiary.

Articles Fifth and Eighth of Mother's will appoint Father as the initial trustee of Trust 1, and Decedent as successor trustee. Articles Sixth and Ninth of Father's will appoint Mother and Decedent as the initial co-trustees of Trust 2 and the survivor of them as successor sole trustee. Article Eighth of Mother's will and Article Ninth of Father's will

specifically permit Decedent to resign as sole trustee or co-trustee of the respective trusts and provide for the appointment of Bank as successor trustee or co-trustee.

The provisions of Trust 1 and Trust 2 do not specify that any particular state law is to govern the administration and construction of the respective trusts. After Father's death, Decedent, while a resident of State A, became the sole trustee of Trust 1 and remained the sole trustee of Trust 1 until his death. Decedent was the initial trustee of Trust 2 and remained the sole trustee of Trust 2 until his death.

In Year 1, while Decedent was residing in State A, State A enacted Statute 1, which provides in part that unless a settlor or a testator clearly indicates that a broader power is intended by express reference to Statute 1, 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 for his or her health, education, support, or maintenance within the meaning of § 2041 and § 2514 of the Internal Revenue Code (Code). Statute 1 applies to any irrevocable trust created under a document executed in or before Year 1, unless all parties in interest elect affirmatively not to be subject to the provision. Such election was not made with respect to Trust 1 and Trust 2.

In Year 2, Decedent became a resident of State B and remained a State B resident until his death on Date 3. Statute 2, effective in State B at the time of Decedent's death, provides in part that unless the terms of the trust expressly indicate that Statute 2 does not apply, a person who is a beneficiary and a trustee may not make discretionary distributions of either principal or income to or for the benefit of that trustee, except to provide for that trustee's health, education, maintenance, or support as described under § 2041 and § 2514 of the Code.

You have requested the following rulings:

1. The enactment of Statute 1 by State A did not cause a release of a general power of appointment under § 2514 that would cause Decedent to be treated as the transferor of any portion of Trust 1 or Trust 2 for gift tax purposes.
2. Decedent did not possess a general power of appointment at the time of his death, nor was Decedent's death a release of a general power of appointment, that would cause the value of any portion of Trust 1 or Trust 2 to be included in Decedent's estate under § 2041 for estate tax purposes.
3. Neither the enactment of Statute 1 by State A nor the lapse of Decedent's fiduciary powers at death affects the exempt status of any portion of Trust 1 or Trust 2 or otherwise causes Trust 1 or Trust 2 to become subject to GST tax.

LAW AND ANALYSIS

Rulings 1 & 2

Section 2501 imposes a tax on the transfer of property by gift by an individual. Section 2511 provides that the tax imposed by § 2501 applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 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 such power.

Section 2514(c) provides that 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 25.2514-1(c)(2) of the Gift Tax Regulations provides that a power to consume, invade, or appropriate income or principal, 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 § 2514(c)(1), not a general power of appointment.

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 §§ 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 shall not be deemed 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.

Under § 20.2041-1(c)(2) of the Estate Tax Regulations, a power to consume, invade, or appropriate income or corpus, or both for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of

the decedent is, by reason of § 2041(b)(1)(A), not a general power of appointment. A power is limited by such a standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them).

While federal law controls what rights or interests shall be taxed after they are created, creation of legal rights and interests in property (such as the breadth and scope of a power of appointment over the corpus of a testamentary trust) is a matter of state law. United States v. Pelzer, 312 U.S. 399 (1941); Morgan v. Commissioner, 309 U.S. 78 (1940).

Rev. Proc. 94-44, 1994-28 I.R.B. 123, sets forth the Service's position regarding the transfer tax consequences of the enactment of Florida Statutes Annotated § 737.402(4)(a)(1) (the "Florida Statute"). 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 § 2514 and § 2041 of the Code. The statute is effective with respect to all trusts that were irrevocable after July 1, 1991 and to trusts that were irrevocable before July 1, 1991 unless all parties in interest elect affirmatively not to be subject to the application of the statute within three years. Pursuant to the revenue procedure, the Service will (i) treat the Florida Statute as effective, with respect to pre-July 1, 1991 irrevocable trusts, on and after July 1, 1991 and (ii) will not treat the Florida Statute as causing the lapse of a general power of appointment for purposes of § 2514, where the scope of a fiduciary power held by a beneficiary was restricted as a result of the statute.

In the present case, prior to the effective date of Statute 1, Decedent's power to distribute trust corpus to himself as trustee-beneficiary constituted a general power of appointment over the corpus of Trust 1 and Trust 2 under § 2514. As of the effective date of Statute 1, Decedent, as trustee-beneficiary of Trust 1 and Trust 2, did not have the power to distribute the corpus of Trust 1 or Trust 2 for his own benefit except in satisfaction of any needs he may have had for health, education, maintenance, and support. Accordingly, we conclude that, as of the effective date of Statute 1, Decedent's power to distribute corpus to himself was limited to an ascertainable standard as described in § 2514(c)(1) and, therefore, Decedent did not possess a general power of appointment over any portion of the trust for gift tax purposes. We further conclude that, consistent with the principles of Rev. Proc. 94-44, the enactment of Statute 1 will not be treated as causing a release of Decedent's general power of appointment over the corpus of Trust 1 or Trust 2 for gift tax purposes under § 2514.

Although Trust 1 and Trust 2 were both established by residents of State A, Decedent, who was the sole trustee of the trust, was a resident of State B at his death. The result is the same regardless of whether State A or State B law governs the interpretation of the terms of Trust 1 and Trust 2 at the time of Decedent's death. Both Statute 1 and Statute 2 provide that where a trustee may make discretionary distributions of income or

principal to himself as beneficiary of the trust, the trustee may exercise that power in his favor only for his health, education, maintenance and support within the meaning of §§ 2514 and 2041 of the Code.

Consistent with the principles of Rev. Proc. 94-44, we conclude that at the time of Decedent's death, Decedent, as trustee-beneficiary of Trust 1 and Trust 2, did not have the power to distribute the corpus of Trust 1 or Trust 2 for his own benefit except in satisfaction of any needs he may have had for health, education, maintenance, and support. Since Decedent's power to distribute corpus to himself is limited to an ascertainable standard as described in § 2041(b)(1), we conclude that Decedent did not possess a general power of appointment over any portion of the trust for estate tax purposes by virtue of any fiduciary power to distribute corpus at his death. Further, we conclude that the lapse of Decedent's fiduciary powers at his death is not the release of a general power of appointment, and, therefore, no portion of Trust 1 or Trust 2 is includible in Decedent's gross estate under § 2041.

Ruling 3

Section 2601 imposes a tax on every GST, which is defined under § 2611 as a taxable distribution, a taxable termination, and a direct skip.

Under section 1433 of the Tax Reform Act of 1986 (the Act), GST tax is generally applicable to GSTs made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the tax does not apply to a transfer under a trust that was irrevocable on September 25, 1985, except to the extent the transfer is made out of corpus added to the trust by an actual or constructive addition after September 25, 1985.

Section 26.2601-1(b)(1)(v)(A) provides in part that 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.

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. The rules contained in § 26.2601-1(b)(4) are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes.

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 § 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 § 26.2601-1(b)(4)(i)(D)(1), 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.

Section 26.2601-1(b)(4)(i)(E), Example 10 provides as follows: In 1980, Grantor executed 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 of the Code.

In Ruling 1 of the present case, we conclude that the enactment of Statute 1 did not constitute a release of a general power of appointment by Decedent. In Ruling 2 of the present case, we conclude that Decedent did not have a general power of appointment at the time of his death and that the lapse of Decedent's fiduciary powers as trustee at his death did not constitute a release of a general power of appointment. Therefore, we conclude neither the enactment of Statute 1 nor the lapse of Decedent's fiduciary powers at his death constitute a constructive addition to the trust for purposes of § 26.2601-1(b)(1)(v)(A).

The enactment of Statute 1 did not change the standard for which distributions can be made to Decedent under the terms of Trust 1 or Trust 2. The enactment of Statute 1 changed who may exercise certain fiduciary powers. Any successor trustee or co-trustee of Trust 1 or Trust 2 appointed pursuant to Article Eighth of Mother's will or Article Ninth of Father's will would have had the power to make the broader distributions to Decedent from Trust 1 and Trust 2 as are allowable under Article Sixth of Mother's will and Article Seventh of Father's will, respectively. The state law restriction on Decedent's ability to exercise the fiduciary powers himself, as trustee of Trust 1 and Trust 2, does not change his interest in the trust for the purposes of § 26.2601-1(b)(4)(i)(D)(2).

In the present case, we conclude that the enactment of Statute 1 will not be considered a modification or trustee action that: (1) results in a shift of a beneficial interest in Trust 1 or Trust 2 to any beneficiary who occupies a generation lower than the persons holding the beneficial interests prior to the modification; or (2) extends the time for vesting of any beneficial interest in Trust 1 or Trust 2 beyond the period provided for in the original trust terms. Accordingly, we conclude that the enactment of Statute 1 did not affect the exempt status of Trust 1 or Trust 2. Additionally, we conclude that because Statute 2 imposes substantially the same changes as Statute 1, Decedent becoming a resident of State B and becoming subject to Statute 2 did not affect the exempt status of Trust 1 or Trust 2.

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.

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.

Sincerely,

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

Enclosures (2):

Copy for §6110 purposes
Copy of this letter

cc:

cc: