Internal Revenue Service

Department of the Treasury

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Refer Reply To:
CC:DOM:P&SI:4-PLR-115117-99
Date:
June 29, 2000

In Re:

Legend:

Grantor =

Trust =

Son =

Daughter-in-law =

Grandchild 1 =

Grandchild 2 =

Grandchild 3 =

University =

Date 1 =
Date 2 =
Date 3 =

Case =

State =

Dear :

This is in response to your letter dated May 16, 2000, and prior correspondence, in which you requested rulings on the gift and generation-skipping transfer tax consequences resulting from a proposed reformation of Trust.

On Date 1, Grantor executed Trust, an irrevocable trust, for the benefit of himself, Son, Daughter-in-law, Grandchild 1, Grandchild 2, and Grandchild 3. Grantor died on Date 2. Son was designated as trustee of Trust.

Paragraph ONE of Trust provides that the trustee is to pay the net income, in quarter annual installments, to Grantor during his life.

Paragraph THREE of Trust provides that, upon Grantor's death, the trustee is to divide sixty percent (60%) of all property then belonging to the principal into as many equal shares and to set apart one such share for each grandchild of Grantor that survives him. Each of the shares allocated to Grantor's grandchildren is to be held in a separate trust and to be administered by the trustee.

Paragraph THREE (a) of Trust provides that until age 21, income and corpus is to be paid to the grandchild for support, maintenance, health and education. At age 21, all income is to be paid to the grandchild and corpus is to be paid as the trustee determines. At age 25, one-tenth (1/10) of the then remaining corpus is to be paid to the grandchild. At age 30, two-thirds (2/3) of the then remaining corpus is to be paid to the grandchild and at age 35, the remaining corpus is to be paid to the grandchild.

Paragraph THREE (b) of Trust provides that if any of Grantor's grandchildren die after Grantor leaving surviving issue, all of the then remaining corpus of his or her trust, together with all accumulations, is to be paid over to such issue by right of representation.

Paragraph THREE (c) of Trust provides that if any grandchild dies after Grantor leaving no surviving issue, all of the then remaining corpus of his or her trust, together with all accumulations, is to be equally divided among Grantor's then living grandchildren, provided that any property distributable to any grandchild of Grantor for whom property is then being held in trust is to be added to the share held in trust for such grandchild and administered in accordance with such trust.

Paragraph FOUR of Trust provides that, upon Grantor's death, the remaining forty percent (40%) of the property then belonging to the principal of the trust is to be retained in trust by the trustee and administered for the benefit of Son and Daughter-in-law or the survivor of them, during their lives.

Paragraph FOUR (a) of Trust provides that the trustee is to pay all of the income to Son during his life.

Paragraph FOUR (b) of Trust provides that, upon Son's death, the trustee is to pay all of the income to Daughter-in-law during her life.

Paragraph FOUR (c) of Trust provides that, upon the death of both Son and Daughter-in-law, all corpus and accumulated income is to be equally divided among and distributed to those of Grantor's grandchildren then living; provided that any property distributable to any grandchild of Grantor for whom property is then being held in trust is to be added to the share held in trust for such grandchild and administered in accordance with such trust.

Paragraph NINE of Trust provides that if upon the happening of any event there shall not be an express and valid provision in Trust for the disposition of any part of the trust estate or of any trust created under the instrument, or of any share or any part or portion thereof, the trustee is to distribute that portion to University.

Trust was executed as an irrevocable trust on Date 1. It is represented that there have been no additions to Trust after September 25, 1985.

It is represented that Son communicated to the attorney retained to draft Trust, Grantor's intent that the remainder of Trust for the benefit of Son and Daughter-in-law pass at the death of the survivor to Grandchild 1, Grandchild 2, and Grandchild 3, and to the children, per stirpes, of any deceased grandchild. The three trusts held for the benefit of Grantor's grandchildren do provide for distribution to a grandchild's issue, in the event a grandchild dies prior to complete distribution of his or her trust. However, the attorney failed to provide a similar provision for Son and Daughter-in-law's trust. Rather, Paragraph Four (c) specifically provides that after the death of the survivor of Son or Daughter-in-law, the trust is to be distributed for the benefit of Grantor's living grandchildren. However, Paragraph Four is silent regarding the disposition of the property if there are no living grandchildren. Paragraph Nine does provide a default provision for distribution to University in the event the instrument fails to validly dispose of Trust property. Son represents, by affidavit on Date 3, that Grantor's intentions in creating Trust were to provide for a per stirpital distribution in the event a grandchild predeceases Son or Daughter-in-law with issue surviving. University represents that it will not oppose the reformation of Trust created by Decedent in which University is a contingent remainder beneficiary. The trustee petitioned the appropriate court to reform Trust instrument to provide that with respect to the trust established for Son and Daughter-in-law, on the death of the last to die of Son and Daughter-in-law, the trust corpus and accumulated income will be distributed to Son and Daughter-in-law's then living issue, per stirpes. The appropriate State Court has issued an order, reforming the instrument in accordance with the trustee's petition, contingent on the issuance of a private letter ruling to the effect that the reformation will not have any adverse gift or generation-skipping transfer tax consequences.

Son, as the trustee of Trust, has requested the following rulings:

1. The reformation of Trust to correct the scrivener's error will not cause Trust to be subject to the generation skipping transfer tax.

2. Neither Grandchild 1, Grandchild 2, or Grandchild 3 will be deemed to have made a gift for Federal gift tax purposes as a result of the reformation.

Ruling Request 1

Section 2601 of the Code imposes a tax on each generation-skipping transfer. Section 2611(a) defines a generation-skipping transfer to mean (1) a taxable distribution, (2) a taxable termination, or (3) a direct skip.

Section 1433(a) of the Tax Reform Act of 1986 (TRA of 1986) provides that the generation-skipping transfer tax is generally applicable to generation-skipping transfers made after October 22,1986. However, under § 1433(b)(2)(A) of the TRA of 1986 and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the tax does not apply to a transfer from a trust, if the trust was irrevocable on September 25, 1985, and no addition (actual or constructive) was made to the trust after that date. Under § 26.2601-1(b)(1)(ii), any trust in existence on September 25, 1985, will be 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 §§ 2038 or 2042, if the settlor had died on September 25, 1985.

In general, any modification of a trust instrument that changes the quality, value or timing of any powers, beneficial interests, rights or expectancies originally provided for under the terms of the trust instrument will cause the trust to lose exempt status for generation-skipping transfer tax purposes.

Generally, if, due to a mistake in drafting, the instrument does not contain the terms of the trust that the settlor and trustee intended, the settlor or other interested party may maintain a suit in equity to have the instrument reformed so that it will contain the terms that were actually agreed upon. Bogert & Bogert, The Law of Trusts and Trustees, § 991 (revised 2d ed. 1983). State law recognizes that instruments may be reformed if the written agreement does not express the intent of the parties. Case, citing Restatement of the Law of Trusts, § 333(e).

Upon consideration of the facts and applicable case law, we conclude that the proposed reformation based on scrivener's error is consistent with applicable state law and therefore, does not change any powers, beneficial interests, rights or expectancies provided for under the terms of Trust. In addition, Trust became irrevocable prior to September 25, 1985 and no additions have been made to Trust since that date. Accordingly, the reformation will not cause Trust or any distribution from Trust to be subject to the generation-skipping transfer tax.

Ruling Request 2

Section 2501 imposes a tax on the transfer of property by gift by an individual. 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 2512(b) provides that, where property is transferred for less than adequate and full consideration in money or money's worth, the amount by which the value of the property exceeds the value of the consideration is deemed a gift.

As discussed above, we have concluded that the reformation based on scrivener's error was consistent with applicable state law and did not change any beneficial interest otherwise provided for under the trust instrument. Therefore, based on the facts submitted and the representations made, we conclude that neither Grandchild 1, Grandchild 2, or Grandchild 3 will be deemed to have made a gift for Federal gift tax purposes as a result of the proposed reformation.

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.

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

The rulings contained in this letter are 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.

Pursuant to Powers of Attorney on file, a copy of this letter is being sent to Son, as the trustee of Trust, Grandchild 1, Grandchild 2, and Grandchild 3.

Sincerely yours,
George L. Masnik
Chief, Branch 4

Enclosure
Copy for section 6110 purposes