

**Internal Revenue Service**

Department of the Treasury

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March 4, 1999

**LEGEND:**

Trust =

A =

B =

Corporation =

State =

Court =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Dear

This letter responds to your representative's letter dated October 21, 1998, requesting the following rulings concerning the effect of a proposed reformation of Trust:

1. The proposed reformation of Trust will not affect the assumed qualification of Trust as a charitable remainder trust, and

2. The proposed reformation of Trust will not disqualify Grantors' charitable deduction under § 170 of the Internal Revenue Code for transfers made to Trust from its inception.

### **FACTS**

On Date 1, A and B, Grantors of Trust, executed the governing instrument forming Trust, which Grantors intended to have treated as a charitable remainder unitrust under § 664. Trust is governed by the laws of State. In Dates 2 and 3, A and B transferred shares of Corporation's stock to Trust. Trust requires the Trustee to pay a unitrust amount to A and B during their lives with the remainder to charitable organizations described in §§ 170(b)(1)(A), 170(c), 2055(a), and 2522(a).

Article III, Paragraph I of Trust's governing instrument provides that the Trust is intended to qualify as a charitable remainder unitrust under § 664 and is to be administered to qualify for the exemption from taxation provided therein for a charitable remainder unitrust.

In Date 4, A and B learned that Trust may not qualify as a charitable remainder unitrust because Trust's governing instrument contained provisions that are not intended for use in a charitable remainder trust. Specifically, Trust's governing instrument contained the following disqualifying provisions.

Article VI, Paragraph I provided that at any time during the lifetimes of the Grantors, the Grantors or either Grantor may acquire, in a nonfiduciary capacity, without the approval of the Trustee, the trust corpus, by substituting other property of an equivalent value.

Article VI, Paragraph K allowed the Trustee to pay death taxes from Trust's assets whenever any portion of the Trust estate became subject to death taxes.

Article VI, Paragraph M allowed the Trustee to terminate the Trust if after the death of both Grantors it is not economically feasible to continue the Trust's existence.

Additionally, Trust's governing instrument contained a provision relating to

testamentary transfers that allows the unitrust payment to be deferred until Trust is completely funded. Trust, however, was funded with an inter vivos transfer.

The drafting attorney provided a sworn affidavit that the above disqualifying provisions were the result of drafting errors and that A and B had always intended Trust to qualify as a charitable remainder trust. On Date 5, the Trustee filed a petition to reform Trust under State law and Article III, Paragraph I of Trust's governing instrument. Article III, Paragraph I of Trust's governing instrument allows the Trustee to amend the terms of Trust for the sole purpose of complying with the requirements of § 664 and the applicable regulations. The proposed reformation deletes the disqualifying provisions and reforms the governing instrument to allow Trust to qualify as a charitable remainder unitrust under §§ 664(d)(2) and (3), retroactive to Date 1. The reformed Trust is drafted in accordance with § 5 of Rev. Proc. 90-31, 1990-1 C.B. 539.

It is represented that under the laws of State, a trust instrument can be reformed to be in accord with a donor's intent if the trust instrument contains drafting errors. It is also represented that the purpose of the reformation is to correct drafting errors to reflect Grantors' original intent to create a charitable remainder trust.

On Date 6, Court granted Trustee's petition to reform Trust. The Court order is contingent upon the Internal Revenue Service's issuance of a letter ruling to Grantors that provides that the reformation will not disqualify Trust as a charitable remainder unitrust and will not disqualify Grantors' charitable deductions for any transfers to Trust from its inception.

## **LAW AND ANALYSIS**

### **Ruling Request 1**

Under § 664(d)(2), a charitable remainder unitrust is a trust that provides for the distribution of the unitrust amount, at least annually for life or a term of years, to one or more persons (at least one of which is not a charitable organization) with an irrevocable remainder interest to be held for the benefit of, or paid over to, a qualified charitable organization.

Section 1.664-1(a)(4) of the Income Tax Regulations provides that for a trust to be a charitable remainder trust, it must satisfy the definition of and function exclusively as a charitable remainder trust from the creation of the trust. Solely for purposes of § 664 and the regulations thereunder, the trust will be deemed to be created at the earliest time that neither the grantor nor any other person is treated as the owner of the entire trust under subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code (subpart E), but in no event prior to the time property is first transferred to the trust. For the preceding sentence, neither the grantor nor the grantor's spouse is treated as the

owner of the trust merely because the grantor or the grantor's spouse is named as a recipient of the annuity or unitrust amount.

Section 1.664-3(a)(3)(ii) provides that a trust is not a charitable remainder unitrust if any person has the power to alter the amount paid to any named person other than an organization described in § 170(c) if such power would cause any person to be treated as the owner of the trust, or any portion thereof, if subpart E, part 1, subchapter J, chapter 1, subtitle A of the Code were applicable to such trust.

Section 1.664-3(a)(4) provides, in part, that the trust may not be subject to a power to invade, alter, amend, or revoke for the beneficial use of a person other than an organization described in § 170(c). Notwithstanding the preceding sentence, the grantor may retain the power exercisable only by will to revoke or terminate the interest of any recipient other than an organization described in § 170(c).

After reviewing the facts and relevant documents submitted, we conclude that the proposed judicial reformation will not violate the requirements of § 664 and the applicable regulations. Because the reformed Trust's governing instrument does not contain the provisions in Article VI, Paragraph I of Trust effective Date 1, Trust will not be a grantor trust under § 675(4)(C). As reformed, Trust contains provisions set forth in Rev. Proc. 90-31, and thus qualifies as a charitable remainder unitrust under § 664(d)(2) and (3). We conclude that the proposed reformation that is retroactive to Date 1 will not adversely affect Trust's qualification as a charitable remainder unitrust.

### **Ruling Request 2**

Section 170(a) allows a deduction for charitable contributions.

Section 170(f)(2), however, does not allow a charitable deduction for a remainder interest in property transferred to a trust unless the trust is a charitable remainder annuity trust (described in § 664) or a charitable remainder unitrust, or a pooled income fund (described in § 642(c)(5)).

Because Trust, as reformed, qualifies as a charitable remainder unitrust effective Date 1, then transfers to Trust from its inception may qualify as charitable contributions under § 170 to the extent of the remainder interests of the charitable beneficiaries.

No opinion is expressed on the federal tax consequences of the formation or operation of Trust under the provisions of any other section 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.

Under a power of attorney on file in this office, we are sending a copy of this

letter to your authorized representative.

Sincerely yours,

Jeff Erickson  
Assistant to the Branch Chief,  
Branch 3  
Office of the Assistant Chief  
Counsel  
(Passthroughs and Special  
Industries)

Enclosures (2)

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