

Internal Revenue Service

Index Nos.: 2041.00-00,
2514.00-00, 2601.00-00
Number: **199911008**
Release Date: 3/19/1999

Department of the Treasury

**P.O. Box 7604
Ben Franklin Station
Washington, DC 20044**

Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:P&SI:7 - PLR-115268-98

Date:

December 4, 1998

Re:

LEGEND:

Grantor =

a =

Trust =

Spouse =

A =

Foundation =

Trust 1 =

Trust 2 =

Trust 3 =

Trust 4 =

Dear Sir:

In a letter, dated _____, you requested several rulings concerning the estate, gift, and generation-skipping transfer (GST) tax consequences of the proposed release of a testamentary power of appointment. This letter responds to your request.

The facts and representations submitted are summarized as follows: Grantor established the Trust on a. Article III of the Trust directs the trustee to divide any property received by the trustee *per stirpes* into trusts for the benefit of Grantor's then living descendants. On Spouse's death, the trustee is to distribute each trust to or for the persons or organizations, other than Spouse, Spouse's estate, and the creditors of either, in the proportions and subject to the trusts, powers, and conditions as Spouse appoints by will specifically referring to this power of appointment.

If Spouse fails to exercise the power of appointment, Article III of the Trust directs the trustee to pay all the net income to the descendant, except that the trustee may withhold any net income that the trustee considers not to be in the descendant's best interests. The trustee may pay to any one or more of the descendant's descendants so much or all of any withheld net income as the trustee considers necessary or desirable for the beneficiary's comfortable support, medical care, education, welfare, and best interests. Any undistributed income is to be added to principal each year.

Article III of the Trust also directs the trustee to pay to the descendant so much or all of the principal as the trustee considers necessary or desirable for the descendant's generous support, medical care, education, welfare and enjoyment, for travel, for luxuries appropriate for the descendant's accustomed standard of living, for use in business, to assist in the purchase of a home, or for any other purpose the trustee considers to be in the best interests of the descendant. The trustee may pay to any one or more of the descendant's descendants so much of the principal as the trustee considers necessary or desirable for the beneficiary's comfortable support, medical care, education, welfare, and best interests.

On the death of a descendant, Article III of the Trust directs the trustee to distribute the trust estate to or for the persons or organizations, other than the descendant, his estate, and creditors of either, in such proportions and subject to such trusts, powers and conditions as the descendant appoints by will

specifically referring to this power of appointment. To the extent a descendant does not effectively exercise the descendant's power of appointment, on the descendant's death, the trustee is to divide the trust estate *per stirpes* into trusts for his then living descendants, or if none, for the then living descendants of his most immediate ancestor who is a descendant of Grantor's father, A, and of whom there is a descendant then living. The trustee is to add any trust set aside for a descendant for whom a trust is then held under the trust instrument to that trust.

If any trust is not effectively disposed of by the exercise of a power of appointment, Article III of the Trust directs that on the death of the surviving beneficiary, the trustee is to distribute the trust to Spouse, or if Spouse is not then living, to the Foundation. If at the time any payment is to be made to the Foundation, it is not then in existence, the trustee is to make payment to charities described in § 170(c) of the Internal Revenue Code and in the proportions among those charities as the trustee determines at that time.

At the time of the initial contribution to the Trust, there were four descendants of Grantor then living. Thus, four trusts, Trust 1, Trust 2, Trust 3, and Trust 4, were established under the Trust. These trusts were irrevocable on September 25, 1985, and you represent that there have been no additions (actual or constructive) to the trusts since that date.

Spouse proposes to execute a written release of the power of appointment granted to Spouse under the Trust.

You have requested the following rulings:

1. Spouse's irrevocable and complete release of the testamentary power of appointment will not be a release of a general power of appointment and will, therefore, not be a taxable transfer for federal estate and gift tax purposes.

2. Spouse's irrevocable and complete release of the testamentary power of appointment will not cause any part of the Trust to be included in Spouse's gross estate under § 2041.

3. The Trust is exempt from the GST tax because it was created, funded, and irrevocable on September 25, 1985, and no additions (actual or constructive) have been made to it since that date.

4. Spouse's irrevocable and complete release of the testamentary power of appointment will not be treated as a constructive addition to the Trust and, thus, the release will not cause any part of the Trust to be subject to the GST tax.

Rulings No. 1 and 2:

Section 2041(a)(2) provides that the value of the gross estate includes the value of all property to the extent of any property with respect to which the decedent has at the time of his 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, the property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive. For purposes of § 2041(a)(2), the power of appointment is considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

Section 20.2041-1(a) of the Estate Tax Regulations provides that a decedent's gross estate includes the value of property in respect of which the decedent possessed, exercise, or released certain powers of appointment.

Section 20.2041-1(c)(2) defines the term "general power of appointment" as any power of appointment exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. 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 20.2041-3(a)(1) provides that property subject to a power of appointment created after October 21, 1942, is includible in the gross estate of the holder of the power under varying conditions depending on whether the power is (i) general in nature, (ii) possessed at death, or (iii) exercised or released.

Section 20.2041-3(a)(2) provides that if the power is a general power of appointment, the value of an interest in

property subject to the power is includible in a decedent's gross estate under § 2041(a)(2) if either-

(i) The decedent has the power at the time of his death (and the interest exists at the time of his death), or

(ii) The decedent exercised or released the power, or the power lapsed, under the circumstances and to the extent described in § 20.2041-3(d).

Section 20.2041-3(a)(3) provides that if a power is not a general power of appointment, the value of property subject to the power is includible in the holder's gross estate under § 2042(a)(3) only if it is exercised to create a further power under certain circumstances described in § 20.2041-3(e).

Based on the information submitted and the representations made, we conclude that: (1) Spouse's irrevocable and complete release of the testamentary power of appointment will not be a release of a general power of appointment and will, therefore, not be a taxable transfer for purposes of the federal estate and gift tax; and (2) Spouse's irrevocable and complete release of the testamentary limited power of appointment will not cause any part of the Trust to be included in Spouse's gross estate.

Rulings No.3 and 4:

Section 2601 imposes a tax on every generation-skipping transfer made by the "transferor" to a "skip-person."

Section 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations provides that the provisions of chapter 13 do not apply to any generation-skipping transfer under a trust (as defined in § 2652(b)) that was irrevocable on September 25, 1985. The rule of the preceding sentence does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985.

Section 26.2601-1(b)(1)(ii) provides that, except as provided in § 26.2601-1(b)(1)(ii)(B) or (C), any trust (as defined in § 2652(b)) in existence on September 25, 1985, is considered an irrevocable trust.

Section 26.2601-1(b)(v)(B) provides that the release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in § 2041(b)) is not treated as an addition to a trust if--

(1) Such power of appointment was created in an irrevocable trust that is not subject to chapter 13 under § 26.2601-1(b)(1); and

(2) In the case of an exercise, the power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (the perpetuities period). For purposes of § 26.2601-1(b)(1)(v)(B)(2), the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership, or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust) will not be considered an exercise that postpones or suspends vesting, absolute ownership, or the power of alienation beyond the perpetuities period. If a power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

Based on the information submitted and the representations made, we conclude that: (1) the Trust is exempt from the GST tax because it was created, funded, and irrevocable on September 25, 1985, and no additions (actual or constructive) have been made to it since that date; and (2) Spouse's irrevocable and complete release of the testamentary power of appointment will not be treated as a constructive addition to the Trust and, thus, the release will not cause any part of the Trust to be subject to the GST tax.

Except as ruled above, we express or imply no opinion concerning the federal tax consequences of this transaction under the cited provisions of the Code or any other provision of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Christine E. Ellison

Christine E. Ellison
Chief, Branch 7
Office of the Assistant Chief Counsel
(Passthroughs and Special Industries)