

**INTERNAL REVENUE SERVICE**  
**NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM**

December 10, 2001

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Index (UIL) No.: 2601-00.00; 2613-00.00; 2652-00.00  
CASE MIS No.: TAM-138332-01/CC:PSI:B04

Taxpayer's Name:

Taxpayer's Identification No:  
Year Involved:  
Date of Conference:

LEGEND:

Decedent =

Trust =

Date 1 =

Date 2 =

Date 3 =

$\$a$  =

$\$b$  =

ISSUE:

Are transfers on Decedent's death from Decedent's revocable trust to trusts for the benefit of Decedent's grandchildren and great grandchildren "direct skips" for generation-skipping transfer tax purposes and, therefore, subject to generation-skipping transfer tax under § 2601 of the Internal Revenue Code at the time of the Decedent's death?

CONCLUSION:

The transfers to trusts for Decedent's grandchildren and great grandchildren are "direct skips" for generation-skipping transfer tax purposes and, therefore, the transfers are subject to generation-skipping transfer tax under § 2601 at the time of the

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Decedent's death.

FACTS:

Decedent executed Trust, a revocable inter vivos trust, on Date 1. On Date 2, Decedent executed an amendment and restatement of Trust. Under Article VI.D.1. of Trust as amended and restated, after Decedent's death, the trustee is directed to establish a separate trust for each then living grandchild of Decedent. Each trust is to be funded with \$a and is to continue until the grandchild reaches age forty-five. The trustee has discretion to distribute income and principal to each grandchild pursuant to an ascertainable standard. Income not distributed is to be accumulated and added to principal. When each grandchild reaches age thirty-five, the trustee is to distribute to the grandchild one-third of the trust principal; when the grandchild reaches age forty, one-half of the remainder of the trust principal is to be distributed to the grandchild; and when the grandchild reaches age forty-five, the remainder of the trust principal is to be distributed to the grandchild. In the event a grandchild dies before attaining age 45, the corpus is to be distributed pursuant to the grandchild's exercise of a testamentary general power of appointment over his or her separate trust. If a grandchild fails to exercise the power of appointment, trust principal is to be distributed to the issue of such grandchild by right of representation, or if there are no issue, to Decedent's issue by right of representation.

Article VI.D.2 of Trust creates separate trusts for each of Decedent's great grandchildren living at the time of Decedent's death in the amount of \$b. All trust terms for the trusts created for the great grandchildren are the same as the terms for the trusts created for the grandchildren under Article VI.D.1.

Decedent died on Date 3. Pursuant to Article VI of Trust, 10 separate trusts were created for Decedent's 10 grandchildren and 4 separate trusts were created for Decedent's great grandchildren. Decedent's executor reported the trusts on Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, but did not remit any generation-skipping transfer tax with the return.

Decedent's executor takes the position that no generation-skipping transfer tax should be paid until it is absolutely certain that a grandchild or great grandchild does, in fact, receive a distribution from his or her trust. The executor argues that there is a possibility that a grandchild or great grandchild may die prior to age 45 without exercising the testamentary power of appointment, and without issue, in which case any remaining trust corpus might pass to non-skip persons, i.e., Decedent's issue. Because the possibility exists, however remote, that a non-skip person may ultimately receive a distribution from one of the trusts, no generation-skipping tax should be imposed currently on the transfers to the trusts. Decedent's executor does not dispute that if a grandchild or a great grandchild actually receives a distribution from a trust, that a generation-skipping transfer tax is due, but instead believes that no tax should be paid until such time as the grandchild or great grandchild actually receives a distribution.

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## LAW AND ANALYSIS

Section 2601 imposes a tax on every generation-skipping transfer. A “generation-skipping transfer” is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Under section 2612(c), the term “direct skip” means a transfer subject to a tax imposed by chapter 11 (the estate tax) or chapter 12 (the gift tax) of an interest in property to a skip person. Section 26.2612-1(a)(1) of the Generation-Skipping Transfer Tax Regulations provides that a direct skip is a transfer to a skip person that is subject to Federal estate or gift tax. If property is transferred to a trust, the transfer is a direct skip only if the trust is a skip person. Only one direct skip occurs when a single transfer of property skips two or more generations.

Section 2613(a) defines “skip person” as follows:

- (1) a natural person assigned to a generation that is two or more generations below the generation assignment of the transferor, or
- (2) a trust
  - (A) if all interests in such trust are held by skip persons, or
  - (B) if there is no person holding an interest in such trust, and at no time after such transfer may a distribution (including distributions on termination) be made from such trust to a non-skip person.

Under section 2613(b), a “non-skip person” means any person who is not a skip person.

Section 2652(c)(1)(A) provides that a person has an interest in property held in trust if (at the time the determination is made) such person has a right (other than a future right ) to receive income or corpus from the trust, or such person is a permissible current recipient of income or corpus from the trust and is not described in § 2055(a).

Section 2652(a)(1)(A) provides that the term “transferor” means, in the case of any property subject to the estate tax, the decedent.

In the present case, each grandchild or great grandchild is the only person who has an “interest” in his or her respective trust for purposes of § 2652(c)(1)(A). That is, each grandchild or great grandchild is a permissible current recipient of income or corpus from the trust, and no other person has any present right to receive income or corpus or is a permissible current distributee of income or corpus. Although Decedent’s children may possibly receive a distribution from a trust at some future time, such a future contingent possibility does not constitute an “interest” in a trust for purposes of § 2652(c)(1)(A).

Accordingly, since all interests, as that term is defined in § 2652(c)(1)(A), in each of the trusts are held by skip persons with respect to the Decedent (Decedent’s

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grandchildren or great grandchildren) each trust is a skip person under § 2613(a)(2). Consequently, the transfers from Decedent's revocable trust that is includible in her gross estate and subject to estate tax, to the 10 trusts established for each grandchild and the 4 trusts established for each great grandchild, are transfers to skip persons that constitute direct skips, subject to generation-skipping transfer tax at the time of Decedent's death.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.