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Washington, DC 20224

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Person To Contact:
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Telephone Number:

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Legend

Grantor =
Trust =
State =
Trust Company =
State Statute =
\$X =

Dear :

This responds to your authorized representative's letter of January 15, 2009, requesting gift and estate tax rulings with respect to a trust.

The facts and representations submitted are as follows: Grantor proposes to create an irrevocable trust (Trust) for the benefit Grantor, his spouse and descendents. Trust will be initially funded with \$X. Trust Company will serve as trustee.

Article Second, paragraph A of Trust provides, in part, that trustee will pay over the income and principal of Trust in such amounts and proportions as trustee in its sole and absolute discretion may determine for the benefit of one or more members of the class consisting of Grantor, Grantor's spouse and Grantor's descendants. Any income not paid will be accumulated and added to principal.

Under the terms of Article Second, paragraph B, upon termination of trust, no part of the income or principal of Trust may be transferred or paid to Grantor, Grantor's estate, Grantor's creditors or the creditors of Grantor's estate. Article Second, paragraph B, also provides that upon the death of Grantor and Grantor's spouse, the

entire principal together with any accrued income shall be distributed to any descendant of Grantor then living to be held in separate trusts. If there is no descendant then living, the principal and income shall be disposed of in accordance with the terms and conditions of Article Fourth, which provides that the property shall be transferred, conveyed and paid over to one or more organizations described in §§ 170, 2055 and 2522 of the Internal Revenue Code.

Article Eighth, paragraph B, provides that the following persons may not be a trustee of Trust or any other trust created under trust: (1) Grantor; (2) the spouse or a former spouse of Grantor; (3) any individual who is a beneficiary of Trust or a trust created under Trust; (4) the spouse or a former spouse of a beneficiary of any trust hereunder; (5) anyone who is related or subordinate to Grantor within the meaning of § 672(c).

Article Eleventh, paragraph B, provides Grantor with the power, exercisable in a nonfiduciary capacity, without the approval or consent of any person in a fiduciary capacity, to acquire property held in the trust by substituting other property of an equivalent value. Grantor will exercise the power by certifying in writing that the substituted property and the trust property for which it is substituted are of equivalent value and Trustee shall have a fiduciary obligation to ensure Grantor's compliance with the terms of the power to substitute property. Before the substitution of property is completed, the trustee must be satisfied that the properties acquired and substituted are in fact of equivalent value. In addition, the power can not be exercised in a manner that can shift benefits among the trust beneficiaries.

Article Twelfth, paragraph B, provides that Grantor may not be a trustee of Trust or remove any trustee of trust. Article Twelfth, paragraph D, provides that trustee shall not pay Grantor or Grantor's executors any income or principal of Trust in discharge of Grantor's income tax liability. Trustee is not a related or subordinate party within the meaning of § 672(c).

Grantor is a resident of State and the situs of Trust is State. State Statute provides that a person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust, may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. Under State Statute, if the trust instrument contains this transfer restriction, it prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor, from satisfying a claim out of the beneficiary's interest in the trust unless, (1) the trust provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; (2) the settlor intends to defraud a creditor by transferring the assets to the trust; (3) the settlor is currently in default of a child support obligation by more than 30 days;

or (4) the trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor.

You have requested the following rulings:

1. A completed taxable gift will occur when Grantor makes a contribution to Trust.
2. No portion of Trust's assets will be includible in Grantor's gross estate.

RULING 1

Section 2501 provides that a tax, computed as provided in § 2502, is imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 2511 (a) provides, in part, that subject to limitations contained in chapter 12, 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 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part thereof, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for the donor's own benefit or for the benefit of another, the gift is complete.

Section 25.2511-2(c) provides, in part, that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves.

In this case, Grantor has retained no power to revest beneficial title or reserved any interest to name new beneficiaries or change the interests of the beneficiaries. Consequently, we conclude that Grantor's transfer of \$X to trust will be a completed gift of \$X.

RULING 2

Section 2036(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which the decedent has retained for life or for any period not ascertainable without reference to

the decedent's death or for any period that does not in fact end before death the possession or enjoyment of, or the right to the income from, the property.

Section 20.2036-1(b)(2) of the Estate Tax Regulations provides that the use, possession, right to income, or other enjoyment of transferred property is treated as having been retained by the decedent to the extent that the transferred property is to be applied towards the discharge of a legal obligation of the decedent.

Rev. Rul. 2008-16, 2008 I.R.B. 796, provides guidance regarding whether the corpus of an *inter vivos* trust is includible in the grantor's gross estate under § 2036 or § 2038 if the grantor retained the power, exercisable in a nonfiduciary capacity, to acquire property held in the trust by substituting other property of equivalent value. The ruling provides that, for estate tax purposes, the substitution power will not, by itself, cause the value of the trust corpus to be includible in the grantor's gross estate, provided the trustee has a fiduciary obligation (under local law) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are in fact of equivalent value and further provided that the substitution power cannot be exercised in a manner that can shift benefits among the trust beneficiaries.

Based on Rev. Rul. 2008-16, we conclude that in this case the substitution power, by itself, will not cause the value of the trust corpus to be includible in Grantor's gross estate.

Rev. Rul. 2004-64, 2004-2 C.B. 7, considers situations in which the trustee reimburses the grantor for taxes paid by the grantor attributable to the inclusion of all or part of the trust's income in the grantor's income. In Rev. Rul. 2004-64, a grantor created an irrevocable *inter vivos* trust for the benefit of the grantor's descendants. The grantor retained sufficient powers with respect to the trust so that the grantor is treated as the owner of the trust under subpart E, part I, subchapter J, of chapter 1 of the Code. When the grantor of a trust, who is treated as the owner of the trust under subpart E, pays the income tax attributable to the inclusion of the trust's income in the grantor's taxable income, the grantor is not treated as making a gift of the amount of the tax to the trust beneficiaries. If, pursuant to the trust's governing instrument or applicable local law, the grantor had to be reimbursed by the trust for the income tax payable by the grantor that was attributable to the trust's income, the full value of the trust's assets would be includible in the grantor's gross estate under § 2036. If, however, the trust's governing instrument or applicable local law gave the trustee the discretion to reimburse the grantor for that portion of the grantor's income tax liability, the existence of that discretion, by itself, whether or not exercised, would not cause the value of the trust's assets to be includible in the grantor's gross estate. However, such discretion combined with other facts (including but not limited to: an understanding or pre-existing arrangement between grantor and the trustee regarding the trustee's exercise of this discretion; a power retained by Grantor to remove the trustee and name

grantor as successor trustee; or applicable local law subjecting the trust assets to the claims of grantor's creditors) may cause inclusion of Trust's assets in grantor's gross estate for federal estate tax purposes.

In this case, under the terms of Article Twelfth, paragraph D, the trustee is prohibited from paying Grantor or Grantor's executors any income or principal of Trust in discharge of Grantor's income tax liability. Although, Rev. Rul. 2004-64 does not consider this situation, it is clear from the analysis, that because the trustee is prohibited from reimbursing Grantor for taxes Grantor paid, that Grantor has not retained a reimbursement right that would cause Trust corpus to be includible in Grantor's gross estate under § 2036. See Rev. Rul. 2004-64. In addition, the trustee's discretionary authority to distribute income and/or principal to Grantor, does not, by itself, cause the Trust corpus to be includible in Grantor's gross estate under § 2036.

We are specifically not ruling on whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under § 2036.

We are specifically not ruling on whether or not Trust is a trust described in subpart E, part I, subchapter J, of chapter 1 of the Code.

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 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,

James F. Hogan
Senior Technician Reviewer
Branch 4
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes