

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200414011**

Release Date: 4/2/04

Index Number: 664.03-02, 2055.12-10

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B02 – PLR-107815-03

Date:

December 04, 2003

Estate =

X =

Y =

A =

B =

C =

D1 =

D2 =

Charitable =

Trust =

Charity =

Dear :

This letter responds to your letter dated January 29, 2003, and subsequent correspondence, submitted on behalf of the Estate as its authorized representative, requesting rulings under §§ 664 and 2055 of the Internal Revenue Code.

The information submitted states that X executed Charitable Trust on D1. X died on D2.

Article Two, Paragraph A, of the Charitable Trust provides that in each taxable year of the Charitable Trust, the trustees shall pay to X, during X's lifetime, a unitrust amount equal to eight percent of the net fair market value of the Charitable Trust valued as of the first day of each taxable year of the Charitable Trust.

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Article Two, Paragraph B, of the Charitable Trust provides that, upon the death of X (if X is survived by Y), the unitrust amount shall be divided into two equal shares. One such share shall be paid to Y during Y's lifetime. The remaining such share shall be paid in equal shares to A, B, and C, or the survivors of them, during the lifetime of Y.

Article Four, Paragraph A, of the Charitable Trust provides that upon the death of the survivor of X and Y, the trustees shall distribute all of the then principal and income of the Charitable Trust to Charity, provided X has not exercised the power of appointment described in Article Four, Paragraph B. If the Charity is not an organization described in §§ 170(c), 2055(a), and 2522(a) at the time when any principal or income of the Charitable Trust is to be distributed to it, then the trustees shall distribute such principal or income to such one or more organizations described in §§ 170(c), 2055(a), and 2522(a) as the trustees shall select in their discretion. Article Four, Paragraph B, provides that X reserves the power to appoint the remainder of the Charitable Trust to one or more charitable organizations who shall be described in §§ 170(c), 2055(a), and 2522(a) at the time when any principal or income of the Trust is to be distributed to them. X shall exercise this power to appoint the remainder interest in the Charitable Trust by specific reference to Article Four in X's will, submitted for probate within ninety days of X's death.

Article Seven of the Charitable Trust provides that the Charitable Trust is irrevocable. The trustees, however, shall have the power, in their sole discretion, to amend the Charitable Trust in any manner required for the sole purpose of insuring that the Charitable Trust qualifies and continues to qualify as a charitable remainder unitrust (CRUT) within the meaning of § 664(d)(2).

The executor of Estate represents that under § 664(f)(2), the initial value of the remainder interest in the Charitable Trust, as of D1, was less than ten percent of the net fair market value of the property contributed to the Charitable Trust.

Section 664(d)(2) defines a CRUT for the purposes of § 664 as a trust (A) from which a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in § 170(c) and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life 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 life or lives of such individual or individuals, (C) following the termination of the payments described in § 664(d)(2)(A), the remainder interest in the trust is to be transferred to, or for the use of, an

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organization described in § 170(c) or is to be retained by the trust for such a use or, to the extent the remainder interest is in qualified employer securities (as defined in § 664(g)(4)), all or part of such securities are to be transferred to an employee stock ownership plan (as defined in § 4975(e)(7)) in a gratuitous transfer (as defined by § 664(g)), and (D) with respect to each contribution of property to the trust, the value (determined under § 7520) of such remainder interest in such property is at least 10 percent of the net fair market value of such property as of the date such property is contributed to the trust.

Section 664(f) provides, in general, that if a trust would, but for a qualified contingency, meet the requirements of §§ 664(d)(1)(A) or 664(d)(2)(A), such trust shall be treated as meeting such requirements. For purposes of determining the amount of any charitable contribution (or the actuarial value of any interest), a qualified contingency shall not be taken into account. For purposes of § 664(f), the term “qualified contingency” means any provision of a trust which provides that, upon the happening of a contingency, the payments described in §§ 664(d)(1)(A) or 664(d)(2)(A) (as the case may be) will terminate not later than such payments would otherwise terminate under the trust.

Section 2055(a)(2) provides in general, that for purposes of § 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, which is not disqualified for tax exemption under § 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Section 2055(e)(2)(A) provides that where an interest in property (other than an interest described in § 170(f)(3)(B)) passes or has passed from the decedent to a person, or for a use, described in § 2055(a), and an interest (other than an interest which is extinguished upon the decedent’s death) in the same property passes or has passed (for less than an adequate and full consideration in money or money’s worth) from the decedent to a person, or for a use, not described in § 2055(a), no deduction shall be allowed under § 2055 for the interest which passes or has passed to the person, or for the use, described in § 2055(a) unless, in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or

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charitable remainder unitrust (described in § 664) or a pooled income fund (described in § 642(c)(5)).

Section 2055(e)(3)(A) provides, in general, that a deduction shall be allowed under § 2055(a) in respect of any qualified reformation.

Section 2055(e)(3)(B) defines the term “qualified reformation” as a change of a governing instrument by reformation, amendment, construction, or otherwise which changes a reformable interest into a qualified interest but only if (i) any difference between (I) the actuarial value (determined as of the date of the decedent’s death) of the qualified interest, and (II) the actuarial value (as so determined) of the reformable interest, does not exceed 5 percent of the actuarial value (as so determined) of the reformable interest, (ii) in the case of (I) a charitable remainder interest, the nonremainder interest (before and after the qualified reformation) terminated at the same time, or (II) any other interest, the reformable interest, and the qualified interest are for the same period, and (iii) such change is effective as of the date of the decedent’s death. A nonremainder interest (before reformation) for a term of years in excess of 20 years shall be treated as satisfying § 2055(e)(3)(B)(ii)(I) if such interest (after reformation) is for a term of 20 years.

Section 2055(e)(3)(C)(i), in general, defines the term “reformable interest” as any interest for which a deduction would be allowable under § 2055(a) at the time of the decedent’s death but for § 2055(e)(2).

Section 2055(e)(3)(C)(ii) provides that the term “reformable interest” does not include any interest unless, before the remainder vests in possession, all payments to persons other than an organization described in § 2055(a) are expressed either in specified dollar amounts or a fixed percentage of the fair market value of the property. For purposes of determining whether all such payments are expressed as a fixed percentage of the fair market value of the property, § 664(d)(3) shall be taken into account.

Section 2055(e)(3)(C)(iii) provides that § 2055(e)(3)(C)(ii) shall not apply to any interest if a judicial proceeding is commenced to change such interest into a qualified interest not later than the 90th day after (I) if an estate tax return is required to be filed, the last date (including extensions) for filing such returns, or (II) if no estate tax return is required to be filed, the last date (including extensions) for filing the income tax return for the first taxable year for which such a return is required to be filed by the trust.

Section 2055(e)(3)(D) defines the term “qualified interest” as an interest for which a deduction is allowable under § 2055(a).

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Section 2055(e)(3)(J) provides that in the case of a trust that would qualify (or could be reformed to qualify pursuant to § 2055(e)(3)(B)) but for failure to satisfy the requirement of §§ 664(d)(1)(D) or 664(d)(2)(D), such trust may be (i) declared null and void ab initio, or (ii) changed by reformation, amendment, or otherwise to meet such requirement by reducing the payout rate or the duration (or both) of any noncharitable beneficiary's interest to the extent necessary to satisfy such requirement, pursuant to a proceeding that is commenced within the period required in § 2055(e)(3)(C)(iii). In a case described in § 2055(e)(3)(J)(i), no deduction shall be allowed under title 26 for any transfer to the trust and any transactions entered into by the trust prior to being declared void shall be treated as entered into by the transferor.

Based solely on the facts and representations submitted, we conclude that the Charitable Trust failed to meet the definition of a CRUT under § 664 as of D1. The termination of the unitrust payments upon the death of Y is a qualified contingency within the meaning of § 664(f). Therefore, this provision does not cause the Charitable Trust to fail to meet the definition of a CRUT under § 664(d)(2)(A). However, the value of the charitable remainder interest must be calculated without regard to the qualified contingency. Based on the representations submitted, the value of the remainder interest of the Charitable Trust at inception was less than the 10 percent of the initial net fair market value of the trust property required by § 664(d)(2)(D). We further conclude that the Charitable Trust is not eligible for qualified reformation under § 2055(e)(3)(A). Because the Charitable Trust failed to meet the definition of a CRUT under § 664(d)(2)(D), any reformation must commence within the period described in §§ 2055(e)(3)(J) and 2055(e)(3)(C)(iii). No such reformation was timely commenced within this period.

Except as specifically set forth above, we express no opinion concerning the federal tax consequences of the transactions described above under any other provisions of the Code. In particular, we express no opinion as to whether any other provisions of Charitable Trust cause it to fail to meet the definition of a CRUT under § 664.

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.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to the Estate.

Sincerely,

J. THOMAS HINES
Chief, Branch 2
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures: 2
Copy of this letter
Copy for § 6110 purposes