

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B4 - PLR-128133-01

Date:

November 01, 2001

Re:

Legend:

Taxpayer =

Decedent =

Decedent's mother =

Trust 1 =

Trust 2 =

Date 1 =

Date 2 =

Date 3 =

State =

Dear

This letter is in reply to your letter of May 15, 2001, requesting a ruling that trust property over which Decedent had powers of appointment will not be included in Decedent's gross estate under section 2041(a)(1) of the Internal Revenue Code.

FACTS

Decedent's mother created an irrevocable trust on Date 1 (Trust 1), of which Decedent was the sole beneficiary. On Date 2, Decedent's mother created a second irrevocable trust (Trust 2) which also benefitted Decedent. Both Date 1 and Date 2 are prior to October 21, 1942. Each of the trust instruments provides that during the life of Decedent the trustees shall pay to Decedent the net income of the trust monthly or quarterly, or as often as, in the judgment of the trustees, the needs of Decedent shall require. Each trust instrument further provides that the trustees have no power to invade the principal of the trust.

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Paragraph 7 of Trust 1 provides that after the death of Decedent, the trustees shall pay the principal of the trust estate to such person or persons as Decedent shall designate by power of appointment, to be exercised by Decedent, either in her will or by separate instrument. Should Decedent fail to exercise such power of appointment, the principal of the trust shall be paid over to Decedent's heirs-at-law.

Paragraph 7 of Trust 2 directs that after the death of Decedent, the trustees shall pay one-half the principal of the trust estate to such person or persons as Decedent shall designate by power of appointment, to be exercised by Decedent, either in her will or by separate instrument. Should Decedent fail to exercise such power of appointment, one-half the principal of the trust shall be paid over to Decedent's heirs-at-law. Neither trust instrument limits the power of appointment to any individual or group of individuals.

Decedent died on Date 3, a resident of State, and is survived by seven children. Decedent did not exercise or release the powers of appointment during her lifetime. Under Article VI of Decedent's will, Decedent specifically refuses to and does not exercise the powers of appointment granted to her under Trust 1 and Trust 2. The assets of Trust 1 and Trust 2 over which Decedent had powers of appointment will pass to Decedent's children who are her heirs-at-law.

You have requested the following rulings:

1. Both Trust 1 and Trust 2 create in Decedent a general power of appointment that is a general power of appointment created before October 22, 1942 under section 2041(a)(1).
2. Failure to exercise the general powers of appointment by will or otherwise is not an exercise of the powers for purposes of section 2041(a)(1) and accordingly, the assets of Trust 1 and Trust 2 will not be includible in Decedent's gross estate.

LAW AND ANALYSIS

Section 2041(a)(1) provides that the value of the gross estate shall include the value of all property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent --

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive;

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but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

Section 2041(b)(1) defines a general power of appointment as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or 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. A power of appointment created on or before October 21, 1942, which is exercisable by the decedent only in conjunction with another person, is not a general power of appointment.

Section 20.2041-1(c)(1) of the Estate Tax Regulations provides that a power of appointment is not a general power if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of the decedent's estate, or (b) expressly not exercisable in favor of the decedent or his creditors, or the decedent's estate or the creditors of his estate.

Section 20.2041-1(e) provides that a power of appointment created by an inter vivos instrument is considered as created on the date the instrument takes effect. Such a power is not considered as created at some future date merely because it is not exercisable on the date the instrument takes effect, or because it is revocable.

Decedent had powers exercisable by will or separate instrument, to appoint the principal of Trust 1 and one-half of the principal of Trust 2 to any persons. The powers given in the instant case are general powers of appointment, because they were exercisable in favor of Decedent, Decedent's estate, Decedent's creditors, or the creditors of Decedent's estate, and were not limited by any ascertainable standard, and were not exercisable only in conjunction with another person. Therefore, the powers of appointment are general powers of appointment under section 2041. The general powers of appointment were created by the trust instruments on Dates 1 and 2. Accordingly, the general powers of appointment were created before October 22, 1942.

Furthermore, based upon the facts submitted and the representations made, Decedent did not exercise or release the powers of appointment during life, and under Decedent's will, Decedent specifically refused to exercise the powers of appointment granted to her under Trust 1 and Trust 2. Therefore, the assets of Trust 1 and Trust 2 which were subject to the general powers of appointment are not includible in Decedent's gross estate under section 2041(a)(1).

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

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referenced in this letter.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant.

Sincerely,
Lorraine E. Gardner
Acting Senior Technician Reviewer
Office of Associate Chief Counsel
(Passthroughs and Special Industries)