

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201021004**

Release Date: 5/28/2010

Index Number: 2601.00-00, 2601.04-00,
2601.04-01, 2501.01-00,
2041.03-00, 2514.00-00

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:04

PLR-128553-09

Date: NOVEMBER 24, 2009

Legend

Trustors =
Original Trust =

Trust =

Trust D =
Trust E =
Trust F =
Trust G =
Trustee =
Successor =

Trustee
A =
B =
C =
D =
E =
F =
G =
H =
I =
J =
K =
L =
M =
Court 1 =
Court 2 =
Settlement =
Agreement

State =
Date 1 =
Date 2 =
Year 1 =
Year 2 =
State Statute 1 =
State Statute 2 =

Dear :

This letter responds to your submission dated June 8, 2009 requesting rulings on the income, gift, and generation-skipping transfer tax consequences of the proposed division of a trust.

The facts submitted and the representations made are as follows. On Date 1 in Year 1, which is prior to September 25, 1985, Trustors created an irrevocable trust (Original Trust) for the benefit of the issue of A, B, and C, i.e. their grandchildren and grandchildren's issue. A, B, and C are Trustors' children and are each referred to as the "primary descendant."

On Date 2 pursuant to a settlement agreement, Court ordered Original Trust severed into three separate and equal trusts; a trust for the benefit of the issue of A, a trust for the benefit of the issue of B, and a trust for the benefit of the issue of C. The trust created for the benefit of the issue of A (Trust) is the subject of this ruling. Date 2 is prior to August 2, 2007. Trustee is the corporate trustee and currently the sole trustee of Trust.

Trust's terms are identical to the terms of Original Trust, except that where Original Trust refers to the issue of primary descendant, each reference means solely the issue of A and the lineal descendants of such issue.

The trustee of Original Trust received a ruling from the Internal Revenue Service (Service) concluding that the Date 2 division would not cause Original Trust or Trust to lose its status as exempt from the generation-skipping transfer tax and that distributions from either trust would not be subject to the generation-skipping transfer tax.

A has four children, D, E, F, and G, and six grandchildren, H, I, J, K, L, and M. Trustors are deceased; A is alive.

The pertinent terms of Original Trust and Trust are as follows:

Section II requires the trustee to distribute Trust income at least annually to the issue of the primary descendant; provided, however, the trustee may accumulate Trust income if it determines it is in the best interests of the beneficiaries after giving full consideration

to the capital gain throwback rules contained in § 669 of the Internal Revenue Code (as then in effect). After the death of the primary descendant and all of his or her lineal descendants, the trustee must distribute income to Trustors' lineal descendants in such proportions as determined by trustee in its sole discretion. The trustee also has discretion to distribute principal to the primary decedent's issue, and upon the death of the primary descendant's issue, to the lineal descendants of Trustors.

Pursuant to Section III, Trust, unless terminated sooner, will terminate immediately prior to the expiration of twenty-one years from and after the death of the last survivor of Trustors and the issue of Trustors' parents living on Date 1. Upon termination, the trustee shall distribute the principal in equal proportions outright and free of trust to the persons then entitled to receive the net income thereof, or if no such persons exist, then to Trustor's heirs.

Section VI, Subsection B provides that Trust is irrevocable and prohibits any portion of the trust principal or income to revert to Trustors or Trustors' estates.

Section VII, Subsection I provides that the corporate trustee may be removed by a majority vote of the individual trustees, and the corporate trustee may resign by serving notice to a majority of the individual trustees. If the corporate trustee ceases to be a trustee, a successor corporate trustee must be named.

Section VII, Subsection G states that Trust is a contract under State law.

The assets of Trust consist of cash, marketable securities, a limited partnership interest and real property. When Trust was created upon the division of Original Trust, D, E, F, and G requested Trustee create four separate sub-accounts for each of the siblings and their respective descendants so that the assets, other than the real property, could be separately managed. Accordingly, since Year 1, except for the management of the real property interests held by Trust, Trustee has kept separate sub-accounts for each family line since Trust's inception.

In Year 2, a dispute arose among D, E, F, and G regarding the administration of Trust. Trustee petitioned Court 1 for instructions on whether State law authorizes Trustee to divide Trust to create a separate share for E and her lineal descendants. D, F, and G filed a complaint with Court 2 seeking to remove Trustee as trustee of Trust.

To end the litigation, the parties entered into Settlement Agreement. Under the terms of Settlement Agreement, Trust will be divided into four separate trusts, Trust D, a trust for the benefit of D and her lineal descendants, Trust E, a trust for the benefit of E and her lineal descendants, Trust F, a trust for the benefit of F and her lineal descendants, and Trust G, a trust for the benefit of G and his lineal descendants (collectively, the "Separate Trusts"). Each Separate Trust has identical terms as Trust, except that where Trust refers to "the issue of the primary descendant" and "such issue's lineal

descendants" as beneficiaries, such reference shall mean solely the particular family line for whom the Separate Trust is established.

Each trust will receive a non-pro rata equal share of Trust assets consisting of the assets held in that family member's sub-account and one-fourth of all other assets, except real property, not held in a sub-account. Trustee will partition the real property pursuant to the parties' agreement; Trust E will receive a fee simple interest that has an estimated value equal to one-fourth of the value of all of the real property owned by Trust, and Trusts D, F, and G will hold three-fourths of the value of all of the real property owned by Trust as tenants-in-common. Any outstanding line of credit from Trustee's institution will be satisfied by Trust prior to the division. Any other debts of Trust will be apportioned amongst Separate Trusts equally.

Settlement Agreement will be approved upon receipt of a favorable ruling from the Service and the filing of an amended petition in Court 1. Trustee will continue as Trustee of Trust E and Successor Trustee will serve as the corporate trustee and sole trustee of Trusts D, F, and G.

State Statute 1 authorizes a trustee of a State trust to combine or divide a trust, provided that the trustee gives notice to the qualified beneficiaries, and "if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust."

Under State Statute 2, when distributing trust property or terminating or dividing a trust, a trustee has a power to "make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation."

Trustee represents that no additions have been made to the corpus of Original Trust or Trust after March 1, 1984.

Trustee, Successor Trustee, and the beneficiaries of Trust, D, E, F, G, H, I, J, K, L, and M request the following rulings:

1. The proposed modification and division of Trust into Separate Trusts, constituting four separate and equal shares of Trust, the non-pro rata transfer of assets from Trust to each such Separate Trust, and the change of trustees with respect to any such Separate Trust will not constitute an addition to or a modification of Trust or any of the four Separate Trusts that would cause Trust or any Separate Trust to lose, wholly or partially, its exempt status under § 2601, and will not subject distributions from Trust or any of the Separate Trusts to the generation-skipping transfer tax. Furthermore, each Separate Trust will constitute a separate trust for purposes of determining the application of any generation-skipping transfer tax subsequent to the division of Trust.

2. The proposed non-pro rata distribution of the assets of Trust to the four Separate Trusts on an equal basis will not result in the realization of gain or loss to Trust or to any Separate Trust or any beneficiary thereof under §§ 61 or 1001.
3. The proposed division of Trust and non-pro rata distributions of assets to such Separate Trusts will not result in a transfer subject to gift tax under § 2501 by Trust or any of Trust's beneficiaries.
4. The basis of each asset received by each Separate Trust from Trust will be the same as the basis which that asset maintained when held by the Trust pursuant to § 1015.
5. The holding period for each asset received by each Separate Trust from Trust will include the same holding period for that asset as held by Trust according to § 1223(2).
6. Each of the four Separate Trusts will constitute a separate trust for purposes of § 643.

Ruling 1:

Section 2601 of the Internal Revenue Code (Code) 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.

Under § 1433(b)(2)(A) of the Tax Reform Act of 1986 and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the GST tax provisions do not apply to any GST trust (as defined in § 2652(b)) that was irrevocable on September 25, 1985, but only to the extent that the transfer is not made out of corpus added to the trust after September 25, 1985 (or out of income attributable to corpus so added).

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), (b)(2), or (b)(3) will not cause the trust to lose its exempt status. These rules are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes. They do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

Under § 26.2601-1(b)(4)(i)(D), a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraph (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. 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 or the creation of a new GST. 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. See, § 26.2601-1(b)(4)(i)(E), Example 5.

In this case, Original Trust was irrevocable on September 25, 1985. The Service ruled that the division of Original Trust did not cause Original Trust or Trust or distributions from either to be subject to GST tax. It has been represented that there have been no additions made to either Original Trust or Trust after September 25, 1985.

In the instant case, Trustee has authority under State law to divide Trust into separate trusts. Trustee has discretion to make non-pro rata distributions to the beneficiaries, and Trust provides for the resignation of trustees and appointment of successor trustees. To end litigation, the parties executed Settlement Agreement in which Trust will be divided into Separate Trusts, Trusts D, E, F, and G, and assets will be allocated equally in a non-pro rata fashion to each Separate Trust. Further, Successor Trustee will serve as Trustee of Trusts D, F, and G.

The division of Trust into Separate Trusts will not shift a beneficial interest in the Separate Trusts to any beneficiary who occupies a lower generation (as defined in § 2651) than the person who held the beneficial interest prior to the division. It will also not 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 the life of any issue of Trustors in being at the date of creation of Original Trust plus a period of 21 years. Accordingly, based on the facts submitted and representations made, we rule that the proposed modification and division of Trust into Separate Trusts and the non-pro rata transfer of assets from Trust to each such Separate Trust will not constitute an addition to or a modification of Trust or any of the four Separate Trusts that would cause Trust or any Separate Trust to lose, wholly or partially, its exempt status under § 2601, and will not subject distributions from Trust or any of the Separate Trusts to the GST tax. The change of corporate trustee for Trusts D, F, and G is administrative in nature and is not considered to shift a beneficial interest in Trust. Accordingly, based upon the facts submitted and the representations made, we rule that the change of corporate trustee will not constitute an addition to or a modification of Trust or any of the Separate Trusts that would cause Trust or any Separate Trust to lose, wholly or partially, its exempt status under § 2601, and will not subject distributions from Trust or any of the Separate Trusts to the GST tax. Furthermore, based on the facts provided and the representations made, we rule that

the four Separate Trusts will constitute a separate trust for the purposes of determining the application of any GST tax subsequent to the division of Trust.

Ruling 2:

Section 61(a) defines gross income as "all income from whatever source derived." Under § 61(a)(3), gross income includes "[g]ains derived from dealings in property."

Section 1001(a) provides that the gain from the sale or other disposition of property is the excess of the amount realized over the adjusted basis provided in § 1011 for determining gain, and the loss is the excess of the adjusted basis provided in § 1011 for determining loss over the amount realized. Under § 1001(c), the entire amount of gain or loss must be recognized, except as otherwise provided.

Section 1.1001-1(a) of the Income Tax Regulations provides that, except as otherwise provided in subtitle A of the Code, the gain or loss realized from the exchange of property for other property differing materially either in kind or in extent is treated as income or as loss sustained.

Under § 1.1001-1(h)(1), the severance of a trust, occurring on or after August 2, 2007, is not an exchange of property for other property differing materially either in kind or in extent, if (i) an applicable state statute or the governing instrument authorizes or directs the trustee to sever the trust; and (ii) any non-pro rata funding of the separate trusts resulting from the severance, whether mandatory or in the discretion of the trustee, is authorized by an applicable state statute or the governing instrument.

In the present case, Trust will be severed into four Separate Trusts on a non-pro rata basis. The operating provisions of the Separate Trusts are the same as those of Trust.

The proposed severance of Trust is authorized under State law. Original Trust and Trust contain no provision contrary to the State law. Therefore, the proposed severance is consistent with the criterion set forth in § 1.1001-1(h)(1)(i) for an exchange of property for property not materially different in kind or in extent.

Under State law, in terminating or dividing a trust, a trustee may make non-pro rata distributions. In addition, under the terms of Original Trust and Trust, the trustees are authorized to distribute trust principal or income on a non-pro rata basis. The proposed non-pro rata severance of Trust is authorized both under State law and under the terms of the trust. Accordingly, the non-pro rata funding of Separate Trusts is consistent with the criterion set forth in § 1.1001-1(h)(1)(ii) for an exchange of property for property not materially different in kind or in extent.

The severance of a trust occurring on or after August 2, 2007, is not an exchange of property for other property differing materially in kind or in extent, if the severance

satisfies the criteria set forth in § 1.1001-1(h)(1). The proposed severance of Trust satisfies those criteria. Accordingly, based on the facts provided and the representations made, we rule that the severance does not constitute an exchange of property for other property differing materially in kind or in extent under §§ 61 and 1001. Ruling 3:

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by an individual, resident or nonresident. Section 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Section 2512(a) provides that, if a gift is made in property, the value thereof at the date of the gift will be considered the amount of the gift. Section 2512(b) states that where property is transferred for less than adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the value of the consideration received shall be deemed a gift.

Based on the facts submitted and the representations made, the beneficial interests of the trust beneficiaries will not change as a result of the division of Trust as described above. Accordingly, based upon the facts provided and the representations made, we rule that the division of Trust into Separate Trusts will not cause Trust or any beneficiary of Trust to have made a taxable gift for federal gift tax purposes under § 2501.

Ruling 4:

Section 1015 states that the basis in property acquired by a transfer in trust is the same as it would be in the hands of the grantor, with adjustments for gain and loss recognized.

Section 1.1015-2(a)(1) provides that in the case of property acquired after December 31, 1920 by a transfer in trust (other than a transfer in trust by gift, bequest or devise) the basis of property so acquired is the same as it would be in the hands of the grantor increased by the amount of gain or decreased in the amount of loss recognized to the grantor under the law applicable to the year in which the transfer was made.

Section 1.1015-2(a)(2) applies the uniform basis principles in § 1.1015-1(b) for determining basis of property where more than one person acquires an interest in property by transfer in trust.

Under § 1.1015-1(b), property acquired by gift has a single uniform basis although more than one person may acquire an interest in the property. The uniform basis of the property remains fixed subject to proper adjustment for items under §§ 1016 and 1017.

In this case, neither § 1001 nor § 61 applies to the proposed transaction. Thus, based upon the facts provided and the representations made, we rule that the basis of each asset received by each Separate Trust will be the same as the basis of the assets in Trust.

Ruling 5:

Under § 1223(2), the taxpayer's holding period for property, however it is acquired, includes the period for which the property was held by any other person, if, for the purpose of determining gain or loss from a sale or exchange, the property has the same basis in whole or in part in his hands as it would have in the hands of the other person.

Under § 1015, the basis in each asset is the same in the hands of each Separate Trust as it is in the hands of Trust. Accordingly, based upon the facts provided and the representations made, we rule that under § 1223(2), the holding period for each asset received by each Separate Trust from Trust will include the period that the asset was held by Trust.

Ruling 6:

Section 643(f) provides that under regulations prescribed by the Secretary, two or more trusts shall be treated as one trust if (1) such trusts have substantially the same grantor or grantors and substantially the same primary beneficiary or beneficiaries, and (2) the principal purpose of such trusts is the avoidance of the tax imposed by Chapter 1 of the Code.

Section 1806(b) of the Tax Reform Act of 1986 provides that in the case of a trust which was irrevocable on March 1, 1984, § 643(f) shall apply only to that portion of the trust which is attributable to a contribution to corpus after March 1, 1984.

Section 643(e)(3)(A) provides that in the case of any distribution of property (other than cash) to which an election under § 643(e)(3) applies, (i) § 643(e)(2) does not apply, (ii) gain or loss is recognized by the trust in the same manner as if such property has been sold to the distributee at its fair market value, and (iii) the amount taken into account under §§ 661(a)(2) and 662(a)(2) shall be the fair market value of such property.

Section 643(e)(3)(B) provides that an election under § 643(e)(3) applies to all distributions made by the trust during a taxable year and is made on the return of the trust for such taxable year.

Section 661(a) provides that in any taxable year a deduction is allowed in computing the taxable income of a trust (other than a trust to which subpart B applies), for the sum of (1) the amount of income for such taxable year required to be distributed currently; and

(2) any other amounts properly paid or credited or required to be distributed for such taxable year, but such deduction shall not exceed the distributable net income (DNI) of the estate or trust.

Section 1.661(a)-2(f) of the Income Tax Regulations provides that gain or loss is realized by the trust or estate (or the other beneficiaries) by reason of a distribution of property in kind if the distribution is in satisfaction of a right to receive a distribution of a specific dollar amount, of specific property other than that distributed, or of income as defined under § 643(b) and the applicable regulations, if income is required to be distributed currently.

Based on the facts and representations submitted, we conclude that as long as the four resulting trusts created by the division of Trust are each separately managed and administered, they will be treated as separate trusts for federal income tax purposes. Based solely on the facts submitted and the representations made, we conclude that the division will not be viewed as a distribution or termination under § 661, nor as a distribution for purposes of § 1.661(a)-2(f) and, therefore, will not result in the realization by Trust or Separate Trusts, or by any beneficiary of Trust or Separate Trusts of any income, gain, or loss.

Furthermore, we conclude that Trust's distribution of assets to four Separate Trusts occurring as part of the proposed division will not cause Trust or its beneficiaries to realize gain or loss, provided that Trust does not make an election under § 643(e)(3).

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 taxpayers 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 taxpayers 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,

Lorraine E. Gardner
Senior Counsel, Branch 4
(Passthroughs & Special Industries)

Enclosures: Copy for § 6110 purposes