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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
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Date:
February 9, 2001

LEGEND:

Trust =

A =

B =

Trust A =

Trust B =

Trustee =

Foundation =

Date 1 =

Date 2 =

Date 3 =

n =

o =

Dear

This letter responds to a letter dated January 27, 2000, and subsequent correspondence, written on behalf of Trust, requesting the following rulings regarding a proposed division of Trust into two separate trusts, Trust A and Trust B:

(1) The division of Trust into Trust A and Trust B will not cause Trust, Trust A or Trust B to fail to qualify as charitable remainder trusts under § 664(d) of the Internal Revenue Code and the applicable regulations;

(2) The basis and holding periods of the assets in Trust A and Trust B immediately after

the division of Trust shall be the same as they were in Trust immediately before the division of Trust;

(3) The division of Trust into Trust A and Trust B shall not be subject to gift tax as to A or B because the division is a transfer of property pursuant to a divorce under § 2516; and

(4) the division of Trust into Trust A and Trust B shall not be subject to income tax as to A or B because the division is a transfer of property pursuant to a divorce under § 1041. In addition, neither Trust, Trust A nor Trust B shall be required to recognize capital gain or loss with respect to the division of Trust.

FACTS

According to the information submitted, on Date 1, A established a charitable remainder unitrust (Trust) during his marriage to B. It is represented that Trust satisfies the requirements under § 664(d)(2).

Trust provides for quarterly unitrust payments equal to n percent of the net fair market value of Trust's assets as determined on the first day of each taxable year to be made to A during his lifetime, and after his death to B, for her lifetime. After the death of the survivor of A or B, Trust's assets will be distributed to one or more charitable organizations described in §§ 170(c), 2055(a), and 2522(a) that A designates (qualified charitable organization) or, in the absence of such designation, to Foundation, if Foundation is a qualified charitable organization.

A and B have agreed to divorce and are currently in the process of dividing their property. On Date 2, A and B entered into a written agreement to settle their marital and property rights. The agreement provides in relevant part that Trust's assets and undistributed ordinary income, capital gain income, and other income will be split equally into two separate trusts (Trust A and Trust B). Trust A and Trust B will each contain the same terms as Trust except that (i) each separate trust will be administered and invested independently by Trustee, (ii) during A's lifetime, A will be the unitrust recipient of Trust A, and during B's lifetime, B will be the unitrust recipient of Trust B, (iii) upon the death of the first to die of A and B, the survivor of them will also be the unitrust recipient of the other's trust, and (iv) upon the death of the survivor of A and B, the assets of Trust A will be distributed to one or more qualified charitable organizations that A designates, or absent such designation, to Foundation, and the assets of Trust B will be distributed to one or more qualified charitable organizations that B designates, or absent such designation, to Foundation.

RULING 1

Section 664(d)(2) provides that a charitable remainder unitrust is a trust—

(A) from which a fixed percentage (which is not less than five percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid,

not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

(B) from which no amount other than the payments described in § 664(d)(2)(A) and other than qualified gratuitous transfers described in § 664(d)(2)(C) may be paid to or for the use of any person other than an organization described in § 170(c),

(C) following the termination of the payments described in § 664(d)(2)(A), the remainder interest in the trust is to be transferred to, or for the use of, an organization described in § 170(c) or is to be retained by trust for such use, and

(D) with respect to each contribution of property to the trust, the value (determined under § 7520) of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 170(f)(2)A) allows a deduction for a contribution of a remainder interest in property transferred in trust if the trust is a charitable remainder annuity trust or unitrust described in § 664. Under § 1.664-1(a)(4) of the Income Tax Regulations, a charitable remainder trust must meet the definition of and function exclusively as a charitable remainder trust from the creation of the trust. Sections 170(f) and 664 are intended to make sure that charitable beneficiaries of charitable remainder trusts receive remainders equal to the amount claimed as a charitable deduction by the creator of the trust. See S. Rep. No. 552, 91st Cong., 1st Sess. 87 (1969).

After the division of Trust into Trust A and Trust B, the total unitrust amount to be paid annually will not change. A and B will each receive an amount equal to o of the amount A would have received absent the division of Trust. As a result, the charitable remainder beneficiaries will still receive what the charitable remainder beneficiaries were entitled to have received prior to the division of Trust.

After applying the relevant law to the information provided and the representations made, we conclude that the division of Trust into Trust A and Trust B will not cause Trust, Trust A or Trust B to fail to qualify as charitable remainder trusts under § 664.

RULING 2

Section 1015(b) provides that if property is acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by gift, bequest, or devise), the basis is the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on the transfer under the law applicable to the year in which the transfer is made.

Section 1.1015-2(a)(1) provides that in the case of property acquired after December 31, 1920, by transfer in trust (other than by transfer in trust by gift, bequest, or devise) the basis of property so acquired is the same as it would be in the hands of

the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on the transfer under the law applicable to the year in which the transfer was made. If the taxpayer acquired the property by transfer in trust, this basis applies whether the property be in the hands of the trustee, or the beneficiary, and whether acquired prior to termination of the trust and distribution of the property, or thereafter.

Section 1223(2) provides that, in determining the period for which the taxpayer has held property however acquired, there shall be included in the period for which the property was held by any other person, if under chapter one such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in the taxpayer's hands as it would have in the hands of such other person.

After applying the relevant law to the information provided and the representations made, we conclude that the assets in Trust A and Trust B immediately after the proposed division of Trust will have the same basis and holding periods as they had immediately prior to the division.

RULING 3

Section 2501 provides that a tax is imposed for each calendar year on the transfer of property by gift during the calendar year by any individual, resident or nonresident.

Section 2511 provides that the gift tax applies 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 an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Section 2043(b), an estate tax provision, requires that a relinquishment of dower or curtesy, or of a statutory estate created in lieu thereof, or of other marital rights in the decendent's estate, shall not be considered to any extent a consideration "in money or money's worth." This provision was held applicable to the definition of "consideration in money or money's worth" for gift tax purposes, by the Supreme Court in Merrill v. Fahs, 324 U.S. 308 (1945). See also, § 25.2512-8 of the Gift Tax Regulations.

Therefore, the release by a spouse of marital property rights cannot serve as consideration in money or money's worth for gift tax purposes. However, the release of the right to support constitutes consideration in money or money's worth. See Rev. Rul. 68-379, 1968-2 C.B. 414.

Transfers of property or property interests under a written settlement agreement between spouses settling their marital and property rights will be considered for adequate and full consideration and will be exempt from gift tax under § 2516 if divorce occurs within the three-year period beginning on the date one year before such agreement is entered into (whether or not such agreement is approved by the divorce decree).

Section 25.2516-1(a) provides that transfers of property or interests in property made under the terms of a written agreement between spouses in settlement of their marital or property rights are deemed to be for an adequate and full consideration in money or money's worth and, therefore, exempt from the gift tax (whether or not such agreement is approved by a divorce decree) if the spouses obtain a final decree within two years after entering into the agreement.

In the present case, on Date 2, A and B executed a written agreement in settlement of their marital property rights. On Date 3, a Judgement of Divorce was rendered in the matter of A v. B. Date 3 is a date that is less than two years after Date 2. Accordingly, after applying the relevant law to the information provided and the representations made, we conclude that the division of Trust into Trust A and Trust B in settlement of A and B's marital property rights pursuant to the couple's property settlement agreement, will be a transfer that is deemed to be for an adequate and full consideration in money or money's worth and, therefore, exempt from the gift tax.

RULING 4

Section 1041(a) provides that no gain or loss will be recognized on a transfer of property from an individual to (or in trust for the benefit of) a spouse, or former spouse if the transfer is incident to the divorce. Under § 1041(b), for purposes of subtitle A, the transferee is treated as having acquired the property by gift from the transferor with a carryover basis from the transferor.

In this case, A is transferring o of his unitrust interest to B incident to their divorce. Section 1041 applies to the transfer.

After applying the relevant law to the information provided and the representations made, we conclude that for purposes of the federal income tax, A will not recognize any gain or loss on the transfer of his interest in Trust to B under § 1041. B will have a carryover basis in her interest under § 1041(b).

CAVEATS

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under any other provision of the Code. Specifically, no opinion is expressed concerning whether Trust qualifies as a charitable remainder trust under § 664 or whether Trust A or Trust B each will qualify as a charitable remainder trust under § 664.

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.

Pursuant to a power of attorney on file with this office, we are sending a copy of this letter to Trust's authorized representative.

Sincerely yours,
Mary Beth Collins
Assistant to the Chief, Branch 3
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

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