

Dear _____ :

This letter responds to a letter dated June 28, 2004, and subsequent correspondence, submitted by Trust's authorized representative on behalf of Trustee and Trust, requesting rulings under §§ 664 and 4941 of the Internal Revenue Code on the qualification of Trust as a net income charitable remainder unitrust (NIMCRUT).

The information submitted states that on D1, A and B created Trust with the intention that Trust qualify as a NIMCRUT under § 664(d)(3). Trustee is the trustee of Trust. A and B established Trust with the assistance of Trustee and Charity. A and B intended that Trust's realized post-contribution capital gains be allocated to Trust income.

Trust provided that the unitrust amount payable to the Donors during their lifetimes is the lesser of (1) Trust income during the taxable year, as defined in § 643(b), and, (b) x% of the fair market value of the assets of Trust valued as of the first day of each taxable year of Trust.

A, B, and Trustee were unaware that Trust did not contain language directing Trustee to allocate realized post-contribution capital gains to Trust income. Trustee administered Trust as though a provision allocating realized post-contribution capital gains to Trust income had been included in Trust. In Year, Trust's law firm determined that Trust did not contain a provision allocating realized post-contribution capital gain to Trust income.

Because of the error, and because Trust is irrevocable, Trustee sought an order from Court authorizing an amendment ab initio of Trust. No parties objected to the proposed reformation. On D2, Court issued an order that due to a scrivener's error, Trust be reformed, ab initio.

The revised language in Trust provides that Trust income will be determined as defined in § 643(b) and allocates post-contribution gain to Trust income; however, pre-contribution gains will be allocated to Trust principal.

Section 664(d)(2) provides that for purposes of § 664, a charitable remainder unitrust is a trust (A) from which a fixed percent (which is not less than 5 percent nor more than 50 percent of the initial net fair market value of all property placed in trust) 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 of 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 the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a qualified gratuitous transfer (as defined by § 664(g)), and (D) the value (determined under § 7520) of such remainder interest is at least 10 percent of the initial net value of all property placed in the trust.

Section 664(d)(3) provides that notwithstanding the provisions of §§ 664(d)(2)(A) and (B), the trust instrument may provide that the trustee shall pay the income beneficiary for any year (A) the amount of the trust income, if such amount is less than the amount required to be distributed under § 664(d)(2)(A), and (B) any amount of the trust income which is in excess of the amount required to be distributed under § 664(d)(2)(A), to the extent that the aggregate of the amounts paid in prior years was less than the aggregate of such required amounts.

Section 1.664-3(a)(4) of the Income Tax Regulations provides that the trust may not be subject to a power to invade, alter, amend, or revoke for the beneficial use of a person other than an organization described in § 170(c).

Section 4941 imposes excise tax on any act of self-dealing between a private foundation and any of its disqualified persons defined in § 4946.

Section 4941(d)(1)(E) provides that an act of self-dealing includes any transfer to, or use by or for the benefit of, a disqualified person, of any of the income or assets of a private foundation. However, § 4941 does not prohibit a disqualified person's cash or donations going for no consideration to such person's private foundation.

Section 53.4941(d)(1)(E) of the Foundation and Similar Excise Tax Regulations provides that an incidental or tenuous benefit to a disqualified person does not constitute an act of self-dealing.

Section 4947(a)(2) describes split-interest trusts as those that are not exempt from federal income tax under § 501(a), not all of the unexpired interests in which are devoted to purposes in § 107(c)(2)(B), and which have amounts in trust for which a deduction was allowed under §§ 170, 545(b)(2), 556(b)(2), 642(c), 2055, 2106(a)(2), or 2522.

Section 4947(a)(2) provides that § 4941 shall apply as if such split-interest trusts were private foundations under § 509(a).

Section 4947(a)(2)(A) provides that the provisions of § 4947(a)(2) do not apply with respect to the amounts payable under the terms of such split-interest trust to its income beneficiaries.

Section 53.4947-1(c)(2)(ii), Example (1) of the regulations indicates that the payments of income by a charitable remainder unitrust to its individual income beneficiaries does not result in any tax on self-dealing under § 4941.

As a NIMCRUT under § 664(d)(3), Trust is a split-interest trust described in § 4947(a)(2) and is, therefore, subject to § 4941, which imposes an excise tax on self-dealing. A and B are disqualified persons with respect to Trust because they are the creators of, and substantial contributors to Trust.

Under § 4947(a)(2)(A) and § 53.4947-1(c)(2)(ii), Example (1), a charitable remainder unitrust's payments to its income beneficiary do not result in any tax on self-dealing under § 4941. Under the circumstances described, a retroactive amendment in favor of the charitable remainder beneficiary does not constitute self-dealing under § 4941.

In addition, the consistent administration of Trust and treatment of realized post-contribution capital gains provides assurance that the parties to Trust intended to include realized post-contribution capital gains in trust income.

Based solely on the representations submitted, we conclude that the judicial reformation of Trust, ab initio, does not violate § 664. Furthermore, assuming that the terms of the reformed Trust are otherwise valid under § 664, the reformed Trust will be treated as a valid CRUT under 664(d)(1), ab initio. Additionally, we conclude that the judicial reformation of Trust to include post-contribution capital gains realized in Trust income will not be an act of self-dealing under § 4941(d)(1)(E) with respect to A and B, or any other disqualified persons under § 4946.

Except as specifically set forth above, no opinion is expressed as to the federal tax consequences of the above described facts under any other provision of the Code. Specifically, no opinion is expressed concerning whether Trust is or was a charitable remainder unitrust within the meaning of § 664(d).

This ruling is directed only to the taxpayer on whose behalf it was requested. 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, a copy of this letter is being sent to Trust's authorized representative.

Sincerely,

J. Thomas Hines
Chief, Branch 2
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

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