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Department of the Treasury

Washington, DC 20224

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Person To Contact:

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PLR-102752-18

Date:

July 27, 2018

Re:

LEGEND

Date 1 =
Grantor 1 =
Grantor 2 =
Trust =

Son =
State =
Child 1 =
Child 2 =
Daughter =
Bank 1 =
Bank 2 =
Date 2 =
Court =
Statute 1 =
Statute 2 =
Statute 3 =
Date 3 =

Dear :

This letter responds to your authorized representative's letter dated December 19, 2017, and subsequent correspondence, requesting estate, gift, and generation-skipping transfer (GST) tax rulings with respect to the proposed modification of Trust.

FACTS

The facts and representations submitted are summarized as follows:

On Date 1, a date after September 25, 1985, Grantor 1 and Grantor 2 (collectively, Grantors) established an irrevocable trust, Trust, for the primary benefit of Son. Trust is administered under the laws of State.

Under Article II of Trust, during Son's lifetime, the Trustee shall pay or expend and apply for the benefit of Son such sums from the principal and income of Trust as the Trustee considers necessary or desirable from time to time for Son's medical care, education, support or maintenance, in its sole and absolute discretion.

Section 2.013 of Article II provides as follows:

Any part, or all, of the then remaining principal of the Trust Estate, together with any accrued and undistributed income therefrom, shall be paid over, conveyed and distributed to [Son's] creditors or the creditors of his estate or such appointee or appointees among those of [Son's] lineal descendants who are living at the death of [Son] in such manner and in such proportions as he may appoint in and by his Last Will and Testament, . . .

Under Section 2.015, in the event Son does not effectively appoint the remaining trust estate under Section 2.013, then the Trustee shall divide the remainder into equal but separate shares to existing trusts for Son's two children, Child 1 and Child 2.

Article III, Section 3.09 provides the Trustee (other than any beneficiary) with certain powers, including, but not limited to the following:

Section 3.091 to create in a lineal descendant of the Grantor a testamentary general power of appointment within the meaning of IRC § 2041 [including the power the exercise of which requires the consent of the Trustee (other than any beneficiary)];

Section 3.092 to limit a general power of appointment of a lineal descendant of the Grantor, as to all or part of such principal at any time prior to the death of such lineal descendant by narrowing the class to whom the powerholder may appoint the property subject to such appointment, so as to convert such power into a special power of appointment;

Section 3.093 to eliminate such power for all or any part of such principal as to which such power was previously created;

* * * * *

Son and Daughter were named in the Trust agreement as the initial Co-Trustees. However, Daughter declined to serve as Co-Trustee, never having signed the Trust agreement and never having accepted such appointment.

Article VIII, Section 8.01 provides that in the event Son or Daughter is removed, dies, or for any reason is unwilling or unable to serve as Trustee, then Child 1 shall serve as Successor Trustee with the surviving Co-Trustee. If Child 1 is removed, dies, or for any reason is unwilling or unable to serve as Successor Trustee, then Bank 1, or its successors in interest, shall serve as Co-Trustee with the remaining Trustee, or as sole Trustee. After a series of acquisitions, Bank 2 is currently the successor in interest of Bank 1.

Although Grantors contemplated that Daughter would serve as a non-beneficiary trustee of Trust at the time Trust was created, Daughter declined to accept such appointment. As a result, Son and Child 1, who are both beneficiaries of Trust, are the current Co-Trustees of Trust. Accordingly, there are no non-beneficiaries serving as a trustee of Trust. The Trust agreement does not specifically provide a method for the appointment of a non-beneficiary trustee (i.e., Special Trustee) for purposes of Section 3.09 in the event both Son and Child 1 are serving despite the fact that the provision expressly states that the powers set forth therein shall be exercised only by a non-beneficiary trustee.

Grantor 1 and Grantor 2 predeceased Son. It is represented that upon the death of Grantor 1 and Grantor 2, a portion of each Grantor's estate was distributed to Trust. It is also represented that each Grantor allocated his or her remaining GST exemption to Trust so that Trust has an inclusion ratio of between one and zero.

On Date 2, Son and Child 1, as the Co-Trustees of Trust, petitioned Court seeking modification of Trust to add new Section 8.06 of Trust to provide a method for appointing an independent special trustee who may exercise the powers set forth in Section 3.09 of Trust, and to appoint Bank 2 as the independent special trustee under new Section 8.06.

Trust, as modified, provides as follows:

Section 8.06 For any trust created herein, the person listed below shall serve as Special Trustee. The Special Trustee's duties shall be limited to the exercise of discretion given to a Trustee who is not a beneficiary under this trust, included, but not limited to, those powers set forth in Section 3.09 herein. The Special Trustee may receive reasonable compensation. Any Special Trustee may resign in the same manner set forth in ARTICLE VIII for other trustees. The initial Special Trustee shall

be [Bank 2], or its successor. If there is no successor Special Trustee appointed pursuant to the provisions hereof, a majority in number of the income beneficiaries, or during any period that such a beneficiary lacks legal capacity, the guardian of such beneficiary's estate, shall appoint as the successor Special Trustee any bank or trust company that shall have been licensed to engage in trust business for at least five (5) years immediately prior to such appointments and which shall then have capital and surplus of at least Twenty Million Dollars (\$20,000,000).

It is represented that Bank 2 is not related or subordinate to Grantor 1, Grantor 2, Son, or Child 1.

Statute 1 provides that a noncharitable irrevocable trust may be modified upon consent of all the beneficiaries if a court concludes that modification is not inconsistent with a material purpose of the trust.

Statute 2 provides that a court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention in order to achieve the settlor's tax objectives. The court may provide that the modification has retroactive effect.

Statute 3 provides that a court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

On Date 3, pursuant to State law, Court issued an Order granting the modification of Section 8.06, as described in the petition, contingent upon the receipt of a favorable letter ruling from the Internal Revenue Service.

The Trustee requests the following rulings:

1. The proposed modification of Trust as set forth in the Order will not adversely affect the GST inclusion ratio of Trust.
2. Bank 2's acceptance and appointment to the office of Special Trustee of Trust pursuant to the Order will not constitute the exercise or release of a general power of appointment under § 2514 so as to constitute a gift by Son for federal gift tax purposes.
3. The exercise of trustee powers, including those delineated in Sections 3.092 and 3.093 of Trust by Bank 2, or a successor Special Trustee, to limit or eliminate Son's testamentary general power of appointment granted under Section 2.013 of Trust will not constitute the exercise or release of a general power of appointment under § 2041(a)(2), and, as a result, the Trust assets will not be included in Son's gross estate under § 2041(a)(2).

LAW AND ANALYSIS

Ruling 1

Section 2601 imposes a tax on every generation-skipping transfer. The term “generation-skipping transfer” is defined in § 2611 as a taxable distribution, a taxable termination, and a direct skip.

Section 26.2601-1(b)(4)(i) of the Generation Skipping Transfer Tax Regulations 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) will not cause the trust to lose its exempt status. Unless specifically provided otherwise, the rules contained in this paragraph are applicable only for purposes of determining whether an exempt trust retains its exempt status for GST tax purposes. Thus, 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 gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(D)(1) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy § 26.2601-1(b)(4)(i)(A), (B), or (C)), 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, if 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 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)(i)(D)(2) provides that for purposes of § 26.2601-1, a modification of an exempt trust will result in a shift in beneficial interest to a lower generation beneficiary if the modification can result in either an increase in the amount of a GST transfer or the creation of a new GST transfer. To determine whether a modification of an irrevocable trust will shift a beneficial interest in a trust to a beneficiary who occupies a lower generation, the effect of the instrument on the date of the modification is measured against the effect of the instrument in existence immediately before the modification. If the effect of the modification cannot be immediately determined, it is deemed to shift a beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification. A modification that is administrative in nature that only indirectly increases the amount transferred (for

example, by lowering administrative costs or income taxes) will not be considered to shift a beneficial interest in the trust.

No guidance has been issued concerning the modification of a trust that may affect the status of a trust that is exempt from GST tax because sufficient GST exemption was allocated to the trust to result in an inclusion ratio of zero. At a minimum, a modification that would not affect the GST status of a grandfathered trust should similarly not affect the exempt status of such a trust.

In the instant case, it is represented that Grantor 1 and Grantor 2 allocated GST exemption to Trust upon the distribution of their respective estates upon each respective death. Accordingly, Trust has an inclusion ratio between one and zero.

Pursuant to the Court's Order, under new Section 8.06, Bank 2 is named as special trustee for the limited purpose of exercising the powers given to a non-beneficiary trustee, including, but not limited to, powers set forth in Section 3.09 of Trust. The proposed modification of Trust will not result in a shift of any beneficial interest in the trust to any beneficiary who occupies a generation lower than the persons holding the beneficial interests. Further, the proposed modification of Trust will not extend the time for vesting of any beneficial interest in the modified Trust beyond the period provided for in Trust. Accordingly, based on the facts submitted and the representations made, we conclude that the proposed modification of Trust will not adversely affect Trust's GST inclusion ratio.

Rulings 2 and 3

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has, at the time of death, a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released a power of appointment by a disposition that is of such nature that if it were a transfer of property owned by the decedent the property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive.

Section 2041(b)(1) defines the term "general power of appointment" as a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate.

Section 20.2041-1(b)(1) provides, in part, if under the terms of the instrument, the trustee or his successor has the power to appoint the principal of trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment. A power to amend only the administrative provisions of a trust instrument, which cannot substantially affect the

beneficial enjoyment of the trust property or income, is not a power of appointment. However, the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of the fiduciary duties is not a power of appointment.

Section 2501(a)(1) imposes a tax, for each calendar year, on the transfer of property by gift by any individual, resident or nonresident.

Section 2511 provides that the tax imposed by § 2501 shall apply 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 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, is deemed the transfer of property by the individual possessing such power. Under § 2514(c), the term “general power of appointment” is defined as a power which is exercisable in favor of the individual possessing the power (“the possessor”), his estate, his creditors, or creditors of his estate.

In this case, Son and Child 1 have beneficial interests in Trust and are the current Co-Trustees. Section 3.09 grants to a non-beneficiary trustee certain trustee powers, including the power to limit or eliminate Son’s testamentary general power of appointment under Section 2.013. Prior to the modification, the terms of Trust did not provide a method for appointing a non-beneficiary trustee who may exercise the powers in Section 3.09 granted to only non-beneficiary trustees.

The modification of Trust to add Section 8.06 to provide a method for appointing an independent special trustee who may exercise the powers set forth in Section 3.09, and to appoint Bank 2 as an independent special trustee with the authority to exercise the powers set forth in Section 3.09 of Trust, does not change or transfer the interests of Son during his lifetime, nor does it confer any new rights to any beneficiaries. Rather, the modification provides a process for the powers set forth in Section 3.09 to be administered by a non-beneficiary trustee (i.e., Special Trustee). The testamentary power of appointment granted to Son in Section 2.013 occurs upon the death of Son, and is not currently exercisable by Son. Son retains the same interest in Trust, both before and after the modification.

Accordingly, based on the facts submitted and the representations made, we conclude that Bank 2’s acceptance and appointment to the office of Special Trustee of Trust pursuant to the Order will not constitute the exercise or release of a general power of appointment under § 2514 so as to constitute a gift by Son for federal gift tax purposes. Further, we conclude that the exercise of trustee powers, including those

delineated in Sections 3.092 and 3.093 of Trust by Bank 2, or a successor Special Trustee, to limit or eliminate Son's testamentary general power of appointment granted under Section 2.013 of Trust will not constitute the exercise or release of a general power of appointment under § 2041(a)(2), and, as a result, the Trust assets will not be included in Son's gross estate under § 2041(a)(2).

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) of the Code 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 your authorized representative.

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,

Leslie H. Finlow

Leslie H. Finlow
Senior Technician Reviewer, Branch 4
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy for § 6110 purposes
Copy of letter

cc: