

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B02-PLR-145805-01

Date:

February 21, 2002

Trust =

H =

W =

H's Trust =

W's Trust =

Unitrust Amount =

Date 1 =

Date 2 =

Year 1 =

Year 2 =

County =

State =

Property Settlement Agreement =

\$x =

Dear

This responds to a letter dated August 16, 2001, and subsequent correspondence, written on behalf of the Trust, requesting rulings on a proposed division of Trust under § § 664, 2516, and 1001 of the Internal Revenue Code.

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The information submitted states that H and W were married in Year 1. H and W created the Trust on Date 1, and funded it with a gift of community property. No additional contributions have been made to the Trust. H and W are the co-trustees of the Trust. H and W represent that the Trust is a charitable remainder unitrust within the meaning of § 664(d)(2). Neither H nor W maintains any power individually over the Trust or any of the Trust's assets. At the time the Trust was created, H and W were married to each other, and each is a beneficiary of the Trust. The Trust is irrevocable and is subject to and governed by the laws of State. Currently, the Trust assets are valued at approximately \$x.

The Trust by its terms pays the Unitrust Amount, in equal monthly installments, to H and W, the unitrust recipients, in equal proportion, during their joint lives, and, following the death of either, wholly to the survivor during his or her lifetime. Following the death of the last to die, all of the remaining principal and income of the Trust is payable to charitable remainder beneficiaries, each of which is an organization described in §§ 170(b)(1)(A), 170(c), 2055(a), and 2522(a). H and W reserved the right to modify the charitable remainder beneficiaries.

In Year 2, W commenced proceedings in the Superior Court of County to dissolve the marriage. On Date 2, the parties entered into the Property Settlement Agreement, which constitutes a settlement of all matters between H and W and an agreement of separation between them with respect to any funds, assets, or properties, owned by both or either of them at the time of the execution of the agreement or thereafter, including the parties' community interest in the Trust. Property Settlement Agreement was incorporated by reference into the divorce decree. The divorce decree was entered on Date 2.

Under the terms of Property Settlement Agreement, the parties propose to divide the Trust into two separate charitable remainder unitrusts, the H's Trust and the W's Trust, each of which is intended to be a charitable remainder unitrust within the meaning of § 664(d)(2). H will be the sole trustee of the H's Trust, and W will be the sole trustee of the W's Trust. Pursuant to the proposed division of the Trust into two separate trusts, the Trustees have agreed to an equitable allocation and division of the assets of the Trust between the two separate and distinct trusts. Thus, each of the two new unitrusts will be allocated approximately one-half of the assets of the Trust and will be administered upon the same terms and conditions as the Trust, except that neither H nor W will retain a survivorship interest in the other's charitable remainder unitrust.

The terms of the H's Trust will provide that in each taxable year of the trust, the trustee of the trust shall pay the Unitrust Amount to H during his lifetime, and after his death, the trust will terminate. Upon termination of the H's Trust, the charitable remainder shall be distributed to one or more charitable organizations described in § 170(b)(1)(a), 170(c), 2055(a) and 2522(a), which are designated by H.

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The terms of the W's Trust will provide that in each taxable year of the trust, the trustee of the trust shall pay the Unitrust Amount to W during her lifetime, and after her death, the trust will terminate. Upon termination of the W's Trust, the charitable remainder shall be distributed to one or more charitable organizations described in §§ 170(b)(1)(a), 170(c), 2055(a) and 2522(a), which are designated by W.

Section 2501(a) provides that a tax is imposed for each calendar year on the transfer of property by gift during the calendar year by any individual, resident or nonresident.

Section 2511(a) provides that the gift tax applies 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.

Section 2512(b) provides that where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Section 2516 provides that where husband and wife enter into a written agreement relative to their marital and property rights and divorce occurs within the 3-year period beginning on the date 1 year before such agreement is entered into (whether or not such agreement is approved by the divorce decree), any transfers of property or interests in property made pursuant to such agreement (1) to either spouse in settlement of his or her marital or property rights, or (2) to provide a reasonable allowance for the support of issue of the marriage during minority, shall be deemed to be transfers made for a full and adequate consideration in money or money's worth.

Accordingly, based on the information provided and the representations made, the proposed transfer by H to W of his community property interest in the Unitrust Amount payable from the assets to be transferred from the Trust to the W's Trust (that are to be the separate property of W) and the proposed transfer by W to H of her community property interest in the Unitrust Amount payable from the assets to be transferred from the Trust to the H's Trust (that are to be the separate property of H), pursuant to the terms of the Property Settlement Agreement, do not constitute transfers subject to federal gift taxation.

Section 61(a)(3) provides that gross income includes gains derived from dealings in property.

Section 664(c) provides, generally, that a charitable remainder unitrust shall be exempt from federal income tax.

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Section 664(d)(2) provides that a charitable remainder unitrust is a trust (A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals, (B) from which no amount other than the payments described in § 664(d)(2)(A) and other than qualified gratuitous transfers described in § 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in § 170(c), (C) following the termination of the payments described in § 664(d)(2)(A), the remainder interest in the trust is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined by § 664(g)), and (D) with respect to each contribution of property to the trust, the value (determined under § 7520), of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

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 extent, is treated as income or as loss sustained.

Section 1041(a) provides that no gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of) (1) a spouse, or (2) a former spouse, but only if the transfer is incident to divorce. Section 1041(c) provides that for purposes of § 1041(a)(2), a transfer of property is incident to the divorce if the transfer occurs (1) within one year after the date on which the marriage ceases, or (2) is related to the cessation of the marriage.

Section 1.1041-1T(b), Q&A-7 of the temporary Income Tax Regulations addresses when a transfer of property is “related to the cessation of the marriage.” Q&A-7 provides that a transfer of property is treated as related to the cessation of the marriage if the transfer is pursuant to a divorce or separation instrument, as defined in § 71(b)(2), and the transfer occurs not more than 6 years after the date on which the marriage ceases. A divorce or separation instrument includes a modification or

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amendment to such decree or instrument. Any transfer not pursuant to a divorce or separation instrument and any transfer occurring more than 6 years after the cessation of the marriage is presumed to be not related to the cessation of the marriage. This presumption may be rebutted only by showing that the transfer was made to effect the division of property owned by the former spouses at the time of the cessation of the marriage. For example, the presumption may be rebutted by showing that (a) the transfer was not made within one- and six-year periods described above because of factors which hampered an earlier transfer of the property, such as legal or business impediments to transfer or disputes concerning the value or the property owned at the time of the cessation of the marriage, and (b) the transfer is effected promptly after the impediment to transfer is removed.

Section 71(b)(2) defines the term “divorce or separation instrument” to mean (A) a decree of divorce or separate maintenance or a written instrument incident to such decree, (B) a written separation agreement, or (C) a decree (not described in § 71(b)(2)(A)) requiring a spouse to make a payments for the support and maintenance of the other spouse. The Settlement Agreement in the instant case constitutes a “divorce or separation instrument” within the meaning of the statute.

Section 1.1041-1T(d), Q&A-10 provides that the transferor of property under § 1041 recognizes no gain or loss on the transfer even if the transfer was in exchange for the release of marital rights or other consideration. This rule applies regardless of whether the transfer is of property separately owned by the transferor or is a division (equal or unequal) of community property. Under § 1041(b), for purposes of subtitle A, the transferee is treated as having acquired the property by gift from the transferor with a carryover basis from the transferor.

Accordingly, based on the information provided and the representations made, the proposed division of the Trust into two separate unitrusts will not require the recognition of any taxable income under § 61 by H and W, and will not require the recognition of any taxable gain or loss under § 1001 to the Trust, the H’s Trust, the W’s Trust, or the Trustee of the respective trusts. Furthermore, the division of the Trust into two separate trusts will not cause the Trust, the H’s Trust or the W’s Trust to fail to qualify as charitable remainder trusts under § 664.

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under any other provision of the Code. In particular, no opinion is expressed on the application of § 4941 to the Trust or whether the Trust, the H’s Trust or the W’s Trust meets or will meet the requirements of a charitable remainder unitrust under § 664.

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.

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Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to the Trust's authorized representative.

Sincerely yours,
J. THOMAS HINES
Chief, Branch 2
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures: 2
Copy of this letter
Copy for § 6110 purposes