Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04
PLR-104368-07

Date:
November 21, 2007

LEGEND

Husband =
Wife =
$a =
x% =
Foundation =

Dear :

This is in response to a letter from your authorized representative, dated January 22, 2007, requesting rulings on whether certain trust provisions will affect the qualification of a proposed trust as a charitable remainder unitrust (CRUT) under § 664(d)(2) of the Internal Revenue Code (Code) and the applicable regulations and on the gift and estate tax consequences of a proposed transaction.

Husband and Wife intend to form a trust and fund the trust with stock valued at $a. The proposed trust (Trust) is intended to qualify as a valid CRUT under § 664(d)(2) and the corresponding regulations.

Article 2.1 of Trust provides for a unitrust amount of x% of the net fair market value of the assets of the trust, valued on the first day of each taxable year. In each taxable year of the unitrust period, the trustee shall pay (i) twenty-five percent of the unitrust amount to Husband and Wife for their joint lives, and then to the survivor for life, and (ii) seventy-five percent of the unitrust amount to such one or more of Husband, Wife, and any organization described on §§ 170(c), 2055(a), and 2522(a), as the Special Trustee, in the exercise of absolute discretion, directs. The first day of the unitrust period shall be the date property is first transferred to the trust and the last day of the unitrust period shall be the date of the surviving spouse's death.

Article 2.5 of Trust provides that at the termination of the unitrust period, the trustee shall distribute all of the principal and income of Trust to Foundation, provided, however, that Husband and Wife shall have the joint power to replace Foundation as the charitable remainder beneficiary with one or more other organizations described in §§ 170(c), 2055(a), and 2522(a) as Husband and Wife may have designated in a written instrument delivered to the trustee. Following the death of the first to die of Husband and Wife, the power to substitute the charitable remainder beneficiary shall be exercisable by the survivor of Husband and Wife during his or her lifetime. If Foundation or any charitable organization designated by Husband and/or Wife is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time when any income or principal of the trust is to be distributed to it, the trustee shall distribute such income or principal to such organizations described in §§ 170(c), 2055(a), and 2522(a) as the trustee shall select in the trustee's sole discretion.

Section 3.2 of Trust designates the initial Special Trustee and successor Special Trustees and provides that in no event shall Husband, Wife, or any party who is related or subordinate to either Husband or Wife, within the meaning of § 672(c), act as the Special Trustee.

Pursuant to Article 3.3 of Trust, Husband and Wife, who are the initial trustees of Trust, reserve the right to remove the Special Trustee then in office and replace such Special Trustee with another Special Trustee, provided, however, that in no event shall either or both of Husband and Wife or any party who is related or subordinate to either Husband or Wife, within the meaning of § 672(c), act as the Special Trustee.

Your authorized representative has requested the following rulings with regard to the proposed trust:

1. Trust qualifies as a CRUT under § 664(d)(2);

2. The power of the Special Trustee to allocate payments of a portion of the unitrust amount among the beneficiaries does not prevent Trust from qualifying as a CRUT;

3. The power retained by Husband and Wife to appoint a successor Special Trustee and to remove the Special Trustee and substitute another Special Trustee does not prevent Trust from qualifying as a CRUT;

4. The creation of the survivor unitrust interest qualifies for the marital deduction under § 2523(g) so that neither Husband nor Wife is subject to gift tax on the creation of the trust; and

5. Upon the death of the first spouse, the portion of the unitrust interest included in the gross estate of the first spouse qualifies for the marital deduction under § 2056(b)(8).

RULINGS 1, 2, and 3

Pursuant to § 4.01(37) of Rev. Proc. 2007-3, 2007-1 I.R.B. 114, the Internal Revenue Service (Service) ordinarily will not issue rulings as to whether a charitable remainder trust that provides for annuity or unitrust payments for one or two measuring lives satisfies the requirements described in § 664.

In lieu of seeking the Service's advance approval of a CRUT, Husband and Wife are directed to follow the sample CRUT provisions outlined in Rev. Proc. 2005-55, 2005-2 C.B. 367. By following the models contained in Rev. Proc. 2005-55, Husband and Wife can be assured that the Service will recognize a trust as meeting all of the requirements of a qualified CRUT under § 664(d)(2), provided that the trust operates in a manner that is consistent with the terms of the trust instrument and provided the trust is a valid trust under applicable local law.

In the present case, Trust contains provisions not addressed in Rev. Proc. 2005-55. Therefore, we will rule on whether those provisions disqualify Trust as a CRUT under § 664(d)(2).

Section 664(d)(2) provides that for purposes of § 664, a charitable remainder unitrust is a trust: (A) from which a fixed percentage (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) is to be paid, not less frequently 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 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 uses of any person other than an organization described in § 170(c); (C) following 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 a 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 in § 664(g)); and (D) with respect to each contribution of property to the trust, the value (determined under § 7520) of the remainder interest passing to charity is at least 10 percent of the initial net fair market value of all property placed in the trust.

Section 1.664-1(a)(1)(i) of the Income Tax Regulations provides that, generally, a charitable remainder trust is a trust that provides for a specified distribution, at least annually, to one or more beneficiaries, at least one of which is not a charity, for the life or for a term of years, with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity.

Section 1.664-1(a)(4) provides that in order for a trust to be a charitable remainder trust it must meet the definition of, and function exclusively as, a charitable remainder trust from the date or time of the creation of the trust. Solely for purposes, of § 664 and the regulations thereunder, the trust will be deemed to be created at the earliest time that neither the grantor nor any other person is treated as the owner of the entire trust under subpart E, part 1, subchapter J, chapter 1, subtitle A. For purposes of the preceding sentence, neither the grantor nor the grantor's spouse shall be treated as the owner of the trust under subpart E merely because the grantor or the spouse is named as a recipient.

Section 1.664-3(a)(3)(ii) provides that a trust is a not a charitable remainder unitrust if any person has the power to alter the amount to be paid to any named person other than an organization described in § 170(c) if such power would cause any person to be treated as the owner of the trust, or any portion thereof, if subpart E, part 1, subchapter J, chapter 1, subtitle A were applicable to such trust.

Section 674(a) provides the general rule that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without approval or consent of any adverse party.

Section 674(c) provides that § 674(a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor, to apportion the income within a class of beneficiaries, or to pay corpus to a class of beneficiaries. See Rev. Rul. 77-73, 1977-1 C.B. 175.

Section 1.674(c)-1 provides that the powers to which § 674(c) applies are powers (a) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, or (b) to pay out corpus to or for a beneficiary or class of beneficiaries (whether or not income beneficiaries). In order for such a power to fall within the exception of § 674(c) it must be exercisable solely (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor.

Section 1.674(d)-2(a) provides that a power in the grantor to remove, substitute, or add trustees may prevent the trust from qualifying under § 674(c) or (d). For example, if a grantor has an unrestricted power to remove an independent trustee and substitute any person including the grantor as trustee, the trustee will not qualify under § 674(c) or (d). See Rev. Rul. 77-285, 1977-2 C.B. 213.

In the present case, Article 2.1 of Trust provides for a unitrust amount of x% of the net fair market value of the assets of the trust, valued on the first day of the unitrust period. In each taxable year of the unitrust period, the trustee shall pay (i) twenty-five percent of the unitrust amount to Husband and Wife for their joint lives, and then to the survivor for life, and (ii) seventy-five percent of the unitrust amount to such one or more of Husband, Wife, and any organization described on §§ 170(c), 2055(a), and 2522(a), as the Special Trustee, in the exercise of absolute discretion, directs.

As noted above, § 674(c) provides an exception to the general rule of § 674(a) with regard to certain powers to apportion trust income or principal among a class of beneficiaries. Thus, a provision that gives an independent trustee the power to allocate the unitrust amount among the charitable and noncharitable beneficiaries on an annual basis is not inconsistent with the provisions of the Code and regulations governing charitable remainder trusts, provided that the governing instrument requires that a portion of the unitrust amount must be allocated and paid to the noncharitable beneficiaries each year and provided that the portion of the unitrust amount so paid is not de minimis under the facts and circumstances for each year.

Based on the foregoing, we conclude that the provision in Trust that gives the Special Trustee the power to allocate a portion of the unitrust amount among charitable and noncharitable beneficiaries will not preclude Trust from qualifying as a CRUT under § 664(d)(2).

In addition, under Article 3.3 of Trust, Husband and Wife reserve the right to remove the Special Trustee then in office and replace such Special Trustee with another Special Trustee, provided, however, that in no event shall either or both of Husband and Wife or any party who is related or subordinate to either Husband or Wife, within the meaning of § 672(c), act as the Special Trustee. Article 3.2 designates the initial Special Trustee and the successor Special Trustee and provides that in no event shall Husband, Wife, or any party who is related or subordinate to either Husband or Wife, within the meaning of § 672(c), act as the Special Trustee.

Based solely on the information submitted and representations made, we conclude that Husband and Wife have not retained a power to remove the Special Trustee that would allow them to substitute any person, including themselves, as Special Trustee, or that would subordinate the Special Trustee to Husband or Wife. Article 3.2 of the trust agreement provides that the Special Trustee can be replaced only by the persons named in the trust agreement and in the order they are named. In no

event will the Special Trustee be a person or entity related to or subordinate to either Husband or Wife. For these reasons, we conclude that the Special Trustee is an independent trustee within the meaning of § 674(c).

Further, we conclude that the provisions in the trust agreement providing Husband and Wife with the power to replace the Special Trustee will not cause any person to be treated as the owner of the trust, or any portion thereof. Accordingly, this provision will not prevent Trust from qualifying as a CRUT under § 664(d)(2).

We note that in this case the trust instrument provides Husband and Wife with the joint power to replace Foundation as the charitable remainder beneficiary with one or more substitute charitable organizations. Because Husband and Wife will retain the right to designate the charitable remainder beneficiary or beneficiaries of the CRUT, they will not make a completed gift of the remainder when the trust is created. However, the retention of this power will not disqualify an otherwise qualifying charitable remainder trust under § 664 and the applicable regulations. Rev. Rul. 76-8, 1976-1 C.B. 179.

RULING 4

Section 2523(a) provides that when 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.

Under § 2523(b), the deduction under § 2523(a) is disallowed when, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest transferred to the spouse will terminate or fail if the donor retains in himself an interest in such property, and if by reason of such retention the donor may possess or enjoy any part of the property after such termination or failure of the interest transferred to the donee spouse.

Section 2523(g) provides that if, after the transfer, the donee spouse is the only non-charitable beneficiary (other than the donor) of a qualified remainder trust, § 2523(b) shall not apply to the interest in such trust which is transferred to the donee spouse. Under § 2056(b)(8)(B)(ii), the term “qualified charitable remainder trust” means a charitable remainder annuity trust or charitable remainder unitrust (described in § 664).

Section 25.2523(g)-1(a)(3) of the Gift Tax Regulations provides that the donee spouse's interest need not be an interest for life to qualify for a marital deduction under § 2523(g).

In the present case, upon the creation of Trust, Husband and Wife are each treated as making a gift to the other of a successive unitrust interest for life in the 1/2 portion of the trust property each contributes. Because the donee spouse is the only noncharitable beneficiary (other than the donor spouse) of Trust, neither Husband nor Wife is subject to gift tax under § 2523(g) upon the creation of the trust. See Rev. Rul. 76-157, 1976-1 C.B. 306.

RULING 5

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

Section 2056(a) provides that, for purposes of the tax imposed by section 2001, the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse.

Section 2056(b)(1) provides the general rule that no deduction shall be allowed for an interest passing to the surviving spouse if, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest will terminate or fail.

Section 2056(b)(8) provides that, if the surviving spouse of a decedent is the only non-charitable beneficiary of a qualified charitable remainder trust, section 2056(b)(1) shall not apply to any interest that passes or has passed from the decedent to the surviving spouse.

Section 2056(b)(8)(B)(ii) provides that the term “qualified charitable remainder trust” means a charitable remainder annuity trust or charitable remainder unitrust described in § 664.

As noted above, § 2056(b)(8) provides that the terminable interest rule does not apply to situations where the donee spouse is the only non-charitable beneficiary of a trust that satisfies the requirements of § 664. In the present case, Trust provides for the unitrust amount to be paid for the joint lives of Husband and Wife. Upon the death of the first spouse, the unitrust amount will be paid to the surviving spouse for his or her life. Thus, upon the death of the first spouse, the surviving spouse will be the only noncharitable beneficiary of Trust. Assuming that Trust satisfies the requirements of § 664, the unitrust interest passing from the predeceasing spouse to the surviving spouse will qualify for the marital deduction under § 2056(b)(8).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayers and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

James F. Hogan
Senior Technician Reviewer, Branch 4
(Passthroughs & Special Industries)

Enclosure
Copy for 6110 purposes

cc: