

Internal Revenue Service

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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:B09

PLR-102328-04

Date:

December 21, 2004

In Re:

Legend

Decedent =
Date 1 =
State A =
Child 1 =
Child 2 =
Child 3 =
Date 2 =
Trust 1 =

Dear :

In a letter dated December 18, 2003, and subsequent correspondence, you requested rulings regarding the generation-skipping transfer (GST) tax consequences of a proposed modification of a trust. This letter responds to that request.

The facts and representations are as follows: Decedent died testate on Date 1, a date prior to September 25, 1985. Decedent, a resident of State A, was survived by Child 1, Child 2, and Child 3.

Article Sixth, paragraph (c)(1) of Decedent's last will and testament, as modified by a codicil executed on Date 2, provides that Decedent's residuary estate shall be divided into three separate shares, with one share for the benefit of each of Decedent's children. Child 3's share shall be distributed outright to him. The remaining two shares shall be held in trust for the benefit of Child 1 and Child 2. The trust created for the benefit of Child 1 is referred to herein as Trust 1. The trust created for the benefit of Child 2 is not at issue in this letter ruling.

Article Sixth, paragraph (c)(2) provides that the trustees of Trust 1, in their sole discretion, shall pay over to Child 1 so much of the income from the trust as the trustees

in their sole discretion shall deem advisable. The trustees may in their further discretion pay to Child 1's children all or part of the income from Trust 1.

Article Sixth, paragraph (c)(4) provides that upon the death of Child 1, Trust 1 shall continue in trust for the benefit of Child 1's surviving children until the youngest surviving child of Child 1 reaches the age of twenty-one years.

Article Sixth, paragraph (c)(5) provides that in the event of sickness or other extreme need, the trustees may advance all or part of the principal of Trust 1 for the necessary care and support of Child 1.

Under State A law, the parties interested in a trust may resolve matters through written agreements. Such agreements may be filed with the court having jurisdiction over the trust, and upon filing, the agreement has the effect of a final court order binding on all persons interested in the trust.

The trustees and the beneficiaries of Trust 1 propose to enter into an agreement (Agreement) under which Trust 1 will be modified to facilitate the administration and investment of the trust estate. The parties to Agreement will convert a portion of Trust 1 into a unitrust pursuant to State A law. Specifically, Article Sixth, paragraph (c)(2) will be modified so that the trustees, in their sole discretion may pay over to, or use for the benefit of, Child 1 an amount equal to the greater of (i) the annual income of Trust 1 or (ii) an amount equal to six percent of the average fair market value of Trust 1 valued as of the close of the last business day of the five preceding years (or such lesser number of years as are available for the first five years). The trustees may in their further discretion use the unitrust amount for the direct benefit of Child 1's children and may pay over to them all or part of the unitrust amount.

It has been represented that no additions have been made to Trust 1 since Decedent's death. You now request a ruling that the proposed modification to Trust 1 as described in Agreement will result in no shift in a beneficial interest to a lower generation beneficiary, and, therefore, will not affect the status of Trust 1 as exempt from the GST tax.

Section 2601 imposes a tax on every generation-skipping transfer.

Section 1433(b)(2)(A) of the Tax Reform Act of 1986 and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations provide that the GST tax shall not apply to any generation-skipping 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)(ii)(A) provides that any trust in existence on September 25, 1985, will be considered an irrevocable trust except as provided in

§ 26.2601-1(b)(1)(ii) (B) or (C) (relating to property includible in the grantor's gross estate under §§ 2038 and 2042).

Section 26.2601-1(b)(1)(iv) provides that if an addition is made after September 25, 1985, to an irrevocable trust, which is excluded from the application of chapter 13 by § 1433(b)(2)(A) of the 1986 Act, a pro rata portion of subsequent distributions from (and terminations of interests in property held in) the trust is subject to the provisions of chapter 13.

Section 26.2601-1(b)(4) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax under § 26.2601-1(b)(1), (2), or (3) (hereinafter referred to as an exempt trust) will not cause the trust to lose its exempt status. In general, unless specifically provided otherwise, the rules contained in § 26.2601-1(b)(4) are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes. Unless specifically noted, the rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(D) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraphs (b)(4)(i)(A), (B), or (C) of this subsection) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, but only if -- (1) the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and (2) the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

Section 26.2601-1(b)(4)(E), Example 8, considers a situation where a trust that is otherwise exempt from the GST tax provides that trust income is payable to A for life and, upon A's death, the remainder is to pass to A's issue, per stirpes. In 2002, the appropriate local court approves a modification to the trust that converts A's income interest into the right to receive the greater of the entire income of the trust or a fixed percentage of the trust assets valued annually (unitrust interest) to be paid each year to A for life. The example concludes that the modification does not result in a shift in beneficial interest to a beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification. Rather, the modification can only operate to increase the amount distributable to A and decrease the amount distributable to A's issue. In addition, the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the trust will not be

subject to the provisions of chapter 13.

In this case, Trust 1 is considered irrevocable because neither § 2038 nor § 2042 apply. Also, it is represented that no additions were made to Trust 1 after September 25, 1985. Consequently, Trust 1 is currently exempt from the GST tax.

The proposed modification of Trust 1 will not result in a shift of any beneficial interest in Trust 1 to any beneficiary who occupies a generation lower than the persons holding the beneficial interests prior to the conversion. Further, the proposed modification will not extend the time for vesting of any beneficial interest in Trust 1 beyond the period provided for in the original trust. Accordingly, based on the facts submitted and representations made, we conclude that the proposed modification of Trust 1 will not affect the status of Trust 1 as exempt from the GST tax.

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.

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 the taxpayer.

The rulings contained in this letter are 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 rulings, it is subject to verification on examination.

Sincerely,

Melissa C. Liquerman
Branch Chief, Branch 9
(Passthroughs & Special Industries)

Enclosures

Copy for 6110 purposes