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Person To Contact:
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December 14, 2011

RE:

Legend

Decedent	=
Spouse	=
Attorney	=
Residuary Trust	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
State	=
Court	=
Citation	=

Dear :

This letter responds to your authorized representative's letter dated June 7, 2011, requesting rulings on the federal gift and estate tax consequences of a judicial reformation of a trust.

The facts and representations submitted are as follows. Decedent died testate on Date 1. Pursuant to the terms of Decedent's will, (Will), dated Date 2, upon the death of Decedent the residue of Decedent's estate is to be distributed to a marital trust and Residuary Trust.

Article IV, D. Residuary Trust, provides as follows:

2. On the Death of My Wife. On the death of my wife, Trustee shall distribute the principal, free from this trust, to such person or persons,

> *including my wife's estate*, in such manner and amounts, and on such terms, whether in trust or otherwise, as my wife effectively appoints by specific reference hereto in the last written instrument which she executes and delivers to Trustee during her lifetime, or, failing any such instrument, in her Will. (Emphasis added.)

In the year preceding Decedent's death, Decedent had a serious health emergency that necessitated surgery. On Date 3, the day before the surgery, Decedent and Spouse asked Attorney to prepare, for their signature, estate planning documents, including Decedent's Will. On the same day, Attorney drafted Decedent's Will and other estate planning documents and immediately delivered the documents to Decedent's and Spouse's home. Decedent and Spouse signed the documents, including Decedent's Will, the next day, Date 2.

Decedent died the following year on Date 1, survived by Spouse. Spouse is the trustee of the Residuary Trust.

In the rush to finalize the documents, Attorney mistakenly included a power in the Residuary Trust allowing Spouse to appoint the principal to any person or persons, including her own estate. Attorney contends, in a sworn affidavit, that "to function correctly" with respect to Decedent's and Spouse's estate plan, the language in Article 2, Paragraph D, subparagraph 2, "should have provided that [Spouse] could appoint the principal in whatever manner she desires, except not to herself, her estate, or the creditors of her estate." Attorney further avers that limiting Spouse's power of appointment in such manner corresponds with Decedent's estate tax planning goals as expressed in Decedent's Will.

In order to correct the error in the Will and to reflect accurately the intent of Decedent, on Date 4, Spouse, as the Trustee of the Residuary Trust, filed a petition with State Court seeking authorization to reform Residuary Trust to correct the scrivener's error in Article 2, Paragraph D, subparagraph 2 of Decedent's Will. Accordingly, the petition requested that the existing language be struck in its entirety and replaced with the following language:

> 2. <u>On the Death of my Wife</u>. On the death of my wife, Trustee shall distribute the principal, free from this trust, to such person or persons, *other than my wife, my wife's estate, my wife's creditors, or the creditors of my wife's estate*, in such manner and amounts, and on such terms, whether in trust or otherwise, as my wife effectively appoints by specific reference hereto in the last written instrument which she executes and delivers to Trustee during her lifetime, or, failing any such instrument, in her Will. (Emphasis added).

On Date 5, the Court issued an Order granting the petition for reformation.

You have requested the following rulings:

1. The power of appointment granted under the Residuary Trust, as reformed by Court, does not constitute – and never did constitute, at any time – a general power of appointment under § 2041(b) over the assets of Residuary Trust and the assets of the Residuary Trust will not be included in Spouse's gross estate under § 2041(a)(2).

2. The reformation of Article 2, Paragraph D, subparagraph 2, of Decedent's Will did not at any time result in the exercise or release of a general power of appointment under § 2514(b) so as to constitute a gift by Spouse for federal gift tax purposes.

Rulings 1 and 2

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

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 §§ 2031 through 2046, 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, such property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive.

Section 2041(b)(1) provides that for purposes of § 2041(a), the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.

Section 2041(b)(2) provides that the lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of such power.

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

Section 2511 provides that the gift tax shall apply 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 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power.

Section 2514(c) provides that the term "general power of appointment" means a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate. Section 2514(e) provides that the lapse of a power of appointment created after October 21, 1942, during the life of the person possessing the power is considered a release of the power.

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Supreme Court considered whether a state trial court's characterization of property rights conclusively binds a federal court or agency in a federal estate tax controversy. The Court concluded that the decision of a state trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter. If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving "proper regard" to the state trial court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

Under State law, a reformation of written contracts on the grounds of mistake may be decreed upon a showing by evidence that is clear, convincing and free from doubt that the instrument sought to be reformed does not, because of mutual mistake, properly record all of the material provisions of a prior, definite, and specific oral agreement by the parties. Citation. Where there is clear and convincing proof, a unilateral mistake by the settlor is sufficient to warrant reformation. Id.

Therefore, based on the facts submitted and the representations made, we conclude that the reformation of Residuary Trust is consistent with applicable State law, as applied by the highest court of State. Accordingly, we conclude that: (1) the power of appointment granted under the Residuary Trust, as reformed by Court, does not constitute – and never did constitute, at any time – a general power of appointment under § 2041(b) over the assets of Residuary Trust and the assets of the Residuary Trust will not be included in Spouse's gross estate under § 2041(a)(2); and (2) the reformation of Article 2, Paragraph D, subparagraph 2, of Decedent's Will did not at any time result in the exercise or release of a general power of appointment under § 2514(b) so as to constitute a gift by Spouse for federal gift tax purposes.

A copy of this letter should be attached to any gift, estate, or generation-skipping transfer tax returns that you may file relating to these matters.

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 taxpayer 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 your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer 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,

Leslie H. Finlow,
Senior Technician Reviewer, Branch 4
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

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

cc: