DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

UIL 4942.03-07

Date: NOV 2 3 2001

Contact Person:

Identification Number:

Telephone Number:

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Employer Identification Number:

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Dear Sir or Madam:

This letter is in response to your request for ruling for authority to create a contingent set-aside pursuant to section 53.4942(a)-3(b)(9) of the Foundation Excise and Similar regulations.

The decedent, A, died testate on e. A's Last Will and Testament was admitted to probate on f. Co-Personal representatives of the estate were appointed by order of the probate court having jurisdiction over the estate.

Pursuant to Article VI of A's Will, the residue of the decedents estate, after payment of all expenses and taxes, was bequeathed to Trustees designated in the Will to be administered as a perpetual private foundation, X. The terms of X set forth in the Will provide that the Trustees shall pay all the income to such one or more organizations described in and that satisfy the requirements of sections 170(b)(l)(A), 170(c), 2055(a) and 2522(a) of the Internal

Revenue Code as the trustee, in its sole discretion, shall determine (the decedent having failed in the Will to designate any charitable recipients). Further, the terms of X set forth in the Will provide that income for each taxable year is to be distributed at such times and in such manner as not to subject the private foundation to tax under section 4942 of the Code.

In July, g, X was funded with the approximate sum of d. In November, g, the Internal Revenue Service issued a determination letter to X recognizing X as an entity exempt from Federal income tax under section 501 (c)(3) of the Code and classified as a private foundation within the meaning of section 509(a) of the Code. X made some qualifying distributions to charity in g (Between July 24 and August 23).

In December, g, an interested party in the estate of A tiled a petition with the court seeking revocation of the probate of the Last Will and Testament of A. The petition was based on allegations of undue influence exercised on A and that A was not mentally competent and lacked testamentary capacity to execute the Will in question. This litigation is on going as of the date of your ruling request.

As a result of the litigation, the trustees of X filed a petition to make qualified distributions from X and seeking indemnification of trustees. An order of the court denying such petition was issued on k. Further, such order of the court directed the trustees of X to create a “contingent” set-aside in accordance with section 53.4942(a)-3(b)(9) of the regulations, thereby allowing X to avoid the excise tax imposed under section 4942 of the Code.

X has requested the following ruling:

Authority to create a contingent set-aside for the qualifying distributions to be made from X created under Article VI of the Last Will and Testament of A for the fiscal years ending June 30, h and June 30, i, as provided by section 53.4942(a)-3(b)(9), pending the outcome of the litigation initiated by petition, in order to avoid incurring taxes under section 4942 of the Code.

LAW AND ANALYSIS:

Section 4942(a) of the Code imposes a tax on the undistributed income of a private foundation which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year (if such day falls within the taxable period).

Section 4942(c) of the Code defines “undistributed income” as the amount by which the distributable amount for such taxable year exceeds qualifying distributions made before such time out of such distributable amount.

Section 4942(f) defines the term “distributable amount” as an amount equal to the sum of the minimum investment return (as adjusted) reduced by the sum of the taxes imposed on such private foundation under subtitle A and section 4940.

Section 4942(e), in substance and generally, defines minimum investment return for any private foundation for any taxable year as five percent of the aggregate fair market value of all assets of the foundation other than those which are used directly in carrying on the foundation's exempt purpose over any acquisition indebtedness with respect to such assets.

Section 4942(g)(l), in substance and generally, defines "qualifying distribution" as any amount paid for tax exempt purposes as defined in section 170(c)(2)(B) of the Code.

Section 4942(g)(2), in substance, provides that an amount set-aside for an approved purpose may be treated as a qualifying distribution.

Section 53.4942(a)-3(b)(9) of the regulations provides that in the event that a private foundation is involved in litigation and may not distribute assets or income because of a court order, the private foundation may seek and obtain a set-aside for a purpose described in section 53.4942(a)-3(a)(2). The amount of the set-aside shall be equal to that portion of the private foundation's distributable amount which is attributable to the assets or income that are held pursuant to court order and which, but for the court order precluding the distribution of such assets or income, would have been distributed. In the event that the litigation encompasses more than one taxable year, the private foundation may seek additional contingent set-asides.

X meets the criteria for a contingent set-aside provided for in section 53,4942(a)-3(b)(9) of the regulations. The petition for the revocation of probate names the both the personal representatives of A's estate and the trustees of X. The three trustees of the trust, X, who are also the three personal representatives of A's estate petitioned the court (in both capacities) to make qualifying distributions from X. The court denied the petition to make qualifying distributions and prohibited the trustees of X from making qualifying distributions from X and also directed the trustees to create a contingent set-aside. Thus, as required by the regulation, there is litigation and there is a court order prohibiting distribution of assets or income. Thus, a contingent set-aside provided by section 53.4942(a)-3(b)(9) of the regulations is necessary and appropriate. Further, since the litigation encompasses more than one year, a set-aside for a second year is appropriate.

Accordingly, we rule as follows:

Under the facts described above, X's creation of a contingent set-aside shall be treated as a qualifying distribution for purposes of section 4942(g) of the Code for tax years ending June 30, h and June 30, i.

Pursuant to a power of attorney on file with this office, a copy of this letter is being, sent to your authorized representative.

This ruling is directed only to the person that requested it. Internal Revenue

Code section 6110(k)(3) provides that it may not be used or cited as precedent.

If you have any questions about this ruling, please contact the person whose name and telephone number are shown in the heading of this letter.

Sincerely,

(signed) Robert C Harper, Jr.

Robert C. Harper, Jr.
Manager, Exempt Organizations
Technical Group 3