

Internal Revenue Service

Department of the Treasury

Number: **200101021**
Release Date: 1/5/2001
Index No.: 2033.00-00, 2038.00-00,
2041.03-00, 2501.00-00,2523.00-00

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:4 - PLR-118834-99
Date:

OCTOBER 2, 2000

Re:

LEGEND:

Grantor A =

Grantor B =

Trust =

\$x =

Dear :

This is in response to your letter dated November 24, 1999, and subsequent correspondence, requesting a ruling concerning the estate and gift tax consequences of the creation of a proposed trust (Trust) under §§ 2033, 2038, 2041, 2501, and 2511 of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: Grantor A and Grantor B, who are husband and wife, propose to create a joint trust ("Trust"). Grantor A will be the initial trustee of Trust. The Grantors will fund Trust with assets that they own as tenants by the entireties having a value of approximately \$x.

Under the terms of Trust, during the joint lives of the Grantors, the trustee may apply income and principal of Trust as the trustee deems advisable for the comfort, support, maintenance, health and general welfare of the Grantors. The trustee may

also pay additional sums to either or both of the Grantors or to a third person for the benefit of either or both Grantors as Grantor A directs, or if he is not capable of this decision, then as Grantor B directs. While both Grantors are living, either one may terminate Trust by written notice to the other Grantor. If Trust is terminated, the trustee will deliver the trust property to the Grantors in both their names as tenants in common. Either Grantor may also amend the trust while both grantors are living by delivering to the other Grantor the amendment in writing at least 90 days before the effective date of the amendment.

Upon the death of the first Grantor to die, he or she possesses a testamentary general power of appointment, exercisable alone and in all events, to appoint part or all of the assets of Trust, free of trust, to such deceased Grantor's estate or to or for the benefit of one or more persons or entities, in such proportions, outright, in trust, or otherwise as the deceased Grantor may direct in his or her will.

If the first Grantor to die fails to fully exercise his or her testamentary general power of appointment, and providing the surviving Grantor survives the first Grantor to die by at least six months, an amount of Trust property sufficient to equal the largest amount that can pass free of federal estate tax by reason of the unified credit, is to be transferred to an irrevocable Credit Shelter Trust. Any amount in excess of the amount needed to fully fund the Credit Shelter Trust that has not been appointed by the deceased Grantor will pass outright to the surviving Grantor.

The terms of the Credit Shelter Trust provide that during the life of the surviving Grantor, the trustee is to pay or apply for the benefit of the surviving Grantor any part of the income and/or principal of the trust as is reasonably necessary for the survivor's support and maintenance. The trustee shall also have the authority to pay or apply for the benefit of the joint descendants of the Grantors any portion of the income and/or principal of the trust as the trustee deems necessary for such descendants maintenance, support, and education. All distributions however, shall be limited by an ascertainable standard relating to health, education, support, or maintenance. Upon the death of the surviving Grantor, he or she shall have a limited power to appoint the Credit Shelter Trust assets to any one or more of the class consisting of the Grantors' joint descendants. Any assets not so appointed are to be divided into equal shares so as to provide one share for each living child of both Grantors and one share for the surviving issue collectively, per stirpes, of a deceased child of both Grantors.

You have requested the following rulings:

1. The contribution of jointly held assets to Trust will not constitute a gift by either Grantor A or Grantor B.
2. Payments to or for the benefit of either Grantor during the term of Trust will not be considered a gift, or, if so, the gift will qualify for the gift tax marital deduction.

3. The value of the entire Trust will be includible in the gross estate of the first Grantor to die.

4. On the death of the first deceasing Grantor, the surviving Grantor will be treated as making a gift that qualifies for the marital deduction, to the deceasing Grantor, with respect to the portion of the Trust property that is attributable to the surviving Grantor's contributions to the Trust.

5. To the extent that the Credit Shelter Trust is funded, any portion of the funds that will pass to the trust that originated with the surviving Grantor will not constitute a gift by such Grantor.

6. Future payments from the Credit Shelter Trust to beneficiaries other than the surviving Grantor will not constitute a gift from the surviving Grantor to those beneficiaries, and none of the assets attributable to the surviving Grantor held in the Credit Shelter Trust will be includible in his or her gross estate.

Section 2001(a) of the Internal Revenue Code imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2033 provides that the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2038(a) of the Code provides that the value of the gross estate includes the value of all property of which the decedent has at any time made a transfer (except where there has been a bona fide sale for adequate and full consideration in money or money's worth) by trust or otherwise where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property or where the decedent relinquished this power within the three year period ending on the date of the decedent's death.

Section 2041(a)(2) provides for the inclusion in the gross estate of any property to which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

Section 2041(b)(1) provides that the term "general power of appointment" means a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate, except that a power to consume property for the benefit of the decedent that is limited by an ascertainable standard relating to health, education, support, or maintenance of the decedent is not deemed a general power of appointment.

Section 20.2041-1(b)(2) provides that the term power of appointment does not include powers reserved by the decedent to himself within the concepts of sections 2036 to 2038.

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 25.2511-2(b) provides that as to any property, or part therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. Section 25.2511-2(c) provides that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property to himself or herself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

Section 1014(a) provides that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from the decedent is the fair market value of the property at the date of the decedent's death (or alternate valuation date).

Section 1014(b)(9) provides that, for purposes of § 1014(a), property acquired from the decedent includes property acquired from the decedent by reason of death, form of ownership, or other conditions, including property acquired through the exercise or non-exercise of a power of appointment, if the property is required to be included in determining the value of the decedent's gross estate for federal estate tax purposes.

Section 1014(e), however, provides an exception to the general rule of section 1014(a). Under section 1014(e), if appreciated property was acquired by the decedent by gift during the one-year period ending on the date of the decedent's death and the property is acquired from the decedent by, or passes from the decedent to, the donor of such property, the basis of such property in the hands of the donor is the adjusted basis of the property in the hands of the decedent immediately before the death of the decedent.

Ruling #1. Grantor A and Grantor B propose to transfer property held as tenants by the entireties to Trust. The Grantors will each retain the power to terminate Trust by written notice to the other Grantor. If Trust is terminated, the trustee will deliver the trust property to the Grantors in both their names as tenants in common. We conclude that the initial contribution of assets to Trust as proposed will not constitute a completed gift by either Grantor under section 25.2511-2(c), since each will retain the

right, exercisable unilaterally, to revoke their respective transfer, and revest title in themselves.

Ruling #2. If either Grantor exercises the right to terminate Trust, each Grantor will receive an undivided 50% interest in the remaining balance of the Trust corpus, as a tenant in common. Therefore, distributions of Trust property to either Grantor during their joint lives will constitute a gift by the other Grantor to the extent of 50% of the value of Trust assets distributed. The gift will qualify for the gift tax marital deduction under section 2523.

Ruling #3 and #4. Upon the death of the first Grantor to die, he or she will possess a testamentary power exercisable alone and in all events, to appoint part or all of the assets of the Trust, free of trust, to such deceased Grantor's estate or to or for the benefit of one or more persons or entities, in such proportions, outright, in trust, or otherwise as the deceased Grantor may direct in his or her will.

We conclude that, on the death of the first Grantor to die, the portion of the Trust property attributable to the property the deceased Grantor transferred to Trust will be includible in the deceased Grantor's gross estate under section 2038. The balance of the property attributable to the property the surviving Grantor contributed to Trust will be includible in the deceased Grantor's gross estate under section 2041.

Further, on the death of the first deceasing Grantor, the surviving Grantor is treated as relinquishing his or her dominion and control over the surviving Grantor's one-half interest in Trust. Accordingly, on the death of the first deceasing Grantor, the surviving Grantor will make a completed gift under section 2501 of the surviving Grantor's entire interest in Trust. This gift will qualify for the marital deduction under § 2523.

In addition, § 1014(e) will apply to any Trust property includible in the deceased Grantor's gross estate that is attributable to the surviving Grantor's contribution to Trust and that is acquired by the surviving Grantor, either directly or indirectly, pursuant to the deceased Grantor's exercise, or failure to exercise, the general power of appointment. See, H. R. Rept. 97-201, 97th Cong., 1st Sess. (July 24, 1981).

Rulings #5 and #6. As discussed above, the surviving Grantor is treated as making a completed gift of his or her interest in Trust on the death of the first deceasing Grantor. Also, as discussed above, a portion of the Trust property will be subject to inclusion in the deceased Grantor's gross estate under section 2038, and a portion will be subject to inclusion under section 2041. Accordingly, to the extent the Credit Shelter Trust is funded, property passing to the trust is treated as passing from the deceased Grantor, and not from the surviving Grantor.

Similarly, any future payments from the Credit Shelter Trust to beneficiaries other than the surviving Grantor will not constitute a gift from the surviving Grantor to those beneficiaries. None of the assets held in the Credit Shelter Trust will be includible in the surviving Grantor's gross estate, since the surviving Grantor will possess only a special power of appointment with respect to the assets in the Credit Shelter Trust.

Except as ruled above, we express or imply no opinion concerning the federal tax consequences of this transaction under the cited provisions of the Code or any other provision of the Code.

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.

Sincerely yours,

Associate Chief Counsel
(Passthroughs and Special
Industries)

By _____
George Masnik
Branch Chief
Branch 4

Enclosure

Copy of letter for section 6110 purposes