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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

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CC:PSI:B04
PLR-107301-21

Date:
September 27, 2021

Legend

Grantor
Spouse
Child 1
Child 2
Attorney
Independent Trustee
Trust

Date 1
Date 2
Date 3
Date 4
Date 5
Date 6
Date 7
Date 8
Year 1
Year 2
State
State Statute 1
State Statute 2
Probate Court 1

Probate Court 2

State Supreme Court
a
b
c
d

Dear :

This letter responds to your authorized representative's letter dated March 29, 2021, and subsequent correspondence, requesting estate, gift, and generation-skipping transfer (GST) tax rulings with respect to the modification of Trust.

The facts and representations submitted are summarized as follows:

On Date 1, Grantor, a resident of State, executed Trust, a revocable inter vivos trust. Grantor amended Trust multiple times, including on Date 2 and Date 3. On Date 4, Grantor amended and restated Trust for the final time before his death (Trust Agreement). Grantor died on Date 5, survived by his spouse, Spouse, and children. Trust became irrevocable upon the death of Grantor.

Article III, Paragraph B.3. of Trust Agreement provides that if Spouse survives Grantor, the trustee is to divide the remaining assets of the trust estate into two parts, Family Fund and Marital Fund.

Article III, Paragraph B.3.b. provides, in relevant part, that the trustee is to distribute assets from Marital Fund equal to $a to Spouse, free of trust. The remaining assets of Marital Fund are to be held in further trust as the Marital Trust.

Article III, Paragraph C. provides, in relevant part, that the trustee is to administer the assets of Family Fund in further trust for the benefit of Spouse. During the life of Spouse, the trustee may distribute for the benefit of Spouse such amounts of net income and principal of Family Fund as the trustee deems advisable for any purpose, provided, however, that a spouse who is a Trustee shall have no power with respect to discretionary distributions. Upon the death of Spouse, the assets of Family Fund are to be divided among the children of Grantor.

Article III, Paragraph D. provides, in relevant part, that the trustee is to administer the assets of Marital Trust as follows: during the life of Spouse, the trustee is to pay to Spouse all of the net income of Marital Trust, at least quarterly. The trustee is to also pay to Spouse all of the expenses for the maintenance of Spouse's residences. The trustee may also make additional distributions for the benefit of Spouse as the trustee deems advisable for any purpose. Upon the death of Spouse, the trustee is to pay to Spouse's estate all the undistributed income of Marital Trust that accrued prior to Spouse's death. In addition, the trustee is to make available to the executor of Spouse's estate a sum sufficient to pay all estate and inheritance taxes payable at Spouse's death that are attributable to the inclusion of Marital Trust in Spouse's estate. The remaining assets of Marital Trust are to be divided among the children of Grantor.

Article IV lists the powers and duties of the trustee. In particular, Paragraph I. provides, in relevant part, that the trustee is to divide any fund established under the

trust agreement into Exempt and Nonexempt shares and may allocate property among such shares.

Article IV, Paragraph O. provides, in relevant part, that if at any time there is no person authorized to exercise the discretionary authority required of the trustee, a trustee may be appointed pursuant to the provisions of Article V and such appointed trustee is to have the sole authority to exercise such discretionary authority, provided, however, that any such trustee is not to be related or subordinate to the trustee making the appointment as those terms are defined in § 672(c).

Article V, Paragraph B. provides, in relevant part, that upon Grantor's death, Spouse and Attorney are to serve as co-trustees of Trust. If Spouse shall, for any reason, fail or cease to serve as co-trustee, then Grantor's children, Child 1 and Child 2, shall serve in her stead as successor co-trustees with the then serving remaining co-trustee. If either or both of Child 1 and Child 2 shall, for any reason, fail or cease to serve as co-trustee(s), then there shall be no need to appoint a successor co-trustee. If Attorney shall, for any reason, fail or cease to serve as co-trustee or as sole trustee, as the case may be, a successor shall be appointed pursuant to the provisions of Article V, Paragraph C.

Article V, Paragraph C. provides, in relevant part, that if there is any vacancy in the office of trustee not filled pursuant to Article V, Paragraph B., additional successor trustees are to be designated as follows. With regard to any trust administered under Article III, Paragraph C. (Family Fund) or Article III, Paragraph D. (Marital Trust), additional successor trustee(s) are to be designated by Spouse, if then living and competent. With regard to any trust administered under Article III, Paragraph F. (trusts for beneficiaries under a certain age), additional successor trustee(s) shall be designated by the beneficiary thereof, provided, however, that such successor trustee is either a corporation or financial institution or an individual experienced in business, finance, or investments or who is an attorney experienced in the trust or tax fields and is "neither a 'related or subordinate to' such beneficiary" as those terms are defined in § 672(c).

Article V, Paragraph F. provides, in relevant part, that whenever Grantor is not living, during the lifetime of Spouse, any trustee of a trust administered under Article III, Paragraph C. or Article III, Paragraph D. may be removed, with or without cause, by Spouse. Whenever Grantor is not living, any trustee of a trust administered under Article III, Paragraph F. may be removed, with or without cause, by a majority of the beneficiaries authorized to receive trust income. No trustee shall be removed except upon delivery to him or her of a written notice of removal signed by the person who so removes such trustee. The removal shall be effective upon appointment of a successor trustee and acceptance of fiduciary duties by the successor trustee.

Grantor died on Date 5. After Grantor's death, while preparing Grantor's federal estate tax return, Attorney, in her capacity as co-trustee of Trust, became aware of a

conflict of interest and thus resigned as co-trustee of Trust by order dated Date 6. Shortly thereafter, Independent Trustee was appointed as a replacement co-trustee.

While further reviewing Trust Agreement to determine the consequences of her resignation, Attorney discovered that the agreement mistakenly omitted language applicable to trusts administered under Article III, Paragraph C. and Article III, Paragraph D. that required that any person appointed to succeed any trustee that has been removed must be a corporation or financial institution; or an individual experienced in business, finance, or investments or who is an attorney experienced in the trust or tax fields and is "neither a 'related or subordinate to' such beneficiary" as those terms are defined in § 672(c) (hereinafter, the Section 672(c) Safe Harbor Language). Attorney advised Spouse to engage independent counsel to handle the issue.

On Date 7, Spouse and Independent Trustee, in their capacities as co-trustees of Trust, petitioned Probate Court 1 to retroactively modify Trust Agreement effective as of Date 4.

Probate Court 1 reassigned the case to Probate Court 2. Probate Court 2 held an evidentiary hearing, where Attorney testified that she had committed scrivener's errors with respect to her drafting of Trust. Probate Court 2 issued an order stating that the retroactive modifications proposed by the co-trustees were not contrary to Grantor's intent. Probate Court 2 deferred consideration of whether the findings were sufficient as a matter of law to allow for retroactive modification of the terms of Trust under State Statute 1, pending interlocutory transfer to State Supreme Court pursuant to State Statute 2.

On Date 8, State Supreme Court issued an order modifying Trust Agreement, effective as of Date 4. Specifically, the order stated that Article V, Paragraph F. of Trust Agreement is to be modified to provide that any successor trustee of any trust shall not be related or subordinate (within the meaning of § 672(c)) to the person who has the power to remove the trustee.

Attorney was retained by Grantor and Spouse with respect to their estate planning in Year 1. In Year 1, Trust was in existence (the trust agreement having been drafted by Grantor's previous attorney) and had been amended multiple times by Grantor's previous attorney, most recently on Date 2. The Date 2 version of the trust agreement contained the Section 672(c) Safe Harbor Language that was applicable to all trusts administered under Article III, Paragraph C., Article III, Paragraph D. and Article III, Paragraph F.

In Year 2, Attorney prepared a new draft of the trust agreement which contained the Section 672(c) Safe Harbor Language and forwarded the draft to Grantor and Spouse. Upon review, Grantor identified several substantive changes he wanted to make to the trust agreement. Grantor did not specify as a desired change the removal of the Section 672(a) Safe Harbor Language that limited Spouse's successor trustee appointment power with respect to trusts administered under Article III, Paragraph C.

and Article III, Paragraph D. Attorney revised the trust agreement in accordance with Grantor's wishes, but in so doing, inadvertently removed the limitation on the Spouse's successor trustee appointment power, mistakenly determining that the limiting language was superfluous. Grantor signed the modified trust agreement on Date 3. Attorney's error was incorporated into the Date 3 version and in all subsequent versions, including the Date 4 Trust Agreement. Attorney has provided an affidavit explaining her actions in Year 1 and Year 2, together with the various aforementioned drafts of the trust agreement, as well as contemporaneous correspondence and notes supporting her narrative.

The executor of Grantor's estate timely filed a Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return). On Schedule M, the executor made a qualified terminable interest property (QTIP) election with respect to Marital Trust with $b passing to Marital Trust. This amount was reported as a deduction from Grantor's gross estate. The executor divided Marital Trust into two trusts, a GST Exempt Marital Trust of $c and a GST Non-Exempt Marital Trust of $d. On Schedule R, the executor allocated $c of Grantor's available GST exemption to the GST Exempt Marital Trust and thereby made a "reverse" QTIP election with respect to the GST Exempt Marital Trust.

You have requested the following rulings:

1. As a result of the modification of Trust Agreement, Spouse does not have, and did not release, a general power of appointment over the property of Trust.

2. As a result of the modification of Trust Agreement, Spouse does not have, and did not release, a general power of appointment over the property of the marital trusts, and therefore Grantor's executor's "reverse" qualified terminable interest property (QTIP) election with respect to the GST exempt marital trust is valid.

LAW AND ANALYSIS

Ruling 1

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) defines "general power of appointment" as a power which is exercisable in favor of the decedent, his estate, his creditors, or creditors of his estate. However, under § 2042(b)(1)(A), a power to consume, invade, or appropriate property 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 not a general power of appointment.

Section 20.2041-1(b)(1) of the Estate Tax Regulations provides, in part, if under the terms of the instrument, the trustee or his successor has the power to appoint the principal of trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment. A power to amend only the administrative provisions of a trust instrument, which cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment. However, the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of the fiduciary duties is not a power of appointment.

Under § 2514(b), the exercise or release of a general power of appointment created after October 21, 1942, is a transfer of property by the individual possessing such power.

Under § 2514(c), a "general power of appointment" is defined as a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or creditors of his estate. However, under § 2514(c)(1), a power to consume, invade, or appropriate property for the benefit of the possessor which 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(b)(1) of the Gift Tax Regulations provides, in part, that a donee may have a power of appointment if he has the power to remove or discharge a trustee and appoint himself. For example, if under the terms of a trust instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and A has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, A is considered as having a power of appointment. A power to amend only the administrative provisions of a trust instrument, which cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment. However, the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of the fiduciary duties is not a power of appointment.

Rev. Rul. 95-58, 1995-2 C.B. 191, holds that the decedent/grantor's reservation of an unqualified power to remove a trustee and appoint an individual or corporate successor trustee that is not related or subordinate to the decedent within the meaning

of § 672(c) is not considered a reservation by the grantor of the trustee's discretionary powers of distribution over the property transferred by the decedent/grantor to the trust.

Section 672(c) defines the term "related or subordinate party" to mean any nonadverse party who is (1) the grantor's spouse if living with the grantor, or (2) any one of the following: the grantor's father, mother, issue, brother or sister, an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

State Statute 1 provides that to achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

State Statute 2 provides that in any case, matter or proceeding in a court of probate, the court at any time may certify to the supreme court any questions or propositions of law concerning which instructions are desired for the proper decision of any matter before it and thereupon the supreme court may give binding instructions on the questions and propositions certified.

In Commissioner v. Estate of Bosch, 387 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 this respect, the federal agency may be said, in effect, to be sitting as a state court.

In this case, based on the facts and supporting documentation submitted, we conclude that Grantor intended Trust to preserve the limitation on Spouse's successor trustee appointment power with respect to trusts administered under Article III, Paragraph C. and Article III, Paragraph D., and that the removal of the Section 672 Safe Harbor Language was a result of scrivener's error. The probate court found that the retroactive modifications are consistent with Grantor's probable intention as described in Attorney's affidavit and evidenced by the multiple drafts of the trust agreement containing the Section 672(c) Safe Harbor Language, together with contemporaneous correspondence and notes provided by Attorney. State Supreme Court ordered that Trust Agreement be modified to provide that, with respect to trusts administered under Article III, Paragraph C. and Article III, Paragraph D., the successor trustee shall not be related or subordinate within the meaning of § 672(c) to the person who has the power to remove the trustee. Accordingly, insofar as the court order retroactively modifying Trust is consistent with applicable State law, we conclude that as a result of the

modification of Trust Agreement, Spouse does not have, and did not release, a general power of appointment over the property of Trust.

Ruling 2

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

Section 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 QTIP, 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 that the surviving spouse has a qualifying income interest for life if: (I) the surviving spouse is entitled to all the income from the property, payable annually or at more frequent intervals, or has a usufruct interest for life in the property; and (II) no person has a 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) of the Estate Tax Regulations 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 (or § 2101). For purposes of § 20.2056(b)-7(b)(4)(i), the term “return of tax imposed by § 2001” means the last estate tax return filed by the executor on or before the due date of the return, including extensions or, if a timely return is not filed, the first estate tax return filed by the executor after the due date.

Section 2652(a)(1) provides that for purposes of chapter 13, the term “transferor” means: (A) in the case of any property subject to the tax imposed by chapter 11, the decedent; and (B) in the case of any property subject to the tax imposed by chapter 12,

the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 2652(a)(3) provides, in pertinent part, that in the case of any trust with respect to which a deduction is allowed to the decedent 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 QTIP had not been made ("reverse" QTIP election).

Section 26.2652-2(a) of the Generation-Skipping Transfer Tax Regulations provides, in part, that a "reverse" QTIP election is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies. Section 26.2652-2(b) provides that an election under § 2652(a)(3) is made on the return on which the QTIP election is made.

As stated above, if Spouse or any person had a power to appoint any part of the property of Marital Trust to any person other than Spouse, Marital Trust would not be a QTIP trust, and if Grantor made a "reverse" QTIP over Marital Trust under such circumstances, the "reverse" QTIP would not be valid. In Ruling 1, we concluded that Grantor intended Trust to preserve the limitation on Spouse's successor trustee appointment power with respect to trusts administered under Article III, Paragraph C. and Article III, Paragraph D., and the removal of the Section 672 Safe Harbor Language was a result of scrivener's error. The probate court found that the retroactive modifications are consistent with Grantor's probable intention, and State Supreme Court ordered that Trust be modified to provide that the successor trustee shall not be related or subordinate within the meaning of § 672(c) to the person who has the power to remove the trustee. Accordingly, based on the facts and supporting documentation submitted, and insofar as the court order retroactively modifying Trust is consistent with applicable State law, we conclude that as a result of the modification of Trust Agreement, Spouse does not have, and did not release, a general power of appointment over the property of the marital trusts. Therefore, Grantor's executor's "reverse" QTIP election with respect to the GST exempt marital trust is valid, assuming all of the other requirements of § 2652(a)(3) are satisfied.

In accordance with the Power of Attorney on file with this office, we have sent a copy of this letter to your authorized representatives.

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.

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.

Sincerely,

Leslie H. Finlow

_____

Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosure:
Copy for § 6110 purposes

cc: