Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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Legend

Grantor =
Trust =
Date 1 =
Daughter =

Date 2 =
Date 3 =
Date 4 =
Date 5 =
Country =
Share A =
Share B =
Trustee =

Dear

We received your letter dated June 19, 2000, and subsequent correspondence requesting a ruling under § 2041 of the Internal Revenue Code. This letter responds to your request.

The facts and representations submitted are summarized as follows: Grantor created Trust on Date 1 for the benefit of Daughter and her family. Trust was amended on Date 2, Date 3, and Date 4. Grantor died on Date 5 and Trust became irrevocable. Grantor was survived by Daughter.

Trust is organized under, and governed by, the laws of Country. Trust has no United States Taxpayer Identification Number. Grantor was never a resident or citizen of the United States. In particular, he was not a resident or citizen of the United States at the time of his death. On Grantor's death, an attorney determined that based upon

the nature of the assets in Trust, which were confirmed in the Trustee's books and records, Trust contained no United States situs assets for United States Estate Tax purposes and that Trust was not subject to United States Estate Tax as a result of Grantor's death.

Paragraph 3.1 of the Trust instrument, as amended by the Date 2 amendment, provides that on Grantor's death, the Trustee shall divide Trust into two separate funds to be known as Share A and Share B. Share A shall consist of the portion of Trust that would not be subject to United States Generation-Skipping Transfer Tax if it were disposed of as provided in paragraph 3.3 but in no event shall such portion exceed forty percent (40%) of the value of Trust as of the date of Grantor's death. That article further provides that the balance of Trust shall constitute Share B and shall be disposed of pursuant to paragraph 3.2 if Daughter survives Grantor.

Paragraph 3.2(c) of the Trust instrument, as amended by the Date 3 amendment, provides Daughter with a testamentary power of appointment. Upon Daughter's death, the Trustee shall distribute Share B to or among Daughter's descendants and Grantor's descendants in such share or shares and on such terms and conditions as Daughter shall have appointed by a written instrument delivered to the Trustee during her lifetime, except that if upon Daughter's death any part of Share B is subject to United States Generation-Skipping Transfer Tax, Daughter shall also have the power to appoint Share B to or among her creditors and the creditors of her estate. The Trustee shall continue to hold all or any part of Share B not effectively appointed or subject to appointment, in trust, as provided in subparagraph (a) of paragraph 3.2 until such time as neither Daughter nor any of her descendants are living or until the termination date specified in the first sentence of paragraph 9.1 of the agreement. Upon termination, the Trustee shall distribute the trust fund to Daughter's then living descendants and if more than one in equal shares, per stirpes.

You have requested the following rulings: (1) the testamentary power of appointment over Trust Share B is not a general power of appointment within the meaning of § 2041(b)(1), and therefore, (2) the existence, exercise, failure to exercise, or partial or complete release of the power of appointment will not cause the value of the property in Share B to be included in Daughter's gross estate under § 2041(a)(2).

Section 2031(a) provides that, the value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

Section 2041(a)(2) provides that the value of the gross estate includes the value of all property to the extent of any property with respect to which the decedent has at the time of his 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 such a power of appointment by a disposition which 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. For purposes of § 2041(a)(2), the power

of appointment is considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after the decedent's death notice has been given or the power has been exercised.

Section 2041(b)(1) provides, with exceptions not relevant here, that the term "general power of appointment" means a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.

Section 20.2041-1(c)(1) of the Estate Tax Regulations provides that the term "general power of appointment" as defined in § 2041(b)(1) means any power of appointment exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. Section 20.2041-1(c)(1)(a) provides that a power of appointment is not a general power if by its terms it is exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of his estate.

A power of appointment is a general power that will cause the property over which the power is exercisable to be included in the estate of the holder of the power if it may be exercised in favor of the holder, the holder's estate, the holder's creditors, or the creditors of the holder's estate. In this case, provided that no part of Share B is subject to the generation-skipping transfer tax, Daughter may appoint the assets in Share B to the class consisting of Daughter's descendants and Grantor's descendants. Because Daughter's power of appointment is a testamentary power, Daughter may not appoint any part of Share B to Daughter or to Daughter's creditors during Daughter's life. In addition, based on the terms of the Trust instrument, as amended, the reference to "Grantor's descendants" as a permissible class of appointees of Daughter's testamentary power is properly viewed as not including Daughter's estate or Daughter's creditors after Daughter's death.

Section 2103 provides that, for the purposes of the tax imposed by § 2101, the value of the gross estate of every decedent nonresident not a citizen of the United States shall be that part of his gross estate (determined as provided in § 2031) which at the time of his death is situated in the United States.

Section 2601 imposes a tax on every generation-skipping transfer (within the meaning of § 2611, § 2612 and § 2613).

Section 2611(a) defines the term "generation-skipping transfer" to include a taxable distribution, a taxable termination, and a direct skip.

Section 2612(a)(1) provides that the term "taxable termination" means the termination (by death, lapse of time, release of power, or otherwise) of an interest in property held in trust unless (A) immediately after such termination, a non-skip person has an interest in such property, or (B) at no time after such termination may a

distribution (including distributions on termination) be made from such trust to a skip person.

Section 2612(b) provides that the term “taxable distribution” means any distribution from a trust to a skip person (other than a taxable termination or a direct skip).

Section 2612(c) provides that the term “direct skip” means a transfer subject to a tax imposed by chapter 11 or 12 of an interest in property to a skip person.

Section 2613(a) defines the term “skip person” as (1) a natural person assigned to a generation that is two or more generations below the generation assignment of the transferor, or (2) a trust if all interests in the trust are held by skip persons, or if there is no person holding an interest in such trust, and at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a non-skip person.

Section 2613(b) provides that, for purposes of the generation-skipping transfer tax, the term “non-skip person” means any person who is not a skip person.

Section 2652(a) provides that, with exceptions not relevant here, the term “transferor” means (A) in the case of any property subject to the tax imposed by chapter 11, the decedent, and (B) in the case of any property subject to the tax imposed by chapter 12, the donor. An individual shall be treated as transferring any property with respect to which such individual is the transferor.

Section 26.2611-1 provides, in part, that the determination as to whether an event is a generation-skipping transfer is made by reference to the most recent transfer subject to the estate or gift tax.

Section 26.2652-1(a)(1) provides, in part, that, except as otherwise provided in paragraph (a)(3) relating to certain qualified terminable interest property trusts, the individual with respect to whom property was most recently subject to federal estate or gift tax is the transferor of that property for purposes of chapter 13. An individual is treated as transferring any property with respect to which the individual is the transferor. Thus, an individual may be a transferor even though there is no transfer of property under local law at the time the federal estate or gift tax applies.

Section 26.2652-1(a)(2) provides that, for purposes of chapter 13, a transfer is subject to federal gift tax if a gift tax is imposed under § 2501(a) (without regard to exemptions, exclusions, deductions, and credits). A transfer is subject to federal estate tax if the value of the property is properly includible in the decedent’s gross estate as determined under § 2031 or § 2103.

Section 26.2663-2(b)(1) provides that a transfer by a non-resident not a citizen of the United States is a direct skip subject to chapter 13 only to the extent that the

transfer is subject to the federal estate or gift tax within the meaning of § 26.2652-1(a)(2).

Section 26.2663-2(b)(2) provides that chapter 13 applies to a taxable distribution or a taxable termination to the extent that the initial transfer of property to the trust by a non-resident not a citizen of the United States transferor, whether during life or at death, was subject to the federal estate tax or gift tax within the meaning of § 26.2652-1(a)(2).

Based on the information submitted and the representations made, we conclude that Trust is a generation-skipping trust because it provides for distributions to more than one generation of beneficiaries below a transferor's generation. Based on your representation that Grantor's assets were not subject to federal gift tax during his life or federal estate tax on his death, Trust was not subject to the generation-skipping transfer tax in accordance with § 26.2663-2(b). In addition, provided the Share B assets will not be subject to the generation-skipping transfer tax at Daughter's death under § 26.2652-1(a)(2), we conclude that paragraph 3.2 of the Trust instrument, as amended by the Date 3 amendment, does not create a general power of appointment. Accordingly, the existence, exercise, failure to exercise, or partial or complete release of the power of appointment will not cause the value of the Share B assets subject to the power to be included in Daughter's gross estate under § 2041(a)(2).

A copy of this letter should be attached to any gift, estate or generation-skipping transfer tax returns that you may file relating to this matter. A copy is enclosed for that purpose. Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,
James C. Gibbons
Assistant to the Branch Chief, Branch 7
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures
Copy of this letter
Copy for § 6110 purposes