

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:P&SI:7:PLR-109780-98

Date: March 8, 1999

Legend: Taxpayer:

SSN:

Decedent:

Trust:

TIN:

TIN:

TIN:

TIN:

TIN:

TIN:

TIN:

TIN:

TIN:

Date 1:

Date 2:

Date 3:

Date 4:

Child 1:

SSN:

Child 2:

SSN:

Grandchild 1:

Dear

We received your letter dated _____ in which you requested rulings on behalf of Taxpayer concerning the generation-skipping transfer (GST) tax consequences of the exercise of specific powers of appointment.

Taxpayer represents the facts to be as follows. Taxpayer is the unrelated third party co-trustee of an irrevocable trust, Trust. Decedent created Trust on Date 1, before September 25, 1985, for the benefit of Decedent's two children, Child 1 and Child 2, and their children. Child 1 had four children who were living on the date of the inception of the Trust and Child 2 also had four children who were living on that date. In addition, Grandchild 1 was born to Child 1 after the date of the inception of the Trust. Decedent died on Date 2. Taxpayer represents that there have been no additions to Trust since September 25, 1985.

Decedent appointed Trustee as disinterested trustee and Child 1 as interested trustee of the trust (both being hereafter jointly referred to as "Trustees"). Article Second of Trust provides that the property originally placed in trust was to be divided into two shares: Child 1's Share and Child 2's Share.

Article Third of the Trust Agreement provides that Child 1's share is to be divided into as many equal shares as there are children of Child 1 living on the date of execution of Trust. One of such equal shares is to be allocated to each living child of Child 1, and each share so allocated is to be held in a separate trust in accordance with the provisions of Article Third. If a new child is born to Child 1 after the date of

execution of Trust, a new separate trust is to be established on the date of birth or adoption of the child. Similarly, Article Fourth divides Child 2's share into as many separate trusts as there are children of Child 2 either living on Date 1 or born to or adopted by Child 2 thereafter.

Article Third, paragraph 1 of the Trust Agreement provides that during Child 1's lifetime, the net income, in whole or in part, may be paid to or applied for the benefit of any one or more of the group consisting of Child 1, the child of Child 1 to whom the share held in the separate trust is allocated, the spouse of such child, and the issue living from time to time of such child, in such amount or amounts as Disinterested Trustee in his uncontrolled discretion may determine. Any net income in any year which is not paid to, or applied for the benefit of any one or more of such group shall be added to the principal at the end of such year. This paragraph also provides that the principal in whole or in part may be paid to, or applied for the benefit of any one or more of such group, from time to time, in such amount or amounts and for such estates and interests and outright or on such terms, trusts, conditions and limitations, provided that no beneficial interest is created in anyone outside of such group by any such payment, as Disinterested Trustee in his uncontrolled discretion may determine.

Article Third, paragraph 1 further provides that from and after Decedent's death, the principal (other than life insurance on the life of Child 1) in whole or in part shall be paid to, or applied for the benefit of any one or more of such group other than Child 1, from time to time, in such amount or amounts and for such estates and interests and outright or upon such terms, trusts, conditions and limitations, provided that no beneficial interest is created in anyone outside of such group (and expressly excluded from such group is Child 1) as Child 1 shall specify in any instrument or instruments in writing delivered to Trustees in his lifetime (nothing contained herein shall be construed as authorizing Child 1 to discharge his legal obligations by any directions he may give as to the payment of the principal); payments of income and principal to the issue of such child of Child 1 pursuant to the above provisions shall not be taken into account in any later division of the principal and undistributed income into shares for the benefit of such issue unless Child 1 or such child of Child 1 directs otherwise in the exercise of any power of appointment hereinafter given to Child 1 or to such child of Child 1.

Article Third, paragraph 2 provides that on the death of Child 1, the then remaining principal and undistributed income shall be paid to, or held for the benefit of, such one or more of the group consisting of the issue of Decedent living at the death of Child 1 or born thereafter, and spouses of the issue of Child

1, including spouses of such issue who predecease Child 1, as well as spouses of such issue who are born after the death of Child 1, as Child 1 shall appoint by Will, executed after the date of this Trust, which refers specifically to this power. This paragraph also provides that the exercise of this power by Child 1 shall not apply to the proceeds of any life insurance on the life of Child 1 payable to this Trust.

Article Third, paragraph 2 of the Trust Agreement further provides that, subject to the above restrictions, in the exercise of this power of appointment, Child 1 may appoint outright or in trust; Child 1 may select the trustee or trustees if Child 1 appoints in trust; Child 1 may create new power of appointment in a trustee or trustees, or in any other appointee; Child 1 may, if Child 1 appoints in trust, establish such administrative powers for the trustee as Child 1 deems appropriate. Further, Child 1 may create life interests or other limited interests in an appointee with future interests in favor of other appointees; may impose lawful conditions on an appointment; may appoint by Will different types of interests to selected appointees; may impose lawful spendthrift provisions; and generally may appoint by Will in any manner, provided always, however, that no appointment shall benefit directly or indirectly persons other than members of the restricted group who are the objects of this power and that nothing in Trust shall be construed as authorizing Child 1 to appoint to himself, his creditors, his estate, or creditors of his estate.

Article Fourth of the Trust Agreement contains identical provisions with respect to the trusts comprising Child 2's share, with the exception that Child 2 does not have the power to appoint trust principal during her lifetime after the death of Decedent. Rather, the trusts comprising Child 2's share pay income and principal to Child 2, the primary beneficiary of each trust, the spouse of such primary beneficiary, issue of such primary beneficiary, and spouses of such issue as Disinterested Trustee in his discretion may determine. Child 2 has a testamentary power of appointment identical to that given to Child 1.

Article Sixth of the Trust Agreement provides that notwithstanding the directions given as to the distribution of income and principal in Articles Third, Fourth and Fifth of the Trust Agreement, any trust established by said Articles shall terminate, if it has not previously terminated, twenty-one years after the death of the survivor of certain (34) named individuals living on the date Trust is executed (Date 1). The then remaining principal and undistributed income of Trust shall be paid to Decedent's issue then living to whom income payments could be made under such trust immediately prior to its termination under this Article Sixth, such issue to take per

stirpes. Furthermore, each power to appoint given under the provisions of Articles Third, Fourth, and Fifth of Trust shall be exercisable by the designated donee if, and only if, the power is exercised prior to twenty-one years after the death of the survivor of the 34 named persons.

Article Eighteenth, paragraph 2 of the Trust Agreement provides that there shall always be a Disinterested Trustee of each trust under the Trust. Article Eighteenth, paragraph 16, provides that the term "Disinterested Trustee" means the trustee hereunder who has no interest, vested or contingent, in the trust property and who cannot be benefitted by the exercise of the powers vested exclusively in the disinterested trustee.

On Date 3, Child 1 executed a Will in which Child 1 exercised the special powers of appointment granted to child in Article Third, paragraph 2 of the Trust Agreement. In paragraphs 7.3 through 7.7 of Article 7 of Child 1's Will, Child 1 expressly exercised the special powers of appointment over all of the principal and undistributed income of Child 1's share of the Trust that had been divided into 5 shares in accordance with Article Third. Child 1 expressly appointed all of the principal and undistributed income to the disinterested trustees named in Article 8.1 of Child 1's Will to be held in trust or paid under and pursuant to the terms and provisions of paragraph 8.2 of Article 8 of Child 1's Will.

Paragraph 8.2 of Article 8 of Will provides that the properties appointed in paragraphs 7.3 through 7.7 of Article 7 of Will shall be held in a single trust for the benefit of of Child 1's son, Grandchild 1.

Paragraph 8.2(a) of Will provides that during the lifetime of Grandchild 1, the net income in whole or in part may be paid to, or applied for the benefit of, any one or more of the group consisting of Grandchild 1, the spouse of Grandchild 1, and the issue living from time to time of Grandchild 1, in such amount or amounts as Disinterested Trustee in his uncontrolled discretion may determine. Any net income which is not paid to, or applied for the benefit of, any one or more of such group shall be added to the principal at the end of the year. The principal, in whole or in part, may be paid to or applied for the benefit of, any one or more of such group, from time to time, in such amount or amounts and for such terms, trusts, conditions, and limitations, provided that no beneficial interest is created in anyone outside of such group by any such payment, as Disinterested Trustee in his uncontrolled discretion may determine. Payments of income and principal to the issue of Grandchild 1 shall not be taken into account in any later division of the principal and undistributed income into shares for the benefit of such issue,

and no payment under this provision (a) shall be made that would discharge any legal obligation any person has to support another.

Paragraph 8.2(b) of Will provides that on the death of Grandchild 1, if any issue of Grandchild 1 is then living, such remaining principal and undistributed income shall be held or disposed of for the benefit of such issue in accordance with the provisions of Article 8.3. If no issue of Grandchild 1 is then living, such remaining principal and undistributed income shall be paid one-half to Child 1's issue then living, per stirpes, and one half to Child 1's Spouse's then living parents and siblings, to be divided equally among or between those then living parents and siblings. If no issue of Child 1 is then living, such remaining principal and undistributed income shall be paid to Child 1's spouse's then living parents and siblings, to be divided equally among or between those then living parents and siblings. If none of Child 1's spouse's parents and siblings are then living, such remaining principal and undistributed income shall be paid to Child 1's issue then living, per stirpes. If no issue of Child 1 is then living and if none of Child 1's spouse's parents and siblings are then living, such remaining principal and undistributed income shall be paid to the issue then living of Child 2, per stirpes, and if no issue of Child 2 is then living, such remaining principal and undistributed income shall be paid to the issue of Decedent then living, per stirpes. If no issue of Decedent is then living, one-half of such remaining principal and undistributed income shall be paid to Decedent's heirs and the other one-half shall be paid to the heirs of Child 1's father.

Paragraph 8.4 of Will provides that notwithstanding the directions given as to the distribution of income and principal in paragraphs 8.2 and 8.3 of Article 8 of the Will, any trust created in or established by this Article shall terminate, if it has not previously terminated, twenty-one (21) years after the death of the survivor of thirty (30) named persons living on Date 1. The persons named in Article 8.4 are the same as those named in the Trust Agreement, except for those four individuals who are deceased.

Article 8.16 of Child 1's Will provides that there shall always be a Disinterested Trustee of each trust created under Article 8. Article 8.1.8 provides that the approval of both of the Trustees in office shall be required in order to act in any manner affecting the trust except (1) such matters as are herein vested exclusively in Disinterested Trustee and, as to such matters, only a Disinterested Trustee shall act, and (2) such matters as are vested in other named or designated individuals.

Article 8.16.12 of Child 1's Will provides that the term "Disinterested Trustee" means the trustee hereunder who has no

interest, vested or contingent, in the trust property and who cannot be benefitted by the exercise of the powers vested exclusively in the Disinterested Trustee. In addition, Disinterested Trustee must be one who can possess the powers vested exclusively in Disinterested Trustee without causing trust income or principal to be attributable to a trust beneficiary for federal income, gift, or estate tax purposes prior to the distribution of the trust income or principal to such beneficiary.

In his Will, Child 1 named a disinterested trustee and designated four unrelated third parties to serve as successor disinterested trustees in the event the named disinterested trustee should fail, cease, or become disqualified to serve as disinterested trustee. Child 1 has also named his spouse, (Spouse) to serve as Interested Trustee, and has provided that Spouse is to be succeeded by one of these same four designated persons. Child 1 provided for a method of choosing successor trustee, which method does not include the power previously given to Child 1's oldest living issue who has attained 30 years of age.

On Date 4, Child 2 executed a second codicil to her Will in which she exercised her powers of appointment. Under the second codicil of Child 2's Will, Child 2 directs the trustees to hold and dispose of all property received by them pursuant to Section B to Article Second of Child 2's Will in accordance with paragraphs 3 and 4 of Article Fourth of the Trust Agreement and subject to the provisions of Article Sixth of the Trust Agreement, all of which provisions are incorporated by reference into Child 2's Will as if she had not exercised her limited power of appointment.

You have requested the following rulings:

(1) Child 1 and Child 2's exercise of their special powers of appointment in their respective Wills does not constitute constructive additions to Trust that will subject any of the trusts to the generation-skipping transfer (GST) tax in § 2601 of the Internal Revenue Code.

(2) The appointment trusts created under Child 1 and Child 2's respective Wills pursuant to the exercise of their testamentary special powers of appointment will continue to be exempt from GST tax, except with respect to any subsequent additions to the trusts.

Section 2601 imposes a tax on every generation-skipping transfer within the meaning of subchapter B of chapter 13. Under section 1431(a) of the Tax Reform Act of 1986, the generation-skipping transfer tax applies to any generation-

skipping transfer made after October 22, 1986. Section 1433(b)(2)(A) of the Tax Reform Act, as amended, and section 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations generally provide that the generation-skipping transfer tax does not apply, however, to any generation-skipping transfer from a trust that was irrevocable on September 25, 1985, and for which no additions (actual or constructive) are made to the trust after September 25, 1985.

Under section 26.2601-1(b)(1)(ii), any trust (as defined in section 2652(b)) in existence on September 25, 1985, is considered an irrevocable trust unless the settlor possessed a power that would have caused the trust to be included in the settlor's gross estate under sections 2038 or 2042, if the settlor had died on September 25, 1985.

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) the 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, 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. If a power is exercised by creating another power, it is deemed to be exercised to whatever extent the second power may be exercised.

Based on taxpayer's submission and representations, we conclude that (1) Child 1 and Child 2's exercise of their special powers of appointment will not constitute actual or constructive additions to the Trust; and, (2) the Trusts created by the exercise of Child 1 and Child 2's special powers of appointment will be exempt from the GST tax, except for any subsequent additions (actual or constructive) to the trusts.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions of the Code or any other provisions of the Code.

This ruling is based on the facts presented and the applicable law in effect on the date of this letter. If there is a change in material fact or law (local or federal) before the transactions considered in this ruling take effect, the ruling will have no force or effect.

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.

Sincerely yours,

Christine E. Ellison

Christine E. Ellison
Chief, Branch 7
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Enclosures:

Copy for § 6110 purposes