



WRNewswire

An AALU Washington Report

Wednesday, 8 March 2017

WRN# 17.03.08

The AALU *WRNewswire* and *WRMarketplace* are published by the Association for Advanced Life Underwriting® and Greenberg Traurig as part of the *Essential Wisdom Series*, the trusted source of actionable technical and marketplace knowledge for AALU members—the nation’s most advanced life insurance professionals.

TOPIC: PLR Holds Power to Add Beneficiaries Results in Treatment of Irrevocable Trust as Grantor Trust & Eligible S Corp Shareholder

Under IRC § 1361(c)(2), a trust treated as a wholly-owned grantor trust for federal income tax purposes with regard to an individual may hold S corporation stock as an eligible S corporation shareholder, so long as the grantor is a U.S. citizen or resident. In PLR 201709020, the IRS ruled that an irrevocable trust created by a U.S. grantor would qualify as his wholly-owned grantor trust under IRC § 674(a) (and thus as an eligible S corporation shareholder) because a person (in this case, the trustee) had the power to add to the class of beneficiaries designated to receive trust income or principal any of the grantor’s parent’s descendants (other than the grantor).

[View PLR 201709020](#)

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Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201709020**
Release Date: 3/3/2017

Third Party Communication: None
Date of Communication: Not Applicable

Index Number: 1001.00-00, 1015.00-00,
2035.00-00, 2036.00-00,
2037.00-00, 2038.00-00,
2501.00-00, 671.00-00,
674.00-00, 677.03-00,
1361.03-01, 1361.03-02,
61.00-00, 643.06-00, 661.00-
00, 662.00-00

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B01
PLR-129630-15

Date:
September 12, 2016

Grantor =

Trust =

X =

Family Trust =

Spouse =

Date 1 =

Date 2 =

Date 3 =

Child 1

Child 2 =

Child 3 =

Child 4 =

Child 5 =

Child 6 =

Child 7 =

State =

Court =

Dear _____ :

This letter responds to a letter dated August 25, 2015, and subsequent information, submitted on behalf of Trust, requesting rulings with respect to Trust.

FACTS

The facts and representations submitted are summarized as follows: Grantor established Trust as an irrevocable trust on Date 1 (after September 25, 1985). Trust is administered under the laws of State. The taxpayers represent that sufficient generation-skipping transfer (GST) tax exemption was allocated to Trust so that Trust has an inclusion ratio of zero. Trust currently holds various assets that include shares of X, an S corporation. Grantor also established an irrevocable trust, Family Trust, by executing an agreement of trust on Date 2.

Paragraph 1.1 of Article FIRST of the Trust agreement (“trust agreement”) provides that during Grantor’s lifetime, the trustee shall pay over or apply the net income and principal to such extent, including the whole thereof, and in such amounts or proportions, including all to one at the exclusion of the others, and at such time or times as the trustee, in the exercise of absolute discretion, shall determine, to Family Trust and/or to or for the benefit of such one or more members of the class consisting of Grantor’s

descendants living from time to time during the term of the trust under paragraph 1.1 and any person added as a beneficiary of the trust under paragraph 1.1 pursuant to the discretionary power granted in the trust agreement, as the trustee, in the exercise of absolute discretion, shall select. Any net income not so paid over or applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed of as a part thereof.

Paragraph 1.1 further provides that during Grantor's lifetime, the trustee is authorized, in the exercise of absolute discretion, at any time and from time to time, to add as a beneficiary of the trust under paragraph 1.1 any person, other than Grantor, who is a descendant of Grantor's parents.

Paragraph 1.1 further provides that upon the Grantor's death, the trust under paragraph 1.1 shall terminate, and the principal of the trust, as it is then constituted, shall be disposed of under paragraph 1.2. Paragraph 1.2 of the trust agreement provides that if any descendant of Grantor is then living the principal of the trust under paragraph 1.1, as it is then constituted, shall be divided into a sufficient number of equal shares so that there shall be set aside one such share for each child of Grantor who is then living and one such share for the collective descendants who are then living of any child of Grantor who is not then living. From each such share so set aside for the collective descendants who are then living of any child of Grantor is not then living there shall be set aside per stirpital parts for such descendants.

Paragraph 1.2 further provides that to the extent that any share or part of a share so set aside consists of stock of an S corporation, within 60 days of Grantor's death such share or part of a share shall be transferred, conveyed and paid over to the trustee, to be held in a separate trust for the benefit of the child or descendant for whom the share or part of a share was so set aside in accordance with the terms and conditions of Article SECOND of the trust agreement. To the extent that any share or part of a share so set aside does not consist of stock of an S corporation, such share or part of a share shall be transferred, conveyed and paid over to the trustee to be held in trust in accordance with the terms and conditions of Article THIRD.

Paragraph 1.3 of the trust agreement provides that if upon the termination of any trust created under the trust agreement no descendant of Grantor is then living, if Spouse is then living the principal of such trust, as it is then constituted, shall be transferred, conveyed and paid over to the trustee to be held in trust. The trustee shall pay over or apply the net income to or for the benefit of Spouse in as nearly equal quarterly installments as practicable, but at least annually during Spouse's life. The trustee, other than Spouse, in the exercise of absolute discretion is authorized to pay over to Spouse or apply for Spouse's benefit principal of the trust. Paragraph 1.3 further provides that in any year in which for the entire year the trust does not own stock of an S corporation, the trustee shall pay over the net income to such extent and at such time or times as the

trustee, other than Spouse, in the exercise of absolute discretion, shall determine, to or for the benefit of Spouse. Any net income not so paid over or applied shall be added to the principal of the trust.

Paragraph 2.1 of Article SECOND the trust agreement provides that any share or part of a share which is directed to be held in accordance with the terms and conditions of Article SECOND shall be held by the trustee in trust. The trustee shall pay over or apply the net income to or for the benefit of the beneficiary in as nearly equal quarterly installments as practicable, but at least annually, during the beneficiary's life. In any year in which for the entire year the trust does not own stock of an S corporation, the trustee shall transfer, convey and pay over the net income to such extent and at such time or times as the trustee, other than the beneficiary, in the exercise of absolute discretion, shall determine, to or for the benefit of the beneficiary. Any net income not so paid over or applied shall be added to the principal of the trust.

Paragraph 2.1 further provides that the trustee, other than the beneficiary, in the exercise of absolute discretion is authorized at any time and from time to time, to pay over to the beneficiary or apply for his or her benefit, out of the principal of the trust, such portion thereof, including the whole, as the trustee, other than the beneficiary, in the exercise of absolute discretion, determines.

Paragraph 2.2 of the trust agreement provides that upon the death of a beneficiary, the principal of the trust, as it is then constituted, shall be divided into a sufficient number of equal shares so that there shall be set aside one such share for each child of the beneficiary who is then living and one such share for the collective descendants who are then living of any child of the deceased beneficiary who is not then living. From each such share so set aside for the collective descendants who are then living of any child of the deceased beneficiary who is not then living there shall be set aside per stirpital parts for such descendants. The share or part of a share so set aside for a beneficiary shall be held in a separate trust in accordance with the terms and conditions set forth in paragraph 2.1 of the trust agreement for the benefit of that beneficiary.

Paragraph 2.3 of the trust agreement provides that if not sooner terminated, each trust held under Article SECOND shall terminate upon the 21st anniversary of the death of the last to die of Grantor, Spouse, all of the descendants of Grantor who were in being at the creation of the trust by Grantor, and the ten youngest descendants of a named individual, who were in being at the creation of the trust. Upon the termination of each such trust, the principal of each such trust, as it is then constituted, shall be transferred, conveyed and paid over to the beneficiary.

Paragraph 2.5 of the trust agreement provides that if income or discretionary amounts of principal become payable to a beneficiary who is a minor, then such income or principal may in the sole discretion of the trustee, other than any trustee who is under a

duty to support the beneficiary, be paid to a court-appointed guardian of the beneficiary's property or the beneficiary's custodian under a Uniform Gifts to Minors Act or similar act in effect under the law of the beneficiary's domicile, to be used exclusively for the benefit of the beneficiary.

Paragraph 2.6 of the trust agreement provides that if upon the death of the beneficiary there is no descendant of the beneficiary then living, the trustee shall transfer, convey and pay over the principal of the trust, as it is then constituted, to and among such one or more of the other trusts then being held pursuant to the trust agreement and then living descendants of the Grantor, as the trustee, in the exercise of absolute discretion, shall select.

Paragraph 3.1 of Article THIRD of the trust agreement provides that any share or part of a share which is directed to be held in accordance with the terms and conditions of Article THIRD, the trustee shall pay over or apply the net income and principal to such extent and at such time or times as the trustee, in the exercise of absolute discretion, shall determine. Any net income not so paid over or applied shall be accumulated and added to the principal of the trust at least annually and thereafter shall be held, administered and disposed as a part thereof.

Paragraph 3.2 of Article THIRD provides that upon the death of the primary beneficiary, the principal of the trust shall be divided into a sufficient number of equal shares so that there shall be set aside one such share for each child of the deceased primary beneficiary who is then living and one such share for the collective descendants who are then living of any child of the deceased primary beneficiary who is not then living.

Paragraph 4.1(M) of Article FOURTH of the trust agreement provides that as to any trust created under paragraph 1.1 of Article FIRST or under Article THIRD of the trust agreement, to purchase life insurance payable to any such trust on the life or joint lives of any individual or individuals in which any beneficiary of such trust may have an insurable interest (including, but without limitation, life insurance on the life of the Grantor) and to pay any premiums on any such life insurance policy held from the income or principal of the trust estate.

Paragraph 4.1(P) of Article FOURTH of the trust agreement gives the trustee the power to: (i) divide any trust created under Article FIRST or Article THIRD of the trust agreement into one or more separate trusts for the benefit of one or more of the beneficiaries of the trust (to the exclusion of the other beneficiaries) so divided, as the trustee, in the exercise of her absolute discretion, shall determine, but in all other respects under the same terms as set forth in Article THIRD; (ii) divide any trust created under Article SECOND hereof into one or more separate trusts for the benefit of the beneficiary but in all respects under the same terms as set forth in Article SECOND hereof; and (iii) to allocate to such divided trust some or all of the assets of the trust

estate for any reason including, but not limited to, enabling any such trust or trusts to qualify as an eligible shareholder of an S corporation as described in the Code, or for any other purpose.

Spouse was the initial trustee of Trust and has continuously served as the sole trustee Trust. Paragraph 6.1 of the trust agreement provides that Spouse and each successor trustee shall have the right to appoint a co-trustee (other than Grantor or any other person who has contributed property to the trust), provided that during Grantor's lifetime no person who is either a descendant of Grantor's parents, or the individuals listed in paragraph 1.3 of the trust agreement, or a charitable organization may serve as trustee. Paragraph 6.2 provides that if Spouse ceases to act as trustee, without appointing a successor, or if there is no trustee acting under the terms of the trust agreement at any time, the trust protector shall appoint a trustee or trustees (other than Grantor or any other person who contributed property to the trust), provided that during Grantor's lifetime, no person who is a descendant of Grantor's parents, or who is any person listed in paragraph 1.3, or a charitable organization shall be eligible to serve as trustee.

Paragraph 7.1 of the trust agreement provides, in relevant part, that no trustee who is a beneficiary of any trust created hereunder or who is obligated to support a beneficiary of any trust created hereunder, shall ever participate in (i) the exercise of, or decision not to exercise, any discretion over payments, distributions, uses, application or accumulation of income or principal by the trustee, (ii) the exercise of discretion to allocate receipts or expenses between principal and income, (iii) the exercise of discretion with respect to an insurance policy on his or her life held hereunder, (iv) the exercise of the power in Paragraph 4.1(P) of Article FOURTH of the trust agreement to divide any trust created hereunder into one or more separate trusts, or (v) the appointment or removal of any trustee or trust protector.

At the present time, Trust's estate has been held in a single trust governed under Article FIRST of the trust agreement. The Grantor has seven children and each child is currently living: Child 1, Child 2, Child 3, Child 4, Child 5, Child 6 and Child 7 (collectively "Grantor's children"). The trustee has not exercised the power to add any additional beneficiaries to Trust.

Proposed Transaction

Trust, through its trustee, proposes to create eight separate trusts governed under Article THIRD of the trust agreement for the Family Trust and each of Grantor's seven children and their descendants ("Article THIRD Trusts") and to transfer the Article ONE trust estate, other than the X stock, in equal shares to each of the Article THIRD Trusts. The trustee will allocate a pro rata portion of each and every asset transferred from Trust to the Article THIRD Trusts. Trust will retain the X stock that will continue to be governed by Article ONE of the trust agreement.

The trustee and beneficiaries filed a petition with Court to: (i) interpret and construe the terms of the trust agreement to provide for the establishment of the Article THIRD Trusts by the trustee pursuant to the powers given under Paragraph 4.1(P) of the trust agreement, (ii) approve the creation of the Article THIRD Trusts for the Family Trust and each of Grantor's seven children and their descendants pursuant the terms of paragraph 4.1(P) of the trust agreement, and (iii) approve the transfer of the Article ONE trust estate other than the X stock in equal shares to the eight Article THIRD Trusts.

Court granted such petition in a Declaratory Judgment on Date 3.

RULINGS REQUESTED

1. The Trust created under Article FIRST of the trust agreement will be an eligible shareholder of an S corporation during Grantor's lifetime and for the 60 day period beginning on the date of Grantor's death because it will be a trust all of which is treated under subpart E of part I of subchapter J as owned by Grantor during Grantor's lifetime, whether or not Spouse (or any other spouse of Grantor) is serving as trustee.
2. Each separate QSST trust which, in accordance with the trust agreement, will be created within 60 days of Grantor's death under Article SECOND of the trust agreement will be an eligible shareholder of an S corporation under § 1361(d), provided that an appropriate election is made under that section and based on the taxpayers' representation that each QSST beneficiary will be a United States citizen and/or resident.
3. The pro-rata transfer of assets from Trust into the Article THIRD Trusts will not result in treating any Trust property as paid, credited, or distributed for purposes of § 661 or § 1.661(a)-2(f) of the Income Tax Regulations, and so will not result in realization of any income, gain, or loss under §§ 661 or 662 by Trust, the Article THIRD trusts, or a beneficiary of any of the trusts. In addition, pro-rata transfer of assets from Trust into the Article THIRD Trusts, will not result in the realization of any income, gain or loss to Trust, the Article THIRD Trusts, or a beneficiary of any of those trusts under § 61 or § 1001.
4. The Article THIRD Trusts will be treated as separate trusts for federal income tax purposes pursuant to § 643(f).
5. The pro-rata transfer of assets from Trust into the Article THIRD Trusts will result in each Article THIRD Trust holding its share of Trust's property with the same basis as it had when owned by Trust at the time of the transfer into the Article THIRD Trusts under § 1015.

6. The pro-rata transfer of assets from Trust into the Article THIRD trusts will not create or result in a transfer of property subject to federal gift tax under § 2501 of the Internal Revenue Code (Code).
7. Any trust created under the trust agreement will not be included in the gross estate of Grantor or the gross estate of Spouse, assuming (as represented by the taxpayers) that Spouse will not make any transfers to any trust created under the trust agreement and that such trust will not acquire any policy of insurance on Spouse's life.
8. The pro-rata transfer of assets from Trust into the Article THIRD Trusts will not cause any portion of the assets of Trust or the Article THIRD Trusts to be includible in the gross estate of any beneficiary under §§ 2035, 2036, 2037, or 2038.
9. The pro-rata transfer of assets from Trust into the Article THIRD trusts will not alter the inclusion ratio of Trust, and each Article THIRD trust will have the same inclusion ratio as Trust for GST tax purposes.

Ruling 1 and 2

Section 671 provides that where it is specified in subpart E of part I of subchapter J that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under chapter 1 in computing taxable income or credits against tax of an individual.

Section 672(a) provides, for purposes of subpart E, the term “adverse party” means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust.

Section 1.672(a)-1(a) of the Income Tax Regulations provides that an interest is substantial if its value in relation to the total value of property subject to the power is not insignificant.

Section 672(e)(1)(A) provides, in general, that a grantor shall be treated as holding any power or interest held by an individual who was the spouse of the grantor at the time of the creation of the power or interest or after the time of creation of such power or

interest but only with respect to the period or periods after such individual became the spouse of the grantor.

Sections 673 through 677 specify the circumstances under which the grantor is treated as the owner of a portion of a trust.

Section 674(a) provides, in general, 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 the approval or consent of any adverse party.

Section 674(b) provides that § 674(a) shall not apply to a power to distribute corpus to or for a beneficiary, provided that the power is limited by a reasonably definite standard. Section 674(c) provides an exception to the general rule of § 674(a) when certain powers are held by an independent trustee. However, that exception does not apply if any person, regardless of the independence of the trustee, has a power to add a beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after adopted children.

Section 1361(a)(1) provides that the term “S corporation” means, with respect to any taxable year, a small business corporation for which an election under § 1362(a) is in effect for such year.

Section 1361(b)(1)(B) provides that the term “small business corporation” means a domestic corporation which is not an ineligible corporation and which does not have as a shareholder a person (other than an estate and other than a trust described in § 1361(c)(2)) who is not an individual.

Section 1361(c)(2)(A)(i) provides that a trust, all of which is treated (under subpart E of part I of subchapter J of chapter 1) as owned by an individual who is a citizen or resident of the United States, may be an S corporation shareholder.

Section 1361(c)(2)(A)(ii) provides that, for purposes of 1361(b)(1)(B), a trust which was described in § 1361(c)(2)(A)(i) immediately before the death of the deemed owner and which continues in existence after such death, may be an S corporation shareholder, but only for the two-year period beginning on the day of the deemed owner’s death.

Section 1361(d)(1) provides that a qualified subchapter S trust (QSST) whose beneficiary makes an election under § 1362(d)(2) will be treated as a trust described in § 1361(c)(2)(A)(i), and the QSST’s beneficiary will be treated as the owner (for purposes of § 678(a)) of that portion of the QSST’s S corporation stock to which the election under § 1361(d)(2) applies. Under § 1361(d)(2)(A), a beneficiary may elect to

have § 1361(d) apply. Under § 1361(d)(2)(D), this election will be effective up to 15 days and two months before the date of the election.

Section 1361(d)(3) provides that for purposes of § 1361(d), the term “qualified subchapter S trust” means a trust (A) the terms of which require that – (1) during the life of the current income beneficiary, there shall be only 1 income beneficiary of the trust; (ii) any corpus distributed during the life of the current beneficiary may be distributed only to such beneficiary; (iii) the income interest of the current income beneficiary in the trust shall terminate on the earlier of such beneficiary’s death or the termination of the trust; and (iv) upon the termination of the trust during the life of the current beneficiary, the trust shall distribute all of its assets to that beneficiary; and (b) all of the income (within the meaning of § 643(b)) of which is distributed (or required to be distributed) currently to one individual who is a citizen or resident of the United States.

In Revenue Ruling 92-20, the Service held that a provision in a trust agreement that authorizes the trustee to accumulate trust income in the event that the trust does not hold any shares of S corporation stock does not, by itself, preclude the trust’s qualification as a qualified subchapter S trust.

Based on the facts and representations made, we conclude that because Grantor will be treated as the owner of the Trust created under paragraph 1.1 under § 674(a), Trust will be an eligible S corporation shareholder under § 1361(c)(2)(A)(i) during Grantor’s lifetime so long as Grantor remains a citizen and/or resident of the United States. Additionally, the Trust created under paragraph 1.1 will be an eligible S corporation shareholder under § 1361(c)(2)(A)(ii) for the two-year period beginning on the day of Grantor’s death.

Each separate trust governed by Article SECOND or created by paragraph 1.3 of the trust agreement and created within two years of Grantor’s death meets the requirements of § 1361(d)(3), provided that each beneficiary of each trust is a United States citizen and/or resident. Accordingly, each of those trusts created within that period following Grantor’s death qualifies as a “qualified subchapter S trust” under § 1361(d)(3) and each will be treated as a trust described in § 1361(c)(2)(A)(i) provided that each beneficiary makes a proper election under § 1361(d)(2) for his or her trust and all of the income of distributed currently to the beneficiary while the trust holds S corporation stock.

Ruling 3

Section 61(a) defines gross income as all income from whatever source derived.

Section 61(a)(3) provides that gross income includes gains derived from dealings in property.

Section 661(a) provides that in any taxable year a deduction is allowed in computing the taxable income of a trust (other than a trust to which subpart B applies), for the sum of (1) the amount of income for such taxable year required to be distributed currently; and (2) any other amounts properly paid or credited or required to be distributed for such taxable year.

Section 1.661(a)-2(f) of the Income Tax Regulations provides that gain or loss is realized by the trust or estate (or the other beneficiaries) by reason of a distribution of property in kind if the distribution is in satisfaction of a right to receive a distribution of a specific dollar amount, of specific property other than that distributed, or of income as defined under § 643(b) and the applicable regulations, if income is required to be distributed currently.

Section 662 provides that there shall be included in the gross income of a beneficiary to whom an amount specified in § 661(a) is paid, credited, or required to be distributed (by an estate or trust described in § 661), the sum of the following amounts: (1) the amount of income for the taxable year required to be distributed currently to such beneficiary, whether distributed or not; and (2) all other amounts properly paid, credited, or required to be distributed to such beneficiary for the taxable year.

Section 1001(a) provides that the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in § 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in § 1011 for determining loss over the amount realized.

Section 1001(b) states that the amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. Under §1001(c), except as otherwise provided in subtitle A, the entire amount of gain or loss, determined under § 1001, on the sale or exchange of property shall be recognized.

Treas. Reg. § 1.1001-1(a) provides that the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or loss sustained.

Treas. Reg. § 1.1001-1(h)(1) provides that the severance of a trust (including without limitation a severance that meets the requirements of § 26.2642-6 or of § 26.2654-1(b) of this chapter) is not an exchange of property for other property differing materially either in kind or in extent if – (i) An applicable state statute or the governing instrument authorizes or directs the trustee to sever the trust, and (ii) Any non-pro rata funding of the separate trusts resulting from the severance ... whether mandatory or in the discretion of the trustee, is authorized by an applicable state statute or governing instrument.

A partition of jointly owned property is not a sale or other disposition of property where the co-owners of the joint property sever their joint interests but do not acquire a new or additional interest as a result of the transaction. Thus, neither gain nor loss is realized on a partition. See Rev. Rul. 56-437, 1956-2 C.B. 507.

Cottage Savings Ass'n v. Commissioner, 499 U.S. 554 (1991), concerns the issue of when a sale or exchange has taken place that results in the realization of gain or loss under § 1001. In Cottage Savings, a financial institution exchanged its interests in one group of residential mortgage loans for another lender's interests in a different group of residential mortgage loans. The two groups of mortgages were considered "substantially identical" by the agency that regulated the financial institution.

The Supreme Court of the United States in Cottage Savings, 499 U.S. at 560-61, concluded that § 1.1001-1 reasonably interprets § 1001(a) and stated that an exchange of property gives rise to a realization event under § 1001(a) if the properties exchanged are "materially different." In defining what constitutes a "material difference" for purposes of § 1001(a), the Court stated that properties are "different" in the sense that is "material" to the Code so long as their respective possessors enjoy legal entitlements that are different in kind or extent. Cottage Savings, 499 U.S. at 564-65. The Court held that mortgage loans made to different obligors and secured by different homes did embody distinct legal entitlements, and that the taxpayer realized losses when it exchanged interests in the loans. Cottage Savings, 499 U.S. at 566. In this case, the trustee's transfer of the non-S Corporation stock assets from the Trust to the eight new Article THIRD Trusts is authorized by paragraph 4.1(P) of Article FOURTH of the trust agreement. See Treas. Reg. § 1.1001-1(h)(1). Moreover, consistent with Rev. Rul. 56-437, 1956-2 CB 507, each and every asset of Trust, transferred to the Article THIRD Trusts will be divided and distributed on a pro-rata basis among the eight Article THIRD Trusts for each of the Grantor's seven children and the Family Trust. Therefore, the post-division and distribution interests of the eight beneficiaries in the assets of the new Article THIRD Trusts will not result in a material difference in kind or extent of the legal entitlements enjoyed by the beneficiaries within the meaning of Cottage Savings from the interests in the assets given up by the beneficiaries in the Trust.

Consequently, based on the facts presented and the representations made, the pro-rata transfer of assets from Trust to the Article THIRD Trusts will not result in a sale or exchange, or other disposition, of any property for purposes of § 1001(a), and thus no gain or loss will be recognized by the beneficiaries or the trusts on the division for purposes of § 61(a)(3) or § 1001(c). We further conclude that the pro-rata transfer of assets from Trust into the Article THIRD Trusts is not a distribution under § 661 or § 1.661(a)-2(f) and therefore not included in the gross income of any Article THIRD trust beneficiary under § 662.

Ruling 4

Section 643(f) provides that, for purposes of subchapter J of chapter 1 of subtitle A, under regulations prescribed by the Secretary, two or more trusts shall be treated as one trust if (1) such trusts have substantially the same grantor or grantors and substantially the same primary beneficiary or beneficiaries, and (2) a principal purpose of such trusts is the avoidance of the tax imposed by chapter 1.

Section 1806(b) of the Tax Reform Act of 1986 provides that § 643(f) shall apply to taxable years beginning after March 1, 1984; except that, in the case of a trust that was irrevocable on March 1, 1984, it shall apply only to that portion of the trust that is attributable to contributions of corpus after March 1, 1984.

The Article THIRD Trusts will each have different primary beneficiaries. We conclude that as long as the Article THIRD Trusts created by the pro-rata transfer of assets from Trust are separately managed and administered, they will be treated as separate trusts for federal income tax purposes.

Ruling 5

Section 1015(a) provides that if the property was acquired by gift, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if the basis (adjusted for the period before the date of the gift as provided in § 1016) is greater than the fair market value of the property at the time of the gift then for the purpose of determining loss the basis shall be the fair market value.

Section 1.1015-2(a)(1) provides that in the case of property acquired after December 31, 1920, by transfer in trust (other than by a transfer in trust by gift, bequest, or devise) the basis of property so acquired is the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on the transfer under the law applicable to the year in which the transfer was made. If the taxpayer acquired the property by a transfer in trust, the basis applies whether the property be in the hands of the trustee, or the beneficiary, and whether acquired prior to the termination of the trust and distribution of the property, or thereafter.

Based on the facts submitted and representations made, we conclude that because § 1001 does not apply to the pro-rata transfer of assets from Trust into the Article THIRD Trusts, under § 1015 the basis of the trust assets will be the same after pro-rata transfer of assets from Trust as the basis of those assets before the transfer.

Ruling 6

Section 2501(a)(1) imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual.

Section 2511(a) provides that the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2512(a) provides that if the gift is made in property, the value thereof at the date of the gift is considered the amount of the gift.

Section 2512(b) provides that where property is transferred for less than adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration is deemed to be a gift, and is included in computing the amount of gifts made during the calendar year.

In this case, the descendants of Grantor will have the same interests in the Article THIRD trusts that they had as beneficiaries under Trust. Because the beneficial interests of the beneficiaries are substantially the same, both before and after the transfer of assets from Trust to the Article THIRD trusts, no taxable transfer of property will be deemed to occur as a result of this transfer. Accordingly, based on the facts submitted and the representations made, we conclude that the transfer of assets from Trust to the Article THIRD trusts will not create or result in a transfer of property subject to federal gift tax under § 2501.

Rulings 7 and 8

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 2033 provides that the value of the gross estate includes the value of all property to the extent of the interest therein of the decedent at the time of death.

Section 2035(a) provides that if -- (1) the decedent made a transfer (by trust or otherwise) of an interest in any property, or relinquished a power with respect to any property, during the 3-year period ending on the date of the decedent's death, and (2) the value of such property (or an interest therein) would have been included in the decedent's gross estate under § 2036, 2037, 2038, or 2042 if such transferred interest or relinquished power had been retained by the decedent on the date of the decedent's death, then the value of the gross estate shall include the value of any property (or interest therein) that would have been so included.

Section 2036(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2037(a) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if (1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and (2) the decedent has retained a reversionary interest in the property, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 percent of the value of such property.

Section 2038(a)(1) provides that the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, revoke, or terminate, or where the decedent relinquished any such power during the 3-year period ending on the date of the decedent's death.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has, at the time of the decedent's death, a general power of appointment or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition that is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 through 2038, inclusive.

Section 2041(b)(1)(A) provides that a general power of appointment is 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, invade or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Section 2042(2) provides that the value of the gross estate shall be the value of all property to the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

In order for §§ 2035 through 2038 to apply, the decedent must have made a transfer of property or any interest therein (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth) under which the decedent retained an interest in, or power over, the income or corpus of the transferred property. In the present case, the proposed transfer of assets from Trust to the Article THIRD trusts does not constitute a transfer within the meaning of §§ 2035 through 2038. The beneficiaries will have the same interests in the Article THIRD trusts that they had as beneficiaries under Trust. Accordingly, based on the facts submitted and the representations made, we conclude that the transfer of assets from Trust to the Article THIRD trusts will not cause any portion of the assets of Trust or the Article THIRD trusts to be includible in the gross estate of any beneficiary under §§ 2035, 2036, 2037, or 2038.

Furthermore, in this case, Spouse is the initial trustee of the proposed trusts created under the trust agreement. It is represented that Spouse has not and will not make any transfers to the proposed trusts created under the trust agreement. It is also represented that no trust will acquire any policy of insurance on Spouse's life. Spouse is not a beneficiary of any Trust created under Article SECOND or Article THIRD. If Spouse is living upon termination of Trust, and no living descendant of Grantor is surviving, a trust will be created for the benefit of Spouse under paragraph 1.3. However, under paragraph 7.1, Spouse will be precluded in participating in any discretionary decisions with regard to the trust created under paragraph 1.3. Accordingly, based on the facts submitted and the representations made, we conclude that any trust created under the trust agreement will not be included in the gross estate of Spouse.

Grantor will not retain any beneficial interest in any proposed trust created under the trust agreement. Grantor cannot be a trustee or trust protector or otherwise have any control over any proposed trust created under the trust agreement. Grantor has no power to remove or replace any trustee of any proposed trust created under the trust agreement. Therefore, no part of Trust or any other trust under the trust agreement is includible in the gross estate of Grantor under §§ 2033, 2035, 2036, 2037, or 2038. If a proposed trust under the trust agreement purchases life insurance on Grantor's life, Grantor cannot act as a trustee or trust protector or remove a trustee or trust protector. Grantor retains no incidents of ownership over the insurance policy. Therefore, no part of Trust or any proposed trust created under the trust agreement should be included in the gross estate of Grantor under § 2042. Accordingly, based on the facts submitted

and the representations made, we conclude that any trust created under the trust agreement will not be included in the gross estate of Grantor.

Ruling 9

Section 2601 imposes a tax on every generation-skipping transfer (GST). Under § 1433(a) of the Tax Reform Act of 1986 (Act), the GST tax is generally applicable to GSTs made after October 22, 1986. However, under § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the tax does not apply to any GST from a trust if the trust was irrevocable on September 25, 1985, and no addition (actual or constructive) was made to the trust after that date.

Under § 2602, the amount of tax imposed under § 2601 is determined by multiplying the taxable amount (the amount involved in the GST transfer) by the applicable rate. Under § 2641, the term "applicable rate" means the product of the maximum federal estate tax rate in the year that the GST occurs and the inclusion ratio. Under § 2642(a)(1), the inclusion ratio with respect to any property transferred in a GST is 1 minus the applicable fraction. Under § 2642(a)(2), in general, the numerator of the applicable fraction is the amount of GST exemption allocated to the property transferred and the denominator is the value of the property transferred.

Section 2631(a) in effect for the date of the transfer provides that for purposes of determining the inclusion ratio, every individual is allowed a GST exemption of \$1,000,000 which may be allocated by the individual or the individual's executor to any property with respect to which the individual is the transferor.

Section 26.2601-1(b)(4)(i) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax under § 26.2601-1(b) will not cause the trust to lose its exempt status. These rules are applicable only for purposes of determining whether an exempt trust retains exempt status for GST tax purposes. The rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

Section 26.2601-1(b)(4)(i)(D) provides that a modification of the governing instrument by judicial reformation or nonjudicial reformation that is valid under applicable state law will not cause an exempt trust to be subject to the GST tax, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. A modification of an exempt trust will result in a shift in a beneficial interest to a lower

generation beneficiary if the modification can result in either an increase in the amount of a GST or the creation of a new GST.

Section 26.2601-1(b)(4)(i)(E), Example 5, provides as follows. In 1980, Grantor established an irrevocable trust for the benefit of his two children, A and B, and their issue. Under the terms of the trust, the trustee has the discretion to distribute income and principal to A, B, and their issue in such amounts as the trustee deems appropriate. On the death of the last to die of A and B, the trust principal is to be distributed to the living issue of A and B, per stirpes. In 2002, the appropriate local court approved the division of the trust into two equal trusts, one for the benefit of A and A's issue and one for the benefit of B and B's issue. The trust for A and A's issue provides that the trustee has the discretion to distribute trust income and principal to A and A's issue in such amounts as the trustee deems appropriate. On A's death, the trust principal is to be distributed equally to A's issue, per stirpes. If A dies with no living descendants, the principal will be added to the trust for B and B's issue. The trust for B and B's issue is identical (except for the beneficiaries), and terminates at B's death at which time the trust principal is to be distributed equally to B's issue, per stirpes. If B dies with no living descendants, principal will be added to the trust for A and A's issue. The division of the trust into two trusts does not shift any beneficial interest in the trust to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the division. In addition, the division does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the two partitioned trusts resulting from the division will not be subject to the provisions of chapter 13.

In the instant case, Trust was created after September 25, 1985. It is represented that sufficient GST exemption was allocated to Trust so that Trust has an inclusion ratio of zero under § 2642. No guidance has been issued concerning changes that may affect the status of trusts that are exempt from GST tax because sufficient GST exemption was allocated to the trust to result in an inclusion ratio of zero. At a minimum, a change that would not affect the GST status of a grandfathered trust should similarly not affect the exempt status of such a trust.

The proposed transfer of assets from Trust to the Article THIRD trusts is similar to the division illustrated in Example 5 of § 26.2601-1(b)(4)(i)(E). Therefore, the proposed transfer of assets (i) will not result in a shift of any beneficial interest in Trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons holding the beneficial interests prior to the division, and (ii) will not extend the time for vesting of any beneficial interest beyond the period provided for under Trust. Accordingly, based upon the facts submitted and the representations made, we conclude that the transfer of assets from Trust to the Article THIRD trusts will not alter the inclusion ratio of Trust, and each Article THIRD trust will have the same inclusion ratio as Trust for GST tax purposes.

This ruling is directed only to the taxpayers requesting it. Section 6110(k)(3) of the Code 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 Trust's authorized representative.

Sincerely,

Faith P. Colson

Faith P. Colson
Senior Counsel, Branch 1
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

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

cc: