200043053

DEPARMENT OF TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Date: JUL 31 2000

Contact Person:

ID Number:

Telephone Number:

T:EO:RA:T4

SIN# 1.507.00-00 507.01-01. 170.00-00.

A =

B =

C =

D =

E =

Dear Sir or Madam:

This is in reply to a ruling request dated September 14, 1999, with respect to a proposed transfer of artwork to you.

A is dedicated to the appreciation of art, especially paintings, literary works and objets d'art of D. A is owned and operated by your organization. You are recognized as exempt under section 501(c)(3) of the Internal Revenue Code and are classified as other than a private foundation under section 509(a)(1) & 170(b)(1)(A)(vi) because historically you have met the 33 1/3 percent-of- support test. You own and maintain the buildings which house A; operate and maintain the gallery, offices, equipment and gift shop in A; negotiate, coordinate and contract for A with government agencies; employ and supervise staff personnel; receive public contributions, plan public events; lease the land upon which A is located and open A to the public on a daily schedule. You currently own a small percentage of the artwork it displays. The remaining artwork is on loan from other entities.

Your membership has eight members and is self-perpetuating. New voting members may be added by a majority of the existing voting members. Your trustees number between three and thirty and are elected annually by a majority of the voting members. Currently there are twenty trustees. Eight of the trustees are your voting members. The remaining twelve trustees are other individual members of the community. Two of the voting members (and thus, two of the trustees) are the grantors of C or their family members.

401

B is recognized as exempt section 501(c)(3) of the Code and was a private operating foundation under section 4942(j)(3). B's private foundation status was subsequently terminated and it became a supporting organization described in section 509(a)(3) of the Code. B's assets consist solely of artwork created by D. B also currently loans the artwork to your organizaiton B. pursuant to arms length loan agreements. Prior to 1992, A, excluding building and equipment, was operated by B. In 1992, pursuant to a separate private letter ruling request, the completed operations and maintenance of A were transferred to you. B is governed by a board of directors consisting of eight trustees. Three of the eight trustees are selected by its donor members. The remaining five trustees are selected by B's public members. The public members are the voting members who are not related to the donor members.

C was formed pursuant to an irrevocable trust agreement. C is recognized as exempt under section 501(c)(3) of the Code. Its only assets consists of twenty-one paintings by D. Since its inception, all of the paintings owned by it have been located and used by A as part of its collection. Upon the death of either of C's grantors, all of its assets will be distributed to B if it is then in existence or to your organization as successor. In addition to donating of the artwork through the Trusts and B, the grantors are important and irreplaceable resources in the operation and maintenance of your organization. They have considerable expertise in the operations of an art museum and have internally recognized expertise concerning D's artwork. Additionally, the grantors have a lengthy friendship with D and are well connected with members of the international art community. A portion of the artwork on display and used at A is owned by revocable trusts created by C's grantors. The grantor's son is the trustee for these revocable trusts. The grantors have irrevocably pledged all of the artwork which they own at their deaths to either A or B.

For the purposes of consolidating the operations of A and to have the artwork contained in one entity, it is proposed that both B and C transfer all of their title and interest in and to the artwork and other assets to you and subsequently terminate. There will be no restrictions or conditions placed on your use of the artwork. The estimate value of the artwork will exceed the total contributions from all other sources for the year of transfer. This proposed transfer would place ownership of the artwork and A's operation under the control of one large entity with a more public board. Thus, the effectiveness of fundraising may be increased. Additionally, the proposed transfer will consolidate A's operation, decrease costs by eliminating the need for the loan agreements and modifications, and reduce administrative costs.

Section 501(c)(3) of the Code provides for the exemption from federal income tax of organizations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 509(a)(1) of the Code provides that for purposes of this title, the term "private foundation" means a domestic or foreign organization described in section 501(c)(3) other than—(1) an organization described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)); (2) an organization—which (A) normally received more than one-third of its support in each taxable year from any combination of –(i) gifts, grants, contributions, or membership fees, and (ii) gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in an activity which is not an unrelated trade or business (within the meaning of section 513), not including such receipts from any person, or from any bureau of similar agency of a governmental unit (as described in section 170(c)(1)), in any taxable year to the extent such receipts exceed the greater of $5,000 or 1 percent of the organization's support in such taxable year, from persons other than disqualified persons (as defined in section 4946) with respect to the organization, from governmental units described in section 170(c)(1), or from organizations described in section 170(b)(1)(A) (other than in clauses (vii) and (viii)), and

402

(B) normally receives no more than one-third of its support in each taxable year from the sum of –(i) gross investment income (as defined in subsection (e)) and (ii) the excess (if any) of the amount of the unrelated business taxable income (as defined in section 512) over the amount of the tax imposed by section 511.

Section 170(b)(1)(A)(vi) of the Code describes an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, education, or other purpose or function constituting the basis for its exempt under section 501(a)) from a governmental unit referred to in subsection (c)(1) or from direct or indirect contributions from the general public.

Section 1.170A-9(e)(2) of the Income Tax Regulations provides that an organization will be treated as a publicly supported organization if the total amount of support which the organization "normally" (as defined in subparagraph (4) of this paragraph) receives from governmental units referred to in section 170(c)(1), from contributions made directly or indirectly to the general public, or from a combination, of these sources, equals at least 33 1/3 percent of the total support "normally" received by the organization.

Section 1.170A-9(e)(6)(ii) of the regulations provides that in applying the 33 1/3 percent-of-support test one or more contributions may be excluded from both the numerator and the denominator of the fraction if such contribution or contributions constitute an unusual grant. This unusual grant exclusion in generally intended to apply to contributions which:

(a) are attracted by reason of the publicly supported nature of the organization;
(b) are unusual or unexpected with respect to the amount thereof; and
(c) would, by reason of their size, adversely affect the status of the organization as normally being publicly supported.

Section 1.170A-9(e)(6)(iii) of the regulations provides that whether a contribution is a unusual grant is based on all pertinent facts and circumstances and that some of the factors similar to the factors to be considered as set forth in section 1.509(a)-(3)(c)(4).

Section 1.509(a)-3(c)(4) of the regulations lists the following nine factors. No single factor will necessarily be determinative. Among the factors to be considered are:

(1) Whether the contribution was made by any person (or persons standing in a relationship to such person which is described in section 4946(a)(1)(C) through (G)) who created the organization, previously contributed a substantial part of its support or endowment, or stood in a position of authority, such as a foundation manager (within the meaning of section 4946(b)), with respect to the organization. A contribution made by a person other than those person described in this subdivision will ordinarily be given more favorable consideration than a contribution made b a person described in this subdivision;

(2) Whether the contribution was a bequest or an inter vivos transfer. A bequest will ordinarily be given more favorable consideration than an inter vivos transfer;

(3) Whether the contribution was in the form of cash, realty marketable securities, or assets which further the exempt purposes of the organization, such as a gift of a painting to a museum;

(4) Except in the case of a new organization, whether, prior to the receipt of the particular contribution, the organization (a) has carried on an actual program of public solicitation and exempt activities and (b) has been able to attract a

significant amount of public support;

(5) Whether the orgnization may reasonably be expected to attract a significant amount of public support subsequent to the particular contribution. In this connection, continued reliance on unusual grant to fund an organization's current operating expenses (as opposed to providing new endowment funds) may be evidence that the organization cannot reasonably be expected to attract future support from the general public;

(6) Whether, prior to the year in which the particular contribution was received, the organization met the one-third-support test described in subparagraph (1) of this paragraph without the benefit of any exclusions of unusual grants pursuant to subparagraph (3) of this paragraph;

(7) Whether neither the contributor nor any person standing in a relationship to such contributor which is described in section 4946(a)(1)(C) through (G) continues directly or indirectly to exercise control over the organization;

(8) Whether the organizaiton has a representative governing body as described in section 1.509(a)-3(d)(3)(i); and

(9) Whether material restrictions or conditions (within the meaning of section 1.507-2(a)(8)) have been imposed by the transferor upon the transferee in connection with such transfer.

The value of works of art to be transferred to you is so great that, in the year of the transfer, it would adversely affect your status as normally being publicly supported. In comparison to your normal pattern of support, the amount involved is clearly unusual. The purposes of the transfer are to facilitate operations and fundraising of the museum. Therefore, the proposed transfer possesses the three characteristic of an unusual grant set forth in section 1.170A-9(e)(6)(ii) of the regulations.

Futhermore, the proposed transfer satisfies most of the factors described in section 1.509(a)(3)(c)(4) of the regulations. Similarly, the contributions of art constitute an unusual grant pursuant to section 1.170A-9(e)(6)(iii) because the transfer of art to you furthers your exempt purposes in that the art could not be displayed without the loan agreements with B and C; you have been carrying out a program of public solicitation and exempt activities in the past and have shown that you will be able to attract significant amount of public support; the contribution of the art may reasonably be expected to attract a significant amount of public support; you have not in the past relied on the use of the unusual grant exclusion in order to meet the one-third support test; your governing body are experts with respect to the contributed art and its voting members are unrelated to C's creators; and there are no material restrictions or conditions with respect to the transfer of art from B and C.

The proposed transfer therefore constitutes an "unusual grant" as that term is defined in section 1.170A-9(e)(6)(ii) of the regulations. As such, it may be excluded from both the numerator and the denominator of the public support fraction.

Section 507(a) of the Code provides that except as provided in subsection (b), the status of any organization as a private foundation shall be terminated only if-

(1) such organization notifies the Secretary (at such time and in such manner as the Secretary may by regulations prescribe) of its intent to accomplish such termination, or

(2) (A) with respect to such organization, there have been either willful repeated acts (or failures to act), or a willful and flagrant act (or failure to act), giving rise to liability for tax under chapter 42, and
(B) the Secretary notifies such organization that, by reason of subparagraph (A), such organization is liable for tax imposed by subsection (c), and either such organization pays the tax imposed by subsection (c) (or any portion not abated under subsection (g)) or the entire amount of such tax is abated under subsection (g).

Section 507(b)(1)(A) of the Code provides that for the termination of a private foundation without the imposition of tax set forth in section 507(c) if the private foundation, with respect to which there have not been either willful repeated acts or omissions or a willful and flagrant acts or omission giving rise to liability for tax under chapter 42, distributes all of its net assets to one or more organizations described in section 170(b)(1)(A) (other than clauses (vii) and (viii)) each of which has been in existence and so described for a continuous period of at least 60 calendar months immediately preceding such distribution.

Section 507(c) of the Code provides that there is imposed on each organization which is referred to in subsection (a) a tax equal to the lower of (1) the amount which the private foundation substantiates by adequate records or other corroborating evidence as the aggregate tax benefit resulting from the section 501(c)(3) status of such foundation, or (2) the value of the net assets of such foundation.

Section 1.507-2(a)(3) of the regulations provides that the phrase "other than in clauses (vii) and (viii) (in section 507(b)(1)(A)) refers to organizations which are not solely described in section 170(b)(1)(A)(vii) or (viii).

Section 1.507-2(a)(7) of the regulations provides that a private foundation will meet the requirement that it "distributes all of its assets" within the meaning of section 507(b)(1) only if it transfers all of its right, title and interest in and to all of its nets assets to one or more organization referred to in section 507(b)(1)(A) of the Code.

Section 1.507-2(a)(8)(i) of the regulations provides that such transfer is effecutated if the transferor private foundation does not impose any material restriction or condition that prevents the transferee from freely and effectively employing the transferred assets or the income derived therefrom, in furtherance of its exempt purposes. The materiality of any such restriction or condition is determined from all the facts and circumstances of the transfer. The more significant facts and circumstances to be considered in making such a determination are as follows:

(a) Whether the public charity is the owner in fee of the assets it receives from the private foundation;

(b) Whether such assets are to be held and administered by the public charity in a manner consistent with one or more of its exempt purposes;

(c) Whether the governing body of the public charity has the ultimate authority and control over such assets and the income derived therefrom and;

(d) Whether and to what extent the governing body of the public charity is organization and operated so as to be independent from the transferor.

Section 1.507-2(a)(8)(ii) of the regulations provides that one of the more significant facts and circumstances to be considered in making the determination whether a particular condition or restriction imposed upon a transfer of assets is "material" within the meaning of paragraph (a)(8) of this section whether, and the extent to which, the governing body is organized and operated so

405

as to be independent from the transferor. In turn, the determination as to such factor must be determined from all the facts and circumstances. Some of the more significant facts and circumstances to be considered in making such a determination are:

(A) Whether, and to what extent, members of he governing body are comprised of persons selected by the transferor private foundation or disqualified persons with respect thereto, or are themselves such disqualified persons;

(B) Whether, and to what extent, members of the governing body are selected by public officials acting in their capacities as such; and

(C) How long a period of each member of the governing body may serve as such.

Section 1.507-2(a)(8)(iv) of the regulations sets forth facts any one of which will be considered as preventing the transferee from "freely and effectively employing the transferred assets or income derived therefrom, in furtherance of its exempt purposes", as follows:

(A) the transferor private foundation, a disqualified person with respect thereto, or any person or committee designated by, or pursuant to the terms of an agreement with, such a person (hereinafter referred to as 'donor'), reserves the right, directly or indirectly, to name (other than by designation in the instrument of transfer of particular section 509(a)(1), (2), or (3) organizations) the persons to Which the transferee public charity must distribute, or to direct the timing of Such distributions (other than by direction in the instrument of transfer that Some or all of the principal, as opposed to specific assets, not be distributed for a specified period);

(B) the transferor by agreement or otherwise requires the public charity to take or withhold action with respect to the transferred assets, which is not designed to further one or more of the exempt purposes of the public charity, and such action or withholding of action would, if performed by the transferor private foundation with respect to such assets, have subjected the transferor to tax under chapter 42;

(C) the public charity assumes liabilities of the transferor private foundation for purposes inconsistent with the purposes or best interests of the public charity;

(D) the public charity is required to retain investment assets that were transferred;

(E) the transferor retains rights of first refusal with respect to the transferred assets;

(F) an agreement between the transferor private foundation and the public charity establishes irrevocable relationships between the public charity and other entities with respect tot he maintenance or management of the assets transferred; and

(G) any other condition imposed on the public charity which prevents it from exercising ultimate control over the assets received.

B is a publicly supported organization, not a private foundation. Therefore, B cannot be subject to the tax imposed by section 507(c) of the Code.

To constitute a termination under section 507(b)(1)(A) of the Code, C must transfer all of its net assets to an orgnization described in section 170(b)(1)(A) which has been so described for a

continuous period of at least 60 calendar months. C's sole assets are the paintings, which it proposes to transfer to you. The value of these paintings constitutes the net assets of C, since the paintings are not subject to any liabilities. You have been a public charity pursuant to section 170(b)(1)(A)(vi) of the Code for the required 60 calendar months prior to the proposed distribution. Therefore, pursuant to section 1.507-2(a)(7) of the regulations, the transfer of C's paintings to you constitutes termination under section 507(b)(1)(A) of the Code as long as all right, title and interest in and to the paintings is transferred.

Pursuant to section 1.507-2(a)(8) of the regulations, such a transfer is effectuated if C places no material restrictions or conditions on the transfer which would prevent you from freely employing the transferred assets or income derived therefrom. The proposed transfer meets all four of the more significant facts and circumstances to be considered which are set forth in section 1.507-2(a)(8) of the regulations in determining whether there is such a material restriction or condition. First, you will be the sole owner in fee of the art. Second, you will display the art or preserve it for later display in furtherance of your exempt purposes. Third, C will place no restrictions on your trustees' authority and control over the art, or the income derived therefrom, nor will any other person or entity exercise such control pursuant to the transfer. Fourth, your trustees are organized and operated so as to be independent from C. Although there is some overlap between the trustees of C of your governing body, person who are disqualified persons with respect to C control only three-eighths of your governing body. Furthermore, the continued participation of these disqualified persons in your activities furthers your exempt purposes because of their expertise with respect to the art of D and their connections to the international art community. Based on the foregoing, we rule that the transfer of art from C to you constitute a transfer of all of the net assets of C to you pursuant to section 507(b)(a)(A) of the Code.

Based on the information submitted, we rule as follows:

1. After the transfer, your organization will continued to be recognized as exempt under section 501(c)(3) of the Code and recognized as other than a private foundation by virtue of being described in section 509(a)(1) and 170(b)(1)(A)(vi); and

2. After the transfer, C will be terminated as described in section 507(b)(1)(A) of the Code, and B will be dissolved, and neither C nor B will be subject to the tax imposed pursuant to section 507(c).

We are informing your key District Director of this ruling. Because this ruling could help resolve future questions about your federal income tax status, you should keep it in your permanent records.

This ruling is directed only to the organization that requested it. Section 6110(j)(3) of Code provides that it may not be used or cited as precedent.

200043053

If you have any questions, please contact the person whose name and telephone Number are shown in the heading of this letter.

Sincerely,

/S/

Robert C. Harper, Jr.
Chief, Exempt Organizations
Technical Branch 3

408