

New York State Department of Taxation and Finance
Office of Tax Policy Analysis
Technical Services Division

TSB-A-03(6)I
Income Tax
November 21, 2003

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I020830A

On August 30, 2002, a Petition for Advisory Opinion was received from Milbank, Tweed, Hadley & McCloy, LLP, c/o Georgiana J. Slade, Esq., One Chase Manhattan Plaza, New York, New York 10005.

The issue raised by Petitioner, Milbank, Tweed, Hadley & McCloy, LLP, is whether the donee of a power of appointment over property held in trust who appoints property in trust is the transferor to the appointive trust for purposes of section 605(b)(3) of the Tax Law and section 105.23 of the Personal Income Tax Regulations (Regulations).

Petitioner submits the following six hypothetical situations for appointive trusts created by the exercise of a power of appointment as the basis for this Advisory Opinion.

Situation 1

In 1995, A, a New York domiciliary, establishes an irrevocable trust, T1, for the benefit of A's daughter, B, a non-New York domiciliary. A is the sole transferor of assets to the trust. Under the terms of the trust, B is permitted to appoint the assets of the trust in further trust for the benefit of one or more of B's descendants. This power is both presently exercisable and exercisable by Will. In 2001, B (while still a non-New York domiciliary) irrevocably appoints the assets of the trust to be held in further trust, T2, for benefit of C, who is B's daughter. The Trustee of both T1 and T2 is a New York domiciliary bank.

Situation 2

In 1995, A, a non-New York domiciliary, establishes an irrevocable trust, T1 for the benefit of A's daughter, B, a New York domiciliary. A is the sole transferor of assets to the trust. Under the terms of the trust, B is permitted to appoint the assets of the trust in further trust for the benefit of one or more of B's descendants. This power is both presently exercisable and exercisable by Will. In 2001, B (while still a New York domiciliary) irrevocably appoints the assets of the trust to be held in further trust, T2, for benefit of C, who is B's daughter. The Trustee of both T1 and T2 is a New York domiciliary bank.

Situation 3

In 1995, A, a New York domiciliary, establishes an irrevocable trust, T1, for the benefit of A's daughter, B, a non-New York domiciliary. A is the sole transferor of assets to the trust. Under the terms of the trust, B is permitted to appoint the assets of the trust (outright or in trust) for the benefit of any individual, including herself. This power is presently exercisable. In 2001, B (while still a non-New York domiciliary) irrevocably appoints the assets of the trust to be held in further

trust, T2, for benefit of C, who is B's daughter. The Trustee of both T1 and T2 is a New York domiciliary bank.

Situation 4

In 1995, A, a non-New York domiciliary, establishes an irrevocable trust, T1, for the benefit of A's daughter, B, a New York domiciliary. A is the sole transferor of assets to the trust. Under the terms of the trust, B is permitted to appoint the assets of the trust (outright or in trust) for the benefit of any individual, including herself. This power is presently exercisable. In 2001, B (while still a New York domiciliary) irrevocably appoints the assets of the trust to be held in further trust, T2, for benefit of C, who is B's daughter. The Trustee of both T1 and T2 is a New York domiciliary bank.

Situation 5

In 1995, A, a New York domiciliary, establishes an irrevocable trust, T1, for the benefit of A's daughter, B, a non-New York domiciliary. A is the sole transferor of assets to the trust. Under the terms of the trust, B is permitted to appoint the assets of the trust (outright or in trust) for the benefit of any individual, including herself. This power is exercisable by Will only. In 2001, B dies while still a non-New York domiciliary. In her Will (duly admitted to probate), B irrevocably appointed the assets of the trust to be held in further trust, T2, for benefit of C, who is B's daughter. The Trustee of both T1 and T2 is a New York domiciliary bank.

Situation 6

In 1995, A, a non-New York domiciliary, establishes an irrevocable trust, T1, for the benefit of A's daughter, B, a New York domiciliary. A is the sole transferor of assets to the trust. Under the terms of the trust, B is permitted to appoint the assets of the trust (outright or in trust) for the benefit of any individual, including herself. This power is exercisable by Will only. In 2001, B dies while still a New York domiciliary. In her Will (duly admitted to probate) B irrevocably appoints the assets of the trust to be held in further trust, T2, for benefit of C, who is B's daughter. The Trustee of both T1 and T2 is a New York domiciliary bank.

Applicable law and regulations

Section 605(b)(3) of the Tax Law defines a resident estate or trust, and provides, in part:

Resident estate or trust. A resident estate or trust means:

(A) the estate of a decedent who at his death was domiciled in this state,

(B) a trust, or a portion of a trust, consisting of property transferred by will of a decedent who at his death was domiciled in this state, or

(C) a trust, or portion of a trust, consisting of the property of:

(i) a person domiciled in this state at the time such property was transferred to the trust, if such trust or portion of a trust was then irrevocable, or if it was then revocable and has not subsequently become irrevocable; or

(ii) a person domiciled in this state at the time such trust, or portion of a trust, became irrevocable, if it was revocable when such property was transferred to the trust but has subsequently become irrevocable.

For the purposes of the foregoing, a trust or portion of a trust is revocable if it is subject to a power, exercisable immediately or at any future time, to revert title in the person whose property constitutes such trust or portion of a trust, and a trust or portion of a trust becomes irrevocable when the possibility that such power may be exercised has been terminated.

Section 605(b)(3)(D) of the Tax Law, as added by Chapter 658 of the Laws of 2003, applicable to tax years beginning on or after January 1, 1996, provides as follows:

(i) Provided, however, a resident trust is not subject to tax under this article if all of the following conditions are satisfied:

(I) all the trustees are domiciled in a state other than New York;

(II) the entire corpus of the trusts, including real and tangible property, is located outside the state of New York; and

(III) all income and gains of the trust are derived from or connected with sources outside of the state of New York, determined as if the trust were a non-resident trust.

(ii) For purposes of item (II) of clause (i) of this subparagraph, intangible property shall be located in this state if one or more of the trustees are domiciled in the state of New York.

(iii) Provided further, that for the purposes of item (I) of clause (i) of this subparagraph, a trustee which is a banking corporation as defined in subsection (a) of section fourteen hundred fifty-two of this chapter and which is domiciled outside the state of New York at the time it becomes a trustee of the trust shall be deemed to continue to be a trustee domiciled outside the state of New York notwithstanding that it thereafter otherwise becomes a trustee domiciled in the state of New York by virtue of being acquired by, or becoming an office or branch of, a corporate trustee domiciled within the state of New York.

Section 605(b)(4) of the Tax Law defines a nonresident estate or trust, and provides:

Nonresident estate or trust.

(A) A nonresident estate means an estate which is not a resident.

(B) A nonresident trust means a trust which is not a resident or part-year resident.

Section 105.20(d)(1) of the Regulations provides:

Domicile, in general, is the place which an individual intends to be such individual's permanent home - the place to which such individual intends to return whenever such individual may be absent.

Section 105.23(c) of the Regulations provides:

The determination of whether a trust is a resident trust is not dependent on the location of the trustee or the corpus of the trust or the source of income; provided, however, no New York State personal income tax may be imposed on such trust if all of the following conditions are met:

(1) all the trustees are domiciled in a state other than New York State;

(2) the entire corpus of the trust, including real and tangible property is located outside of New York State; and

(3) all income and gains of the trust are derived or connected from sources outside of New York State, determined as if the trust were a nonresident.

Section 10-3.1(a) of the Estates, Powers and Trusts Law (EPTL) provides:

This article applies to powers of appointment. A power of appointment, as the term is used in this article, is an authority created or reserved by a person having property subject to his disposition, enabling the donee to designate, within such limits as may be prescribed by the donor, the appointees of the property or the shares or the manner in which such property shall be received.

Section 10-3.2 of the EPTL provides:

(a) A power of appointment is:

(1) general or special.

(2) exclusive or non-exclusive.

(b) A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his creditors or the creditors of his estate.

(c) All other powers of appointment are special.

(d) A special power of appointment is exclusive if it may be exercised in favor of one or more of the appointees to the exclusion of the others.

(e) A special power of appointment is non-exclusive if it must be exercised in favor of all the appointees.

Section 10-3.3 of the EPTL provides:

(a) A power of appointment, as to the time of its exercise, is either presently exercisable, testamentary or postponed.

(b) A power of appointment is presently exercisable if it may be exercised by the donee, during his lifetime or by his written will, at any time after its creation, and does not include a postponed power as described in paragraph (d).

(c) A power of appointment is testamentary if it is exercisable only by a written will of the donee.

(d) A power of appointment is postponed if it is exercisable by the donee only after the expiration of a stated time or after the occurrence or non-occurrence of a specified event.

Internal Revenue Code (IRC) section 2041(a) contains the rules for powers of appointment with respect to determining the gross estate for federal estate tax purposes, and provides, in part:

The value of the gross estate shall include the value of all property.

(1) Powers of appointment created on or before October 21, 1942. To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent....

* * *

(2) Powers created after October 21, 1942. 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 sections 2035 to 2038, inclusive....

IRC section 2041(b)(1) contains the definition of a general power of appointment for federal estate tax purposes, and provides, in part:

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; except that

(A) 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.

Opinion

A power of appointment is a hybrid between agency relationship and ownership. A general power of appointment is one that can be exercised wholly in favor of the donee of the power, his or her estate, creditors or the creditors of the estate. If a person has a presently exercisable general power of appointment, the property is treated for purposes of gift and estate taxation, determining validity under the rule against perpetuities, and determining whether a creditor can reach the assets subject to the power, as though the holder of the power owned it outright. If the holder of a power cannot exercise it in favor of himself or herself, his or her estate, creditors or the creditors of the estate, the power is special. A special power of appointment is more like an agency; the holder of the power exercises it on behalf of the property owner. See 17B McKinney's Consolidated Laws of New York, Practice Commentaries on EPTL sections 10-3.1 and 10-3.2.

All property in which a person has an interest at the time of death is includible in the gross estate for federal estate tax purposes to the extent of his or her interest in the property. IRC section 2041 provides that a decedent's gross estate includes the value of property over which the decedent possessed a general power of appointment. For purposes of IRC section 2041, the term general power of appointment means a power which is exercisable in favor of the decedent, his or her estate, creditors, or creditors of the estate. This includes a power of appointment which is either presently exercisable or testamentary.

For purposes of section 605(b)(3), (4) of the Tax Law, the residency of an appointive trust created by the exercise of a power of appointment is determined based on the domicile of the donor of the property who transferred the property to the trust. See Senate Rules Committee memo S. 4410 (1967) L 1967, ch. 792, 1967 NY Legis Ann, at 222. A person who transfers property held in trust to an appointive trust by the exercise of a general power of appointment over the trust property is considered the donor of the trust property for purposes of determining the residency of the appointive trust. Conversely, a person who transfers property held in trust to an appointive trust by the exercise of a special power of appointment over the trust property is not considered the donor of the trust property for purposes of determining the residency of the appointive trust. The donor of the special power of appointment is considered the donor of the trust property for purposes of determining the residency of the appointive trust.

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In situations 1 and 2, B, the donee of a presently exercisable power of appointment and testamentary power of appointment over the property of T1, was only permitted to appoint the assets of the trust in further trust for the benefit of B's decedents. Therefore, B possessed a special power of appointment. In situation 1, B, while a nonresident of New York State, appointed the assets of T1 in further trust, T2. In situation 2, B, while a resident of New York State, appointed the assets of T1 in further trust, T2. Since B possessed a special power of appointment, A, the donor of the power, is considered the donor of the property transferred to T2. Therefore, the appointive trust, T2, created in situation 1 is a resident trust pursuant to section 605(b)(3) of the Tax Law, since the donor of the property, A, was a New York domiciliary. The appointive trust, T2, created in situation 2 is a nonresident trust pursuant to section 605(b)(4) of the Tax Law, since the donor of the property, A, was a non-New York domiciliary.

In situations 3 and 4, B, the donee of a presently exercisable power of appointment over the property of T1, was permitted to appoint the assets of the trust for the benefit of any individual, including herself. Therefore, B, possessed a general power of appointment. In situation 3, B, while a nonresident of New York State, appointed the assets of T1 in further trust, T2. In situation 4, B, while a resident of New York State, appointed the assets of T1 in further trust, T2. Since B possessed a general power of appointment, B is considered the donor of the property transferred to T2. Therefore, the appointive trust, T2, created in situation 3 is a nonresident trust pursuant to section 605(b)(4) of the Tax Law, because B was a nonresident domiciliary. The appointive trust, T2, created in situation 4 is a resident trust pursuant to section 605(b)(3) of the Tax Law, because B was a resident domiciliary.

In situations 5 and 6, B, the donee of a testamentary power of appointment which is exercisable only by will was permitted to appoint the assets of the trust for the benefit of any individual, including herself. Therefore, B, possessed a general power of appointment. In situation 5, B dies while a nonresident of New York State. By will, B appointed the assets of T1 in further trust, T2. In situation 6, B, dies while a resident of New York State. By will, B appointed the assets of T1 in further trust, T2. Since B possessed a general power of appointment, B is considered the donor of the property transferred to T2. Therefore, the appointive trust, T2, created in situation 5 is a nonresident trust pursuant to section 605(b)(4) of the Tax Law, because B was a nonresident domiciliary. The appointive trust, T2, created in situation 6 is a resident trust pursuant to section 605(b)(3) of the Tax Law, because B was a resident domiciliary.

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/s/
Jonathan Pessen
Tax Regulations Specialist IV
Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.