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The information submitted states that on D1, Trust was established by A with the intention that Trust qualify as a NIMCRUT under § 664(d)(3). Trustee is the trustee of Trust. The governing document for Trust provides for an Annual Unitrust Payment to be paid to A in quarterly installments. The Annual Unitrust Payment is equal to the lesser

of (i) $\underline{x}\%$ of the net fair market value of the assets of Trust valued annually (the unitrust amount) or, (ii) the trust income for the taxable year as defined under § 643(b). In addition, if the trust income for any year exceeds the unitrust amount, the annual payment will include such excess net income to the extent the aggregate amounts paid to A in prior years is less than $\underline{x}\%$ of the aggregate net fair market value of the trust assets for such years. Pursuant to section 10 of the governing instrument of Trust, Trustee has the power to amend Trust's governing instrument in any manner required for the sole purpose of ensuring that Trust qualifies as a charitable remainder trust within the meaning of §§ 664(d)(2) and (3) and the regulations thereunder.

On December 10, 1998, after Trust was established, final regulations under § 1.664-3 were issued. See T.D. 8791, 63 F.R. 68188, 1991-1 C.B. 364. Section 1.664-3(a)(1)(b)(3) of those final regulations provides, in part, that proceeds from the sale or exchange of any assets contributed to the trust must be allocated to principal and not to trust income at least to the extent of the fair market value of those assets on the date of their contribution. Additionally, the preamble to those regulations indicates that taxpayers do not have to treat the make-up amount as a liability when valuing the assets of a NIMCRUT (a make-up liability provision). The governing instrument of Trust complies with § 1.664-3(a)(1)(b)(3) as promulgated in those final regulations with respect to the property used to fund Trust initially, but will not comply with respect to additional contributions to Trust. The governing instrument of Trust also includes a make-up liability provision.

Because Trustee was concerned that he could not accept additional contributions of property to Trust without disqualifying Trust as a NIMCRUT, Trustee petitioned Court to reform Trust. On D2, Court entered a judgment reforming Trust by striking Trust's make-up liability provision. The judgment also reforms Trust by adding a paragraph requiring that the proceeds from the sale or exchange of any assets contributed to Trust be allocated to principal and not to Trust income to the extent of the fair market value of those assets on the date of their contribution to Trust, and requiring the proceeds from the sale or exchange of any assets purchased by Trust to be allocated to principal and not to trust income to the extent of Trust's purchase price of those assets. Otherwise, per the judicial reformation, all realized capital gain of Trust is to be allocated to Trust income.

Section 664(d)(2) provides that for purposes of § 664, 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 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 employee 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 664(d)(3) provides that notwithstanding the provisions of § 664(d)(2)(A) and (B), the trust instrument may provide that the trustee shall pay the income beneficiary for any year - (A) the amount of the trust income, if such amount is less than the amount required to be distributed under § 664(d)(2)(A), and (B) any amount of the trust income which is in excess of the amount required to be distributed under § 664(d)(2)(A), to the extent that (by reason of § 664(d)(3)(A)) the aggregate of the amounts paid in prior years was less than the aggregate of such required amounts.

Section 1.664-3(a)(4) of the Income Tax Regulations provides in part that [a charitable remainder 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).

Based on the information submitted and representations made, we conclude that the judicial reformation of Trust described above will not cause Trust to fail to qualify as a NIMCRUT under § 664.

Except as specifically set forth above, no opinion is expressed as to the federal tax consequences of the above facts under any other provisions of the Code. Specifically, we express no opinion as to whether Trust was or is a charitable remainder unitrust under § 664.

This ruling is directed only to the taxpayer on whose behalf it was requested. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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

Sincerely,

Melissa C. Liquerman
Senior Technician Reviewer, Branch 2
Associate Chief Counsel
(Passthroughs & Special Industries)

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

cc: