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:TEGE:EOEG:EO2
PLR-103051-17
Date:
July 24, 2017

Legend:

Foundation =
Trustee 1 =
Trustee 2 =
State =
Year 1 =
Trust =
Grantor =
Agreement =

Dear :

This letter responds to a letter from your authorized representative dated January 23, 2017, and subsequent correspondence submitted on behalf of Foundation, requesting rulings concerning whether the entering into and making or receiving payments under the Agreement with Trustee 1 and Trustee 2 will result in an act of self-dealing under Internal Revenue Code ("IRC") § 4941 and whether any refunds or payments pursuant to the Agreement will constitute taxable expenditures under § 4945.

Foundation is a nonprofit public benefit corporation incorporated under the laws of State. Grantor established and was principal donor to Foundation. In Year 1, Foundation received a determination from the Internal Revenue Service (IRS) that it was exempt from Federal income tax under IRC § 501(a) and described as a private foundation under § 509(a).

Trust was created by Grantor and is a trust subject to the laws of State. Pursuant to the terms of the Trust, Foundation is the sole remaining beneficiary of Trust, which became irrevocable upon the death of Grantor. Trustee 1 and Trustee 2 are the successor co-trustees of the Trust.

You represent that Trust and Foundation are seeking to fulfill Grantor's intent that the Trust distribute the maximum value of Trust to the Foundation at the earliest opportunity. You further represent that the administration of Trust has not been completed and is ongoing. Pursuant to the provisions of Trust instrument, assets remaining to be distributed to the Foundation may be or become subject to expenses, losses or liabilities sustained in the administration of Trust. You state that under State law, Trustee 1 and Trustee 2 may be personally liable for expenses, losses and liabilities sustained in the administration of the Trust. Given the potential exposure to future claims and liabilities against Trust, Trustee 1 and Trustee 2 believe it would be prudent to retain until the completion of trust administration a sufficient reserve to satisfy any such claims. You represent that there is a risk that liabilities will likely extend well beyond the termination of Trust.

The transfer of the remaining assets of Trust to the Foundation is within the powers of Trustee 1 and Trustee2. Foundation has requested that Trustee 1 and Trustee 2 accelerate distributions of the assets of the Trust to Foundation before Trustee 1 and Trustee 2 know the full extent of potential claims and liabilities. In order to induce Trustee 1 and Trustee 2 to make substantial distributions to Foundation sooner than they otherwise would make them, Foundation has proposed to execute and deliver to Trustee 1 and Trustee 2 the Agreement.

Under the Agreement, Foundation acknowledges that Trustee 1 and Trustee 2 would normally defer a substantial portion of the distributions to Foundation until a final resolution of all liabilities and claims. Trustee 1 and Trustee 2 would only make a final distribution of the remaining assets of the Trust when they are satisfied that all liabilities of the Trust have been determined and discharged. Trustee 1 and Trustee 2 are willing to consider accelerating the distribution of assets to the Foundation, provided that the Foundation obligates itself to indemnify Trustee 1 and Trustee 2. Further, under the Agreement, Foundation agrees to return any distribution required to be refunded under the Agreement to either Trustee 1 or Trustee 2 should claims and liabilities arise. Under the Agreement, the distribution of assets to the Foundation will include cash or in kind assets whether investment securities, real property or other assets. Pursuant to the Agreement, Trustee 1 and Trustee 2 can be assured that the Foundation will pay such amounts or return such portion of distributions that Trustee 1 and Trustee 2 determine in their sole and absolute discretion are needed or desirable to pay all such liabilities.

In addition, under the Agreement, Foundation agrees to indemnify and hold harmless Trustee 1 and Trustee 2 from any and all liabilities and expenses sustained in the administration of the Trust. Further, nothing in the Agreement requires Trustee 1 or Trustee 2 to make any distributions to Foundation at any particular time and Trustee 1 and Trustee 2 shall determine the amounts of and whether to make distributions in their sole and absolute discretion.

RULINGS REQUESTED

1. Payments made under the Agreement to either Trustee 1 or Trustee 2 will not be a taxable expenditure under IRC § 4945.

2. That no act of self-dealing under IRC § 4941 will arise solely on account of Foundation's entering into the Agreement, making or receiving payments pursuant to the Agreement, or any other return by the Foundation of property distributed by the Trust under the Agreement.

LAW

IRC § 4941(a)(1) imposes a tax on each act of self-dealing between a disqualified person and a private foundation.

IRC § 4941(d)(1) provides, in part, that the term self-dealing means any direct or indirect -- (A) sale or exchange, or leasing, of property between a private foundation and a disqualified person; (B) lending of money or any other extension of credit between a private foundation and a disqualified person; (C) furnishing of goods, services, or facilities between a private foundation and a disqualified person; (D) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person; and (E) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation.

IRC § 4945(a)(1) imposes on each taxable expenditure (as defined in subsection (d)) a tax equal to 20 percent of the amount thereof. The tax imposed by this paragraph shall be paid by the private foundation.

IRC § 4945(d) provides that the term taxable expenditure means any amount paid or incurred by a private foundation -- (1) to carry on propaganda, or otherwise to attempt, to influence legislation, within the meaning of subsection (e); (2) except as provided in subsection (f), to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive; (3) as a grant to an individual for travel, study, or other similar purposes by such individual, unless such grant satisfies the requirements of subsection (g); (4) as a grant to an organization unless (A) such organization (i) is described in paragraph (1) or (2) of § 509(a), (ii) is an organization described in § 509(a)(3) (other than an organization described in clause (i) or (ii) of section 4942(g)(4)(A)), or (iii) is an exempt operating foundation (as defined in section 4940(d)(2)), or (B) the private foundation exercises expenditure responsibility with respect to such grant in accordance with subsection (h), or; (5) for any purpose other than one specified in § 170(c)(2)(B).

IRC § 4946(a)(1) provides, in part, that the term disqualified person means, with respect to a private foundation, a person who is -- (A) a substantial contributor to the foundation; (B) a foundation manager (within the meaning of subsection (b)(1)); (C) an owner of more than 20 percent of (i) the total combined voting power of a corporation, (ii) the profits interest of a partnership, or (iii) the beneficial interest of a trust or unincorporated enterprise, which is a substantial contributor to the foundation; (D) a member of the family of any individual described in subparagraph (A), (B), or (C); (E) a corporation in which persons described in subparagraph (A), (B), (C), or (D) hold more than 35 percent of the total combined voting power; (F) a partnership in which persons described in subparagraph (A), (B), (C), or (D) hold more than 35 percent of the profits interest; or (G) a trust or estate in which persons described in subparagraph (A), (B), (C), or (D) hold more than 35 percent of the beneficial interest,

IRC § 4946(b)(1) provides, in part, that the term foundation manager means, with respect to any private foundation an officer, director, or trustee of a foundation (or an individual having powers or responsibilities similar to those of officers, directors, or trustees of the foundation).

In Underwood v. United States, 461 F. Supp. 1382 (N.D. Texas 1978), an individual agreed to contribute money to a law school on the condition that the contribution would be fully deductible by him for federal income tax purposes. The individual set up a private foundation for this purpose and contributed money to the foundation. Upon audit, the IRS determined that the individual's contributions exceeded the maximum permissible percentages and disallowed part of his claimed deductions. Thereafter, the foundation returned to the individual the amount of the contributions disallowed by the IRS. The IRS claimed that the refund to the individual was an act of self-dealing under IRC § 4941(d)(1)(E) and a taxable expenditure under § 4945. The Court held that because the individual's commitment was conditioned upon his being able to deduct all of his contributions for federal income tax purposes, when it was subsequently determined by the IRS that the contributions made by the individual to the foundation were not so deductible, the return by the foundation of the amount of those contributions to which the foundation should not have received and which it was not entitled to keep is not an amount paid or incurred by a private foundation within the meaning of § 4945.

ANALYSIS

1. Ruling Under IRC § 4945

Any payments made by the Foundation through the return of distributions in accordance with the Agreement are similar to the return of contributions in Underwood. The Court in Underwood, supra, considered whether a foundation's return of a conditional contribution was a taxable expenditure within the meaning of § 4945. The Court stated that the amounts returned were assets that the foundation should not have received and

which it was not entitled to keep. Such amounts are not an “amount paid or incurred by a private foundation” within the meaning of § 4945.

Under the Agreement, Trustee 1 and Trustee 2 will make a conditional distribution of Trust assets to Foundation. Should a liability arise triggering the terms of the Agreement, the return of distributions by the Foundation under the terms of the Agreement is a return of assets that Foundation would not have received had the final distributions not occurred until all liabilities and expenses of the Trust had been administered and are assets which it was not entitled to keep. Accordingly, such payments through the return of assets will not constitute amounts paid or incurred for a non-charitable purpose by a private foundation within the meaning of § 4945(d)(5). Therefore, payments made under the Agreement to either Trustee 1 or Trustee 2 will not be a taxable expenditure under § 4945(d).

2. Ruling under IRC § 4941

Generally, IRC § 4941(a)(1) imposes a tax on any act of self-dealing between a disqualified person as defined in § 4946(a)(1) and a private foundation.

IRC § 4941(d)(1) defines self- dealing as any direct or indirect transaction described above, including any transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation. However, § 4941 does not apply to any transactions between a private foundation and a person who is not a disqualified person.

In this case, neither Trustee 1 nor Trustee 2 will be treated as a disqualified person as described in § 4946(a)(1) with respect to Foundation. Therefore, no act of self-dealing will arise on account of entering into the Agreement with Trustee 1 and Trustee 2, making or receiving payments pursuant to the Agreement or any return of property by the Foundation pursuant to the Agreement.

RULINGS

Based solely on the facts and representations submitted by Foundation we rule:

1. Payments made under the Agreement to either Trustee 1 or Trustee 2 will not constitute taxable expenditures under IRC § 4945.

2. That no act of self-dealing under IRC § 4941 will arise solely on account of Foundation’s entering into the Agreement, making or receiving payments pursuant to the Agreement, or any other return by the Foundation of property distributed by the Trust under the Agreement.

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.

Except as expressly provided herein, no opinion is expressed or implied as to the federal tax consequences of the facts described above under any other provision of the IRC.

This ruling is directed only to the taxpayer requesting it. IRC § 6110(k)(3) provides that it may not be used or cited as precedent. This ruling is directed only to Foundation. IRC § 6110(k)(3) provides that it may not be used or cited as precedent by any other taxpayer, including Trustee 1, Trustee 2, or Trust.

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

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

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,

Taina Edlund
Senior Technical Reviewer
(TEGE Associate Chief Counsel - EO)

cc: