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**Department of the Treasury**

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Person to Contact:

Telephone Number:

Refer Reply To:

**CC:PSI:4-PLR-116388-00**

Date:

**December 18, 2001**

Re:

Legend:

Settlor	=
Spouse	=
Daughter	=
Independent Trustee	=
Trust	=
\$X	=
State	=
School	=

Dear :

This is in response to your letter of October 22, 2001 and prior correspondence in which you request a ruling on the estate and gift tax consequences of a proposed transfer to a trust.

Settlor proposes to transfer \$X in marketable securities to an irrevocable inter vivos trust (Trust). Settlor and Spouse will elect to treat the gifts, to the extent made to a person other than Spouse, as made one-half by each under § 2513 of the Internal Revenue Code. In addition, Settlor and Spouse will each allocate a sufficient portion of their generation-skipping transfer (GST) tax exemption so that Trust will have a zero inclusion ratio at the date of the funding of Trust. Each will file a gift tax return, Form 709, reporting the transfer and allocation of GST exemption. Spouse and Independent Trustee will be the initial trustees of Trust.

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Article 1, section 1.1 provides that Trust is irrevocable and cannot be altered, or amended except as expressly provided in Trust.

Article III, section 3.1 provides that the Family Trustee may, in his or her sole discretion, pay or apply the trust estate's net income and principal to or for the benefit of Settlor's lineal descendants living from time to time, in such amounts and proportions as the Family Trustee deems necessary or desirable for a descendant's health, education (including post-graduate), support and maintenance in reasonable comfort and in the manner to which the descendant has become accustomed, and shall add any unpaid net income to principal. The trust estate shall not be used to pay any support obligation of Settlor or Spouse. The Family Trustee may apportion net income and principal among the descendants without regard for equality of distribution among them, and no adjustment need be made to account for any unequal or disproportionate payment or application of net income or principal to a descendant. If a descendant of the Settlor is appointed as Family Trustee prior to attaining age thirty, the independent trustee shall exercise the powers and discretions described in section 3.1 until such family member attains the age of thirty.

Section 3.2 provides that upon Settlor's death, the trustee shall collect any property which is added to the trust estate as a result of Settlor's death.

Section 3.3 provides that if any portion of the trust estate existing at Settlor's death is included in Settlor's gross estate for federal estate tax purposes, then upon Settlor's death that portion shall be paid either to Settlor's estate or to a revocable trust established by Settlor during his lifetime, and the trustee shall have discretion to pay such amount to the estate or such trust.

Under section 3.4, the trust will terminate on the earlier of: (1) the date twenty-one years after the death of the last survivor of the lineal descendant's of His Late Majesty King George the Fifth of England living on the date the trust is executed, or (2) the date of death of Settlor's last living descendant.

Section 3.5 provides that upon the termination of Trust, the trustees shall distribute the trust estate to Settlor's lineal descendants in equal shares, per stirpes, to create one share for each child of Settlor and one share for the descendant's, collectively, of a deceased child of Settlor, and so on by the stocks to more remote generations.

Section 3.6 provides that if there are no descendants of Settlor living, but Spouse is living, then Trust will be further administered for the benefit of Spouse according to the terms of Section 3.1, but substituting Settlor's Spouse for the term lineal descendant, and Spouse will have a testamentary special power to appoint the corpus to any person other than her estate or creditors. If Spouse does not survive (or upon her later death assuming that Spouse does not appoint the property) then the

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remaining trust estate shall be distributed to named individuals and if none are living then to the certain named individuals lineal descendants. If none of the beneficiaries survive then trust will be distributed to Settlor's then living heirs at law as if Settlor had died in State without a valid will, and if there are not heirs living, then to School.

Article V, section 5.1 provides that at all times there is to be one independent trustee who is not a related or subordinate party to Settlor or Spouse within the meaning of § 672 and one Family Trustee who may be any person other than Settlor. Independent Trustee and Spouse are named Trustees.

Section 5.2 provides that if a vacancy arises in the position of independent trustee or Family Trustee, it will be filled by such bank, trust company, or individual (other than Settlor) as Settlor while living and able may appoint. If Settlor is not living or able to appoint successor trustees, then successor trustees will be appointed by Spouse, and if Spouse is not living or able to appoint successor trustees will be appointed by Daughter, if she has attained the age of majority in her jurisdiction of domicile. If Daughter is not living or able to appoint trustees, then a majority of the living beneficiaries of Trust, or their guardians, will appoint successor trustees. If Settlor and Spouse predecease Daughter before she attains the age of twenty-five, then the independent trustee will act as sole trustee until Daughter attains age twenty-five.

Section 5.4 provides that the independent trustee may amend the instrument in writing in any manner required to meet the tax objectives listed in Article 1. No amendment may increase the class of beneficiaries or give any beneficial interest or economic benefit in Trust to any person not already a beneficiary of Trust. In addition, an independent trustee may grant a descendant of Settlor the power to appoint all or a portion of the trust estate by Will to the person's estate or the creditor's of the person's estate, and the independent trustee may withdraw any power so given prior to the exercise of the power. To the extent that a power of appointment has been granted over less than the entire of the principal of the trust estate, the independent trustee may in its discretion divide the trust estate into two portions, one as to which the power was granted and the other as to which it was not granted, and may combine previously divided portions if a power or consent is withdrawn.

Section 5.7 provides that a trustee may be removed, by delivering a written statement of removal to the trustee, at any time and for any reason by the person or persons then entitled to appoint a successor trustee.

You have requested the following rulings:

1. The conveyance from Settlor to Trust will be a completed gift for gift tax purposes.

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2. If the gift tax computed under § 2502 with respect to the gifts made by Settlor and Spouse, respectively, is equal to or less than the Settlor's and Spouse's respective unused credit under § 2505, no gift tax will be payable with respect to the transfer.

3. Trust will not be includible in Settlor's or Spouse's gross estate pursuant to §§2035-2038.

4. Settlor's power to appoint anyone but himself as substitute Family Trustee and independent trustee will not cause Trust to be included in Settlor's gross estate.

5. Neither Spouse's position as Family Trustee nor her ability to appoint a successor independent trustee or Family Trustee will cause inclusion of Trust in her gross estate.

6. If GST exemption is timely allocated to Trust in an amount equal to the initial transfer to Trust, Trust's initial inclusion ratio will be zero.

Rulings 1 and 2:

Section 2501 imposes a tax on the transfer of property by gift by an individual, resident or nonresident. Section 2502 provides, generally, that the tax imposed by § 2501 shall be an amount equal to the excess of -

(1) a tentative tax on the aggregate sum of the taxable gifts for the calendar year and for each of the preceding calendar periods, over

(2) a tentative tax on the aggregate sum of the taxable gifts for each of the preceding calendar periods.

Section 2505(a), as effective for gifts made after December 31, 2001, but before December 31, 2009, provides that in the case of a citizen or resident of the United States, there shall be allowed as a credit against the tax imposed by § 2501 for each calendar year an amount equal to -

(1) the applicable credit amount in effect under § 2010(c) for such calendar year (determined as if the applicable exclusion amount were \$1,000,000) reduced by

(2) the sum of the amounts allowable as a credit to the individual under § 2505 for all preceding calendar periods.

Section 2511(a) provides that the gift tax shall apply 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.

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Section 25.2511-2(b) of the Gift Tax Regulations provides that as to any property of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. Section 25.2511-2(c) provides that a gift is incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

Section 2513(a) provides that, for gift tax purposes, a gift made by one spouse to any person other than his or her spouse shall be considered as made one-half by him or her and one-half by his or her spouse. In order to qualify for "split gift" treatment, both husband and wife must signify their consent to treat the gifts as made one-half by each spouse and must satisfy the requirements set forth under section 2513(b) regarding the time and manner of signifying consent. Section 25.2513-1(b)(4) provides that if one spouse transfers property in part to his or her spouse and in part to third parties, "split gift" treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable and severable from the interest transferred to the spouse.

Rev. Rul. 95-58, 1995- 2 C.B.191, holds that the grantor's reservation of an unqualified power to remove a trustee and appoint a new trustee (other than the grantor) will not be considered the reservation by the grantor of the trustee's discretionary powers of distribution, for estate tax purposes under §§ 2036 and 2038, and for gift tax purposes under § 2511, if the donor can only appoint an individual or corporate successor trustee that is not related or subordinate to the grantor (within the meaning of section 672(c)).

In this case, the independent trustee will have the power to amend the trust and to grant any descendant of Settlor who is a beneficiary a general power of appointment with respect to the trust corpus. Settlor will retain the power to remove and replace the independent trustee; however, any successor independent trustee appointed by Settlor can not be related or subordinate to the Settlor, within the meaning of section 672(c). Accordingly, under Rev. Rul. 95-58, Settlor's retained power to remove and replace the independent trustee will not cause the independent trustee's powers to be attributed to the Settlor for purposes of section 2511.

In addition, the Family Trustee will have the power to distribute trust income and corpus among the trust beneficiaries. However, income and corpus may be distributed only for the beneficiaries' health, education, and support and maintenance in reasonable comfort and in a manner to which the beneficiary has become accustomed. The standard for invasion constitutes an ascertainable standard as described in §25.2511-2(c). See Treas. Reg. § 25.2514-1(c)(2). Further, this invasion power can not be exercised to satisfy any support obligation with respect to Settlor or Spouse.

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Accordingly, Settlor's retained power to remove and replace the Family Trustee, will not cause the Settlor's transfer to constitute an incomplete gift.

Therefore, we conclude that the transfer by Settlor to Trust will be a completed gift for gift tax purposes. After application of §2513, if the gift tax computed under § 2502 with respect to the gift treated as made by Settlor, is equal to or less than Settlor's unused credit available under §2505, then no gift tax will be payable with respect to the gift treated as made by Settlor. Similarly, if, after application of §2513, the gift tax computed under § 2502 with respect to the gift treated as made by Spouse, is equal to or less than Spouse's unused credit available under §2505, then no gift tax will be payable with respect to the gift treated as made by Spouse.

Rulings 3, 4 and 5:

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 2033 provides that the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2035(a) provides that, (1) if the decedent transferred an interest in property or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent's death, and (2) the value of the property (or interest therein) would have been included in the gross estate under section 2036, 2037, 2038, or 2042 if the interest or power had been retained by the decedent on the date of death, then the value of the gross estate shall include the value of any property (or interest therein) which would have been so included. Under § 2035(b), the gross estate shall be increased by the amount of any gift tax paid by the decedent or his estate on any gift made by the decedent or his spouse during the three year period ending on the date of decedent's death.

Section 2036(a) provides that the value of the decedent's gross estate includes the value of all property to the extent of any interest therein of which the decedent has made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life, or for any period not ascertainable without reference to the decedent's death, or any period that does not in fact end before the decedent's death, (1) the possession or enjoyment of, or the right to the income from the property, or (2) the right either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income from the property.

Section 2038(a) provides that the value of the gross estate includes the value of all property of which the decedent has at any time made a transfer (except where there has been a bona fide sale for adequate and full consideration in money or

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money's worth) by trust or otherwise where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property or where the decedent relinquished this power within the three year period ending on the date of the decedent's death.

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. Section 2041(b)(1) defines the term "general power of appointment" as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. A power to consume, invade, or appropriate property for the benefit of the decedent that 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(c)(2) of the Estate Tax Regulations provides that a power to consume, invade, or appropriate income or corpus is limited by an ascertainable standard if the extent of the holders duty to exercise or not exercise the power is reasonably measurable in terms of the holders needs for health, education, or support (or any combination of them). Included in examples of powers that are limited by an ascertainable standard are powers exercisable for the holder's "support in reasonable comfort," and "maintenance in health and reasonable comfort."

Rev. Rul. 73-143, 1973-1 C.B. 407, considers a situation where the decedent created an inter vivos trust for the benefit of the decedent's child. The decedent, as trustee could invade corpus for the child's "support and maintenance." The ruling concludes that the decedent's retained power as trustee to invade trust corpus is not a retained power to alter the beneficial interests in the trust for purposes of § 2038, because the decedent's power is limited by an ascertainable standard. On the other hand, if the retained power is not limited by an ascertainable standard, then the trust property is includible in the gross estate under § 2038.

Under the terms of Trust, Trust is irrevocable and Settlor will have no right, title or interest in or power over, privilege or incident of ownership in regard to any trust property. Settlor has retained no beneficial interest in the trust and has not retained any right to alter, amend revoke or terminate the Trust within the meaning of §2038, or the right to designate the persons who will possess or enjoy the property or the income therefrom within the meaning of § 2036.

As discussed above, Settlor will retain the power to remove and replace the independent trustee; however, any successor independent trustee appointed by Settlor can not be related or subordinate to the Settlor or Spouse, within the meaning of § 672(c). Accordingly, under Rev. Rul. 95-58, Settlor's retained removal and

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replacement power will not be considered the reservation of the independent trustee's powers for purposes of § 2038. Further, as discussed above, the Family Trustee's power to distribute trust income and corpus among the trust beneficiaries, is limited by an ascertainable standard. In accordance with Rev. Rul. 73-143, Settlor's power to remove and replace the Family Trustee will not cause the Trust corpus to be included in Settlor's gross estate under § 2038.

Regarding inclusion of the Trust corpus in Spouse's gross estate under §§ 2035 through 2038, although Spouse will consent under § 2513 to treat the gift to Trust made by Settlor as if made one-half by Spouse, § 2035(a) and §§ 2036 through 2038 do not apply to property interests that the decedent did not actually own and thus did not transfer. Accordingly, assuming only Settlor makes transfers to Trust, Spouse will not be the transferor of property to Trust for purposes of § 2035(a), and §§ 2036 through 2038. See Rev. Rul. 82-198, 1982-2 C.B. 206; Rev. Rul. 74-556, 1974-2 C.B. 300; Rev. Rul. 54-246, 1954-1 C.B. 179.

Further, Spouse, as Family Trustee, can not currently make any distributions from Trust for her own benefit and is prohibited from making any distribution that would satisfy any support obligation. Under Section 3.6, Spouse may become a beneficiary of the Trust. However, Spouse's power, as Family Trustee, to distribute Trust income and corpus to herself would be limited by an ascertainable standard relating to Spouse's health, maintenance and support, as described in § 20.2041-1(c)(2). Further, Spouse's testamentary power to appoint created under Section 3.6 can not be exercised in favor of her estate or creditors. Therefore, that power, if it becomes effective, would not be a general power of appointment. Finally, Spouse's power to remove and replace the independent trustee with a person who is not related or subordinate to Settlor or Spouse, and her power to replace successor Family Trustees, would not cause Spouse to be treated as possessing a general power of appointment with respect to Trust, if these powers become effective. Accordingly, upon Spouse's death, no portion of the value of Trust will be includible in Spouse's gross estate under section 2041(a)(2).

Consequently, Trust will not be includible in Settlor's or Spouse's gross estate under §§ 2033, 2035-2038, or 2041.

Ruling 6:

Section 2601 imposes a tax on every generation-skipping transfer (GST), as defined in §§ 2611 through 2613, made after October 26, 1986, by a "transferor" to a "skip person."

Under section 2652(a)(1) and § 26.2652-1(a)(1) of the Generation-Skipping Transfer Tax Regulations, generally, the transferor for purposes of the GST tax is the individual with respect to whom the property was last subject to Federal estate or gift tax. Section 2652(a)(2) provides that, if, under section 2513, one-half of a gift is treated



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as made by an individual and one-half is treated as made by the spouse of the individual, then for purposes of the GST tax, each spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor spouse.

Under § 2613, a “skip person” is defined generally as a natural person assigned to a generation which is 2 or more generations below the generation of the transferor, or a trust, if all interests in such trust are held by skip persons.

Under § 2602, the amount of the tax imposed under §2601 is equal to the taxable amount multiplied by the applicable rate. Section 2641(a) provides that the “applicable rate” with respect to any generation-skipping transfer, is the product of the maximum federal estate tax rate multiplied by the inclusion ratio with respect to the transfer. Under § 2641(b) , the maximum federal estate tax rate means the maximum rate imposed under § 2001 on the estates of decedents dying at the time of the relevant generation-skipping transfer. Under §2642(a)(1), in general, the inclusion ratio with respect to any property subject to a generation-skipping transfer is the excess of one over the applicable fraction determined for the trust from which the transfer is made. Under § 2642(a)(2), the applicable fraction with respect to a trust is a fraction, the numerator of which is the amount of GST exemption under §2631 allocated to the trust, and the denominator of which is, generally, the value of the property transferred to the trust, with certain specified adjustments.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption of \$1,000,000 (adjusted for inflation under § 2631(c)) that may be allocated by the individual (or his executor) to any property with respect to which the individual is the transferor for GST tax purposes under § 2652(a). Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

Section 2632(a) provides that any allocation by an individual of the individual's GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for the individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed. Section 2632(c) provides deemed allocation rules in the case of certain transfers in trust that are “indirect skips” made after December 31, 2000.

In this case, Settlor proposes to transfer \$X to Trust. Settlor and Spouse propose to treat the gift, to the extent made to persons other than Spouse, as made one-half by each under §2513. Under §2652(a)(2), if the requirements for signifying consent under § 2513(b) are satisfied, Settlor and Spouse will each be deemed the transferor for federal generation-skipping transfer tax purposes of one-half of the value of Settlor's gift to Trust, to the extent made to persons other than Spouse. If Settlor and Spouse each allocate sufficient GST exemption to the Trust equal to the amount of the gift each is treated as making, Trust will have an inclusion ratio of zero for GST tax purposes.

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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.

Sincerely yours,

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George L. Masnik  
Chief, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure

Copy for 6110 purposes