

Internal Revenue Service

Number: **200535022**

Release Date: 9/2/2005

Index Number: 2601.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:04

PLR-164242-04

Date: MAY 05, 2005

Legend:

Testator =

Trust =

Date 1 =

Date 2 =

Taxpayer =

Child 1 =

Child 2 =

Child 3 =

State =

Dear :

This is in response to a letter dated December 8, 2004 from your authorized representative requesting a ruling concerning the generation-skipping transfer tax consequences of a proposed exercise of a testamentary non-general power of appointment.

The facts and representations submitted are summarized as follows:

Testator died on Date 1, prior to September 25, 1985, leaving a will creating Trust for the benefit of Testator's spouse and children, all who survived Testator. Taxpayer is a child of Testator. Under Article Fifth of Testator's will, a portion of the residuary estate designated as the Portion A trust is to consist of an amount equal to the maximum estate tax marital deduction allowable in determining the Federal estate tax on Testator's gross estate reduced by the value of all other items in Testator's gross estate which qualify for the marital deduction and pass or have passed to Testator's spouse. The balance of the residuary estate designated as the Portion B trust is to be administered in accordance with Article Seventh of Testator's will.

Under Article Seventh A., the Portion B trust is to be divided into three equal shares, one for the benefit of each of Testator's children and their issue, each to be administered as a separate trust. The entire net income from each trust is to be paid for the benefit of Testator's child for whom the trust is held, the child's issue, and the child's mother, in such amounts, as executors and trustees deem necessary to provide for the maintenance, comfort, support or education of all such persons. In addition, the executors and trustees, in their sole discretion, are authorized to pay from the principal of these trust estates as they deem necessary to provide for the suitable comfort, support or maintenance of Testator's spouse, children, and issue of children, or any of them.

Article Seventh B. provides that upon the death of each of Testator's children who survive Testator, each child has the right to appoint the respective separate trust, consisting of undistributed corpus and income, among the child's spouse and issue in such manner and upon such trusts or otherwise as he or she may direct by will. In default of the exercise of this power of appointment, and to the extent that the power of appointment is not exercised by the child, the share of the child's trust estate is to pass to the child's issue, per stirpes. If a child has no issue surviving, the share of the child's trust is to pass to Testator's other issue surviving, per stirpes; provided, however, the amount distributable to any child is to be added to the share of principal held for the child's benefit in accordance with Article Seventh B., and in default of any of Testator's issue surviving, to that person or those persons then constituting Testator's next of kin under the laws of State.

Article Seventh E. provides that no individual trustee is entitled to participate in any decision to be made by the trustees or trustee involving the distribution of principal or income to a trustee, a trustee's spouse, or a trustee's descendants, but any such decision is to be made solely by the other trustee or trustees.

No actual or constructive additions have been made to Trust since Trust was created.

In accordance with Article Seventh A. of Trust, a separate trust was established for the benefit of Taxpayer and Taxpayer's issue. Under paragraph B of Article IV of a codicil to Taxpayer's will, Taxpayer proposes to exercise the testamentary non-general power of appointment granted to Taxpayer under Article Seventh B. of Testator's will as follows:

Forty percent (40%) to my daughter [Child 1], or if my said daughter is deceased, the share to which my deceased daughter otherwise would have been entitled is to be distributed to her then living lineal descendants, per stirpes, or if none, then to the remaining then living beneficiaries of this paragraph B in proportion to the amount of the appointed property that each such beneficiary otherwise receives; subject to the terms and provisions of the Trust for Younger Beneficiaries set forth in paragraph C below.

Forty percent (40%) to my daughter [Child 2], or if my said daughter is deceased, the share to which my deceased daughter otherwise would have been entitled is to be distributed to her then living lineal descendants, per stirpes, or if none, then to the remaining then living beneficiaries of this paragraph B in proportion to the amount of the appointed property that each such beneficiary otherwise receives; subject to the terms and provisions of the Trust for Younger Beneficiaries set forth in paragraph C below.

Twenty percent (20%) to the then living lineal descendants, per stirpes, of my son [Child 3], or if none, then to the remaining then living beneficiaries of this paragraph B in proportion to the amount of the appointed property that each such beneficiary otherwise receives; subject to the terms and provisions of the Trust for Younger Beneficiaries set forth in paragraph C below.

Under paragraph C, any distribution under Article IV to a beneficiary who has not attained age 21 at the time of distribution is to be held in trust until that beneficiary attains the age of 21. If any such beneficiary dies after vesting, but before attaining the age of 21, the trustee is to distribute the remaining assets of the beneficiary's share to the estate of that beneficiary.

The codicil further provides that if the exercise of the special power of appointment provides for the distribution of any part of the trust share created for Taxpayer's benefit under Testator's will to a trustee of any trust created for the benefit of any beneficiary, then the trust is to, in any event, terminate upon the expiration of the lesser of ninety (90) years from the date of Testator's death or twenty-one (21) years less one day after the date of Taxpayer's death. If a trust or trust share is terminated by under this provision, then the trustee is to distribute the entire trust estate to the then income beneficiaries of the trust in the same proportions as they are then entitled to income.

Taxpayer has requested a ruling that Taxpayer's proposed exercise of the testamentary non-general power of appointment granted to Taxpayer under Article Seventh B. of Testator's will, as set forth in Taxpayer's will under paragraph B of Article IV, will not result in a constructive addition to Trust that will cause Trust to lose its exempt status and will not subject Trust assets to the generation-skipping transfer (GST) tax under § 2601 of the Internal Revenue Code.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property with respect to which the decedent possessed, at the time of death, a general power of appointment. Section 2041(b)(1) provides that the term "general power of appointment" means a power which is exercisable in favor of the decedent, decedent's estate, decedent's creditors, or the creditors of decedent's estate. Section 20.2041-1(c)(1)(b) of the Estate Tax Regulations provides that a power is not a general power of appointment if by its terms it is expressly not

exercisable in favor of the decedent or decedent's creditors or the creditors of decedent's estate.

Section 2601 imposes a tax on each generation-skipping transfer (GST) (within the meaning of subchapter B).

Under section 1433(a) of the Tax Reform Act of 1986 (Act) and section 26.2601-1(a) of the Generation-Skipping Transfer Tax Regulations, the generation-skipping transfer tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under section 1433(b)(2)(A) of the Act and section 26.2601-1(b)(1)(i), the tax does not apply to a transfer under a trust that was irrevocable on September 25, 1985, but only to the extent that such 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)(1)(v)(A) provides that, except as provided in section 26.2601-1(b)(1)(v)(B), where any portion of a trust remains in the trust after the post-September 25, 1985, release, exercise, or lapse of a power of appointment over that portion of the trust, and the release, exercise, or lapse is treated to any extent as a taxable transfer under chapter 11 or chapter 12, the value of the entire portion of the trust subject to the power that was released, exercised, or lapsed is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise, or lapse. The creator of the power will be considered the transferor of the addition except to the extent that the release, exercise, or lapse of the power is treated as a taxable transfer under chapter 11 or chapter 12.

Section 26.2601-1(b)(1)(v)(B) provides that the release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in section 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 section 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 of 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 section 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 the 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.

In the present case, Trust was irrevocable when it was created on Date 1. It is represented that there have been no constructive or actual additions to Trust since

September 25, 1985. The testamentary power of appointment granted to Taxpayer under Article Seventh B. of Testator's will is exercisable only in favor of Taxpayer's spouse and issue, excluding Taxpayer. Thus, under § 2041(b) and § 20.2041-1(c)(1) and for purposes of § 26.2601-1(b)(1)(v)(B), Taxpayer's power of appointment is not a general power of appointment.

In the instant case, Taxpayer proposes to exercise her testamentary non-general power of appointment by appointing by will Taxpayer's separate trust corpus outright to Taxpayer's surviving lineal descendants, per stirpes or if none, then to the remaining then living beneficiaries under Taxpayer's will. Any distribution to a beneficiary who has not attained age 21 at the time of distribution is to be held in trust until that beneficiary attains the age of 21. Further, if as a result of the exercise of the power of appointment any part of the trust corpus is distributed in trust for the benefit of any beneficiary, then the trust must, in any event, terminate upon the expiration of the lesser of ninety (90) years from the date of Testator's death or twenty-one (21) years less one day after the date of Taxpayer's death.

Thus, for purposes of section 26.2601-1(b)(1)(v)(B), Taxpayer's proposed exercise of her testamentary power of appointment will not postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property extending beyond any life in being at the date of the creation of Trust plus a period of 21 years or a term of years that will exceed 90 years measured from the date of the creation of Trust. Accordingly, we conclude that Taxpayer's proposed exercise of the testamentary non-general power of appointment granted to Taxpayer under Article Seventh B. of Testator's will, as set forth in Taxpayer's will under paragraph B of Article IV, will not result in a constructive addition to Trust that will cause Trust to lose its exempt status and will not subject Trust assets to the generation-skipping transfer (GST) tax under § 2601.

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. In addition, we express or imply no opinion regarding the value of the property transferred to Trust.

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.

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 ruling contained in this letter is 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 ruling, it is subject to verification on examination.

Sincerely,

George L. Masnik
Chief, Branch 4
(Passthroughs & Special Industries)

Enclosures

Copy for section 6110 purposes

Copy of this letter