2019 TRUST ADVISORS FORUM PINEHURST, NORTH CAROLINA

HOT TOPICS

C. GRAY JOHNSEY, M.B.A, J.D., LL.M. (Tax)
WHITE & ALLEN, P.A.
KINSTON, NEW BERN, SNOW HILL, GREENVILLE
NORTH CAROLINA
www.whiteandallen.com

White&Allen

ELINOR J. FOY, J.D., LL.M. (Tax)
WOMBLE BOND DICKINSON
RALEIGH, NORTH CAROLINA
https://www.womblebonddickinson.com/us

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Unless otherwise indicated, all references to "Section", "§_____", and the "Code" are to the specified section in the Internal Revenue Code of 1986, as amended, and to the Code itself. All references to "Regulation", "Regulations", and "Regs" are to the Treasury Regulations issued with respect to the Code. All references to the "Service" or "IRS" are to the Internal Revenue Service. References to the "Act" are to the Tax Cuts and Jobs Act of 2017.

These materials are intended to provide the reader with general guidance. The materials do not constitute, and should not be treated as, legal advice regarding any particular matter or the tax consequences associated with any such matter. Although every effort has been made to assure the accuracy of these materials, the Firms do not assume responsibility for any individual's reliance on these materials. The reader should independently verify all statements made in the materials before applying them to a particular fact situation, and should independently determine both the tax and nontax consequences.

1. Proposed Regulations, IRC §199A

The Act added new §199A establishing a new tax deduction taking effect in 2018 with respect to "qualified business income" from a partnership, S corporation, LLC, or sole proprietorship. This income is sometimes referred to as "pass-through" income.

The deduction is 20% of your "qualified business income" (QBI) from a partnership, S corporation, or sole proprietorship, defined as the net amount of items of income, gain, deduction, and loss with respect to your trade or business. The business must be conducted within the U.S. to qualify, and specified investment-related items are not included, e.g., capital gains or losses, dividends, and interest income (unless the interest is properly allocable to the business). The trade or business of being an employee does not qualify. Also, QBI does not include reasonable compensation received from an S corporation, or a guaranteed payment received from a partnership for services provided to a partnership's business.

The deduction provided in §199A is available regardless of whether you itemize deductions or take the standard deduction. In general, the deduction cannot exceed 20% of the excess of your taxable income over net capital gain. If QBI is less than zero, it is treated as a loss from a qualified business in the following year.

The deduction under §199A reduces the discrepancy in the top rates (21% - 37%) at which business income would be taxed depending on whether the business is taxed as a C corporation or as a pass-through entity. Generally, the §199A deduction results in a top rate of 29.6% for taxation of qualified business income from pass-through entities: (1 – 0.20) x 37% = 29.6%.

The IRS on August 8, 2018 issued 184 pages of Proposed Regulations (including a 104 page preamble to §199A and the multiple trust rule under §643). Some of the Proposed Regulations have been controversial and all of them are complicated.

On January 18, 2019, the IRS released the final §199A Regulations.

See Exhibit A.

2. Proposed Regulations, §20.2010-1

Before the Act, the first $5,000,000 (as adjusted for inflation in years after 2011) of transferred property was exempt from estate tax, gift tax, and generation-skipping tax. For estates of decedents dying and gifts made in 2018, this "basic exclusion amount" as adjusted for inflation, would have been $5,600,000, or $11,200,000 for a married couple. With proper planning, the unused portion of a deceased spouse's exclusion amount (DSUEA) could be added to that of the surviving spouse ("portability") for purposes of the estate tax and gift tax.

For decedents dying and gifts made from 2018 through 2025, the Act doubles the base estate and gift tax exemption amount from $5 million to $10 million. Indexing for post-2011 inflation, and considering C-CPI U adjustment for tax years beginning after 2017, brings this amount to $11,180,000 for 2018, and $22,360,000 per married couple, with the same basic portability techniques. The Act doesn't specifically mention the generation-skipping tax (GST), but since the GST exemption amount is based on the basic exclusion amount, the GST exemption amount is similarly adjusted.

The Act amends §2001(g)(2) directing the Treasury to prescribe Regulations necessary to address any difference in the basic exclusion amount at the time of a gift and at the time of death. This is to deal with the possibility of a "clawback" of a prior gift. A clawback would occur with respect to a prior gift that was covered by the gift tax exclusion at the time of the gift, but results in estate tax because the estate tax exclusion has decreased at the time of the donor's death. This was an issue in 2012 when there was a possibility that the gift tax exclusion could be reduced from $5,000,000 to $1,000,000.

Proposed Regulations were released on November 20, 2018, dealing with the clawback issue. The Proposed Regulations deal specifically with the issue addressed in §2001(g)(2). The Proposed Regulations would amend §20.2010-1 to ensure that a decedent's estate is not inappropriately taxed with respect to gifts made during the increased basic exclusion amount period.

See Exhibit B.

3. Proposed Regulations, §1.170A-1

This document contains proposed amendments to Proposed Regulations under §170. The Proposed Regulations provide rules governing the availability of charitable contribution deductions under §170 when a taxpayer receives or expects to receive a corresponding state or local tax credit. This document also proposes amendments to the Regulations under §642(c) to apply similar rules to payments made by a trust or decedent's estate.

In 1986, the Supreme Court interpreted the phrase "charitable contribution" in §170. The Court held that the "sine qua non of a charitable contribution is a transfer of money or property without adequate consideration"—that is, without the expectation of a quid pro quo. A payment of money generally cannot constitute a charitable contribution if the contributor expects a substantial benefit in return. The Court recognized that some payments may have a "dual character"—part charitable contribution and part quid pro quo— whereby the taxpayer receives some "nominal benefit" of lesser value than the payment. In such cases, the Court reasoned, "it would not serve the purposes of §170 to deny a deduction altogether." Instead, the Court held, the charitable contribution deduction is allowed, but only to the extent the amount donated or the fair market value of the property transferred by the taxpayer exceeds the fair market value of the benefit

received in return, and only if the excess amount was transferred with the intent of making a gift. United States v. American Bar Endowment, 477 U.S. 105 (1986).

In recent years, it has become increasingly common for states and localities to provide state or local tax credits in return for contributions by taxpayers to or for the use of certain entities listed in §170(c). As a result of the new limit on the deductibility of state and local taxes under §164(b)(6), treating a transfer pursuant to a state or local tax credit program as a charitable contribution for federal income tax purposes may reduce a taxpayer's federal income tax liability. Thus, as a consequence, state and local tax credit programs now give taxpayers a potential means to circumvent the $10,000 limitation in §164(b)(6) by substituting an increased charitable contribution deduction for a disallowed state and local tax deduction. State legislatures are also now considering or have adopted proposals to enact new state and local tax credit programs, with the aim of enabling taxpayers to characterize their transfers as fully deductible charitable contributions for federal income tax purposes, while using the same transfers to satisfy or offset their state or local tax liabilities. The Treasury Department and the IRS believe that when a taxpayer receives or expects to receive a state or local tax credit in return for a payment or transfer to an entity listed in §170(c), the receipt of this tax benefit constitutes a quid pro quo that may preclude a full deduction under §170(a). Thus, the Treasury Department and the IRS believe that the amount otherwise deductible as a charitable contribution must generally be reduced by the amount of the state or local tax credit received or expected to be received, just as it is reduced for many other benefits. The Proposed Regulations generally provide that if a taxpayer makes a payment or transfers property to or for the use of an entity listed in §170(c), and the taxpayer receives or expects to receive a state or local tax credit in return for such payment, the tax credit constitutes a return benefit, or quid pro quo, to the taxpayer and reduces the charitable contribution deduction. In addition to credits, the Proposed Regulations also address state or local tax deductions claimed in connection with a taxpayer's payment or transfer. The Treasury Department and the IRS believe that sound policy considerations as well as considerations of efficient tax administration warrant making an exception to quid pro quo principles in the case of dollar-for-dollar state or local tax deductions.

4. Final Regulations. §1.170A-15; §170A-16

These Final Regulations implement changes to the substantiation and reporting rules for charitable contributions under §170. The Final Regulations set forth the substantiation requirements for contributions of more than $500 under §170(f)(11)(B) through (D); the new definitions of *qualified appraisal* and *qualified appraiser* applicable to noncash contributions under §170(f)(11)(E); substantiation requirements for contributions of clothing and household items under §170(f)(16); and recordkeeping requirements for all cash contributions under §170(f)(17). Regulations, §1.170A-15 implements the requirements of §170(f)(17) for cash, check, or other monetary gift contributions, and clarifies that these rules supplement the substantiation rules in §170(f)(8). Regulations, §1.170A-16 implements the requirements of §170(f)(11)

for noncash contributions, as added by the Act, and clarifies that these rules are in addition to the requirements in §170(f)(8).

See Exhibit C.

5. Notice 2018-37

This Notice announces that the Treasury and the IRS intend to issue Regulations providing clarification of the application of the effective date provisions concerning the repeal of §682. Section 71, as in effect prior to the Act, provides rules regarding the tax treatment of alimony and separate maintenance payments, with §71(a) providing that gross income includes amounts received as alimony or separate maintenance payments. Section 682, as in effect prior to the Act, provides rules regarding the tax treatment of the income of certain trusts payable to a former spouse who was divorced or legally separated. Section 682(a) provides that there shall be included in the gross income of a wife who is divorced or legally separated the amount of the income of any trust which such wife is entitled to receive. The Act prospectively repealed §71, §215, and §682. The Act applies to: (1) any divorce or separation instrument executed after December 31, 2018; and (2) any divorce or separation instrument executed on or before such date and modified after such date if the modification expressly provides that the amendments made by the Act apply to such modification. The Regulations will provide that §682, as in effect prior to December 22, 2017, will continue to apply with regard to trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument executed on or before December 31, 2018.

6. Notice 2018-41

This Notice announces that the Treasury and the IRS intend to issue Proposed Regulations providing guidance to assist taxpayers in complying with new information reporting obligations for certain life insurance contract transactions under §6050Y, which was added to the Code by the Act. The Proposed Regulations also will provide guidance on a modification to the transfer for value rules for life insurance contracts added by the Act.

A life insurance policyholder who sells a life insurance contract may have taxable gain on the sale. The gain is capital gain, except to the extent of the amount that would be recognized as ordinary income if the contract were surrendered, which is ordinary income under the substitute for ordinary income doctrine. The amount that would be recognized as ordinary income under §72(e)(5) if the contract were surrendered is the "inside buildup" – the excess of the amount that would be received upon surrender over the investment in the contract as defined in §72(e)(6). Section 72(e)(6) defines the "investment in the contract" as of any date as the aggregate amount of premiums or other consideration paid for the contract before that date, less the aggregate amount received under the contract before that date to the extent that such amount was excludable from gross income. Life insurance contracts may be sold in transactions

known as life settlement transactions. In a typical life settlement transaction, the policyholder, often the individual insured under the life insurance contract, sells his or her life insurance contract to an unrelated person. A viatical settlement, a subset of life settlement transactions, may involve the sale of a life insurance contract, but may not be taxed as a sale. Under a viatical settlement, a policyholder may sell or assign a life insurance contract after the insured has become terminally ill or chronically ill. If any portion of the death benefit under a life insurance contract on the life of an insured who is terminally ill or chronically ill is sold or assigned in a viatical settlement to a viatical settlement provider, the amount paid for the sale or assignment of that portion is treated as an amount paid under the life insurance contract by reason of the death of the insured, rather than gain from the sale or assignment. See §101(a) and (g). The Act added §6050Y to the Code. In general, §6050Y imposes information reporting requirements on the acquirer and issuer in the case of the acquisition, or notice of the acquisition, of an existing life insurance contract in a reportable policy sale, and on each person who makes a payment (the "payor") of reportable death benefits. The term "reportable policy sale" is defined in §6050Y(d)(2), to mean "the acquisition of an interest in a life insurance contract, directly or indirectly, if the acquirer has no substantial family, business, or financial relationship with the insured apart from the acquirer's interest in such life insurance contract." The term "reportable death benefits" is defined in §6050Y(d)(4) to mean "amounts paid by reason of the death of the insured under a life insurance contract that has been transferred in a reportable policy sale." Generally, amounts received under a life insurance contract that are paid by reason of death of the insured are excluded from federal income tax. However, if a life insurance contract is sold or otherwise transferred for valuable consideration (such as in a life settlement transaction or viatical settlement), the excludable portion of the amount paid by reason of the death of the insured is limited. In general, under the §101(a)(2) limitation, the excludable amount following a transfer for valuable consideration may not exceed the sum of: (1) the actual value of the consideration paid by the transferee to acquire the life insurance contract; and (2) the premiums and other amounts subsequently paid by the transferee. The second sentence of §101(a)(2) provides that the §101(a)(2) limitation does not apply if: (1) the transferee's basis in the contract is determined in whole or in part by reference to the transferor's basis in the contract; or (2) the transfer is to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer. The Act added §101(a)(3), which provides that the exception to the §101(a)(2) limitation provided in the second sentence of §101(a) (2) does not apply in the case of a reportable policy sale. Treasury and the IRS intend to propose Regulations under §6050Y describing the manner by which and time at which the reporting requirements of §6050Y must be satisfied. Treasury and the IRS intend to propose Regulations under §6050Y(a)(1) requiring every person who acquires a life insurance contract or any interest in a life insurance contract in a reportable policy sale to file an information return.

7. Notice 2018-58

This Notice announces that the Treasury and the IRS intend to issue Regulations providing clarification regarding: (1) the special rules for contributions of refunded qualified higher education expenses to a qualified tuition program under §529(c) (3)(D); (2) the new rules under §529(c) (3)(C)(i)(III) permitting a rollover from a qualified tuition program to an ABLE account under §529A; and (3) the new rules under §529(c)(7) treating certain elementary or secondary school expenses as qualified higher education expenses. The Act added §529(c)(3)(C)(i)(III) which provides that a distribution from a qualified tuition program is not subject to income tax if, within 60 days of the distribution, it is transferred to an ABLE account of the designated beneficiary or a member of the family of the designated beneficiary. In addition, the Act expanded the definition of qualified higher education expenses to include tuition in connection with the designated beneficiary's enrollment or attendance at an elementary or secondary public, private, or religious school. The Act also amended §529(e)(3)(A) to limit the total amount of these tuition distributions for each designated beneficiary to $10,000 per year from all qualified tuition programs of the designated beneficiary.

8. Notice 2018-61

This Notice announces that the Treasury and the IRS intend to issue Regulations providing clarification of the effect of newly enacted §67(g) of the Code on the deductibility of certain expenses described in §67(b) and (e) and §1.67–4 of the Regulations that are incurred by estates and non-grantor trusts. The Act added §67(g) to the Code, which generally provides that, notwithstanding §67(a), no miscellaneous itemized deductions shall be allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026. Section 67(e) provides that, for purposes of §67, the adjusted gross income of an estate or trust shall be computed in the same manner as that of an individual, except that: (1) the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such estate or trust, and (2) the deductions allowable under §642(b), §651, and §661 shall be treated as allowable in arriving at adjusted gross income. Regulations, §1.67–4(a) states that §67(e) provides an exception to the 2-percent floor on miscellaneous itemized deductions for costs that are paid or incurred in the administration of an estate or a nongrantor trust and that would not have been incurred if the property were not held in such estate or trust. A cost is subject to the 2-percent floor to the extent that it is included in the definition of miscellaneous itemized deductions under §67(b), is incurred by an estate or non-grantor trust, and commonly or customarily would be incurred by a hypothetical individual holding the same property. Regulations, §1.67–4(c) provides that, subject to certain exceptions, if an estate or non-grantor trust pays a single fee, commission, or other expense for both costs that are subject to the 2-percent floor and costs that are not, then, the single fee, commission, or other expense (bundled fee) must be allocated, between the costs that are subject to the 2-percent floor and those that are not.

Commentators have suggested that new §67(g) might be read to eliminate the ability of estates and non-grantor trusts to deduct any expenses described in §67(e)(1) and Regs., §1.67–4. The Treasury Department and the IRS do not believe that this is a correct reading of §67(g). For the taxable years during which it is effective, §67(g) denies a deduction for miscellaneous itemized deductions. Section 67(b) defines miscellaneous itemized deductions as itemized deductions other than those listed therein. Section 63(d) defines itemized deductions by excluding personal exemptions, §199A deductions, and deductions used to arrive at adjusted gross income. Therefore, neither the above-the-line deductions used to arrive at adjusted gross income nor the expenses listed in §67(b)(1)–(12) are miscellaneous itemized deductions. Thus, §67(e) removes the expenses described in §67(e)(1) from the category of itemized deductions (and thus necessarily also from the subset of miscellaneous itemized deductions) and instead treats them as above-the-line deductions allowable in determining adjusted gross income under §62(a). Therefore, the suspension of the deductibility of miscellaneous itemized deductions under §67(a) does not affect the deductibility of payments described in §67(e)(1). However, an expense that commonly or customarily would be incurred by an individual (including the appropriate portion of a bundled fee) is affected by §67(g) and thus is not deductible to the estate or non-grantor trust during the suspension of §67(a). Additionally, nothing in §67(g) affects the ability of the estate or trust to take a deduction listed under §67(b). For example, §691(c) deductions (relating to the deduction for estate tax on income in respect of the decedent), which are identified in §67(b)(7), remain unaffected by the enactment of §67(g).

The Treasury and the IRS intend to issue Regulations clarifying that estates and non-grantor trusts may continue to deduct expenses described in §67(e)(1) and amounts allowable as deductions under §642(b), §651 or §661, including the appropriate portion of a bundled fee, in determining the estate or non-grantor trust's adjusted gross income during taxable years. Additionally, the Regulations will clarify that deductions enumerated in §67(b) and (e) continue to remain outside the definition of "miscellaneous itemized deductions" and thus are unaffected by §67(g). The Treasury and the IRS are aware of some concerns that the enactment of §67(g) will affect a beneficiary's ability to deduct §67(e) expenses upon the termination of the trust or estate as provided in §642(h). Section 642(h) provides that if, on the termination of an estate or trust, the trust or estate has: (1) a net operating loss carryover under §172 or a capital loss carryover under §1212, or (2) for the last taxable year of the estate or trust, deductions in excess of gross income for such year, then such carryover or such excess deductions shall be allowed as a deduction, to the beneficiaries succeeding to the property of the estate or trust. Regulations, §1.642(h)–1(b) provides, in part, that net operating loss carryovers and capital loss carryovers are taken into account when determining adjusted gross income. Therefore, they are above-the-line deductions and thus are not miscellaneous itemized deductions on the returns of beneficiaries. Conversely, Regs., §1.642(h)–2(a) provides that if, on the termination of an estate or trust, the estate or trust has for its last taxable year deductions in excess of gross income, the excess is allowed under §642(h)(2) as a deduction to the beneficiaries. However, the §642(h)(2) excess deduction is allowed only in computing the taxable

income of the beneficiaries. Therefore, a §642(h)(2) excess deduction is not used in computing the beneficiaries' adjusted gross income and is treated as a miscellaneous itemized deduction of the beneficiaries. Miscellaneous itemized deductions are not permitted, and that appears to include the §642(h)(2) excess deduction. The Treasury and the IRS are studying whether §67(e) deductions, as well as other deductions that would not be subject to the limitations imposed by §67(a) and (g) in the hands of the trust or estate, should continue to be treated as miscellaneous itemized deductions when they are included as a §642(h)(2) excess deduction.

9. Rev. Proc. 2017-58

This Revenue Procedure sets forth inflation-adjusted items for 2018 for various provisions of the Code prior to the Act. For an estate of any decedent dying in calendar year 2018, the basic exclusion amount is $5,600,000 for determining the amount of the unified credit against estate tax under §2010. The aggregate decrease in the value of qualified real property resulting from electing to use §2032A for purposes of the estate tax cannot exceed $1,140,000. For calendar year 2018, the first $15,000 of gifts to any person (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §2503 made during that year. For calendar year 2018, the first $152,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts. For an estate of a decedent dying in calendar year 2018, the dollar amount used to determine the "2-percent portion" (for purposes of calculating interest under §6601(j)) of the estate tax extended as provided in §6166 is $1,520,000. For fees incurred in calendar year 2018, the attorney fee award limitation under §7430(c)(1)(B)(iii) is $200 per hour. See Item #11; Rev. Proc. 2018-18.

10. Rev. Proc. 2018-3

The purpose of this Revenue Procedure is to provide a revised list of those areas of the Code relating to issues on which the IRS will not issue letter rulings or determination letters. Whenever appropriate in the interest of sound tax administration, it is the policy of the IRS to answer inquiries of individuals and organizations regarding their status for tax purposes and the tax effects of their acts or transactions, prior to the filing of returns or reports that are required by the revenue laws. There are, however, certain areas in which, because of the inherently factual nature of the problems involved, or for other reasons, the IRS will not issue rulings or determination letters. These areas are set forth in four sections of this Revenue Procedure. Section 3 reflects those areas in which rulings or determination letters will not be issued. Section 4 sets forth those areas in which rulings or determination letters will not ordinarily be issued. "Not ordinarily" means that unique and compelling reasons must be demonstrated to justify the issuance of a ruling or determination letter. Section 5 sets forth those areas in which the IRS is temporarily not issuing rulings or determination letters because those matters are under study. Finally, Section 6 of this Revenue Procedure lists specific areas in which the

Service will not ordinarily issue rulings because the Service has provided automatic approval procedures for these matters.

Section 3. Areas In Which Rulings Or Determination Letters Will Not Be Issued
(14) Sections 101, 761, and 7701.—Certain Death Benefits; Terms Defined; Definitions.—Whether, in connection with the transfer of a life insurance policy to an unincorporated organization, (i) the organization will be treated as a partnership under §761 and §7701, or (ii) the transfer of the life insurance policy to the organization will be exempt from the transfer for value rules of §101, when substantially all of the organization's assets consist or will consist of life insurance policies on the lives of the members.
(15) Section 102.—Gifts and Inheritances.—Whether a transfer is a gift within the meaning of §102(a).
(27) Section 121.—Exclusion of Gain from Sale of Principal Residence.—Whether property qualifies as the taxpayer's principal residence.
(29) Section 162.—Trade or Business Expenses.—Whether compensation is reasonable in amount.
(84) Section 671.—Trust Income, Deductions, and Credits Attributable to Grantors and Others as Substantial Owners.—Whether the grantor will be considered the owner of any portion of a trust when (i) substantially all of the trust corpus consists or will consist of insurance policies on the life of the grantor or the grantor's spouse, (ii) the trustee or any other person has a power to apply the trust's income or corpus to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse, (iii) the trustee or any other person has a power to use the trust's assets to make loans to the grantor's estate or to purchase assets from the grantor's estate, and (iv) there is a right or power in any person that would cause the grantor to be treated as the owner of all or a portion of the trust under §673 to §677.
(85) Section 704(b).—Determination of Distributive Share.—Whether the allocation to a partner under the partnership agreement of income, gain, loss, deduction, or credit (or an item thereof) has substantial economic effect or is in accordance with the partner's interest in the partnership.

Section 4. Areas In Which Rulings Or Determination Letters Will Not Ordinarily Be Issued
(19) Section 170.—Charitable, Etc., Contributions and Gifts.—Whether a transfer to a charitable remainder trust described in §664 that provides for annuity or unitrust payments for one or two measuring lives qualifies for a charitable deduction under §170(f)(2)(A).
(49) Sections 2035, 2036, 2037, 2038, and 2042.—Adjustments for Certain Gifts Made Within Three Years of Decedent's Death; Transfers with Retained Life Estate; Transfers Taking Effect at Death; Revocable Transfers; Proceeds of Life Insurance.—Whether trust assets are includible in a trust beneficiary's gross estate under §2035, §2036, §2037, §2038, or §2042 if the beneficiary sells property (including insurance policies) to the trust or dies within 3 years of selling such property to the trust, and (i) the beneficiary has a power to withdraw the trust property (or had such power prior to a release or modification, but retains other powers which would cause that person to be the owner if

the person were the grantor), other than a power which would constitute a general power of appointment within the meaning of §2041, (ii) the trust purchases the property with a note, and (iii) the value of the assets with which the trust was funded by the grantor is nominal compared to the value of the property purchased.

Section 5. Areas Under Study In Which Rulings Or Determination Letters Will Not Be Issued Until The Service Resolves The Issue Through Publication of a Revenue Ruling, a Revenue Procedure, Regulations, or Otherwise
(7) Sections 661 and 662.—Deduction for Estates and Trusts Accumulating Income or Distributing Corpus; Inclusion of Amounts in Gross Income of Beneficiaries of Estates and Trusts Accumulating Income or Distributing Corpus.—Whether the distribution of property by a trustee from an irrevocable trust to another irrevocable trust (sometimes referred to as a "decanting") resulting in a change in beneficial interests is a distribution for which a deduction is allowable under §661 or which requires an amount to be included in the gross income of any person under §662.
(8) Section 1014.—Basis of Property Acquired from a Decedent.—Whether the assets in a grantor trust receive a §1014 basis adjustment at the death of the deemed owner of the trust for income tax purposes when those assets are not includible in the gross estate of that owner under Chapter 11 of subtitle B of the Internal Revenue Code.
(13) Sections 2601 and 2663.—Tax Imposed; Regulations.—Whether the distribution of property by a trustee from an irrevocable generation-skipping transfer tax (GST) exempt trust to another irrevocable trust (sometimes referred to as a "decanting") resulting in a change in beneficial interests will cause loss of GST exempt status or constitutes a taxable termination or taxable distribution under §2612.

11. Rev. Proc. 2018-18

This Revenue Procedure modifies and supersedes certain sections of Rev. Proc. 2017–58, to reflect statutory amendments by the Act. The Act amends §1 to provide a temporary modification to the tax rate tables for taxable years beginning after December 31, 2017, and before January 1, 2026. The Act changes the beginning and ending dollar amounts for the brackets, and replaces the existing tax rates with seven new rates: 10%, 12%, 22%, 24%, 32%, 35%, and 37%. The Act amends §1f(3) to provide a permanent cost-of-living adjustment based on the Chained Consumer Price Index for All Urban Consumers (C-CPI-U). Any existing items that are not reset for 2018 will be adjusted for inflation after 2017 based on the C-CPI-U. Items that are reset for 2018 will be adjusted for inflation after 2018 based on the C-CPI-U. The Act amends §63(c)(2) to provide a temporary increase in the basic standard deduction for taxable years beginning after December 31, 2017, and before January 1, 2026. Under §63(c)(2), the basic standard deduction is: $12,000 for single individuals and married individuals filing separate returns; $18,000 for heads of households; and $24,000 for married individuals filing a joint return and surviving spouses. These amounts will be adjusted for inflation for taxable years beginning after December 31, 2018. The Act amends §151(d) to provide a temporary set dollar amount of $0 for the personal exemption deduction, for taxable years beginning after December 31, 2017, and before January 1, 2026. The Act amends

§68 to provide a temporary suspension of the limitation on itemized deductions for taxable years beginning after December 31, 2017, and before January 1, 2026. The Act amends §2010(c)(3) to provide a temporary increase to $10,000,000 of the estate tax exemption, effective for estates of decedents dying after December 31, 2017, and before January 1, 2026. The $10,000,000 amount is indexed for inflation for taxable years beginning after December 31, 2017. For an estate of any decedent dying in calendar year 2018, the basic exclusion amount is $11,180,000 for determining the amount of the unified credit against estate tax under §2010.

12. Rev. Proc. 2018-57

This Revenue Procedure sets forth certain inflation-adjusted items for 2019 for various provisions of the Code, subsequent to the Act.

.01. Tax Rate Tables. For taxable years beginning in 2019, the tax rate tables under §1 are as follows:

TABLE 1 - Married Individuals Filing Joint Returns and Surviving Spouses

If Taxable Income Is:	The Tax Is:
Not over $19,400	10% of the taxable income
Over $19,400 but not over $78,950	$1,940 plus 12% of the excess over $19,400
Over $78,950 but not over $168,400	$9,086 plus 22% of the excess over $78,950
Over $168,400 but not over $321,450	$28,765 plus 24% of the excess over $168,400
Over $321,450 but not over $408,200	$65,497 plus 32% of the excess over $321,450
Over $408,200 but not over $612,350	$93,257 plus 35% of the excess over $408,200
Over $612,350	$164,709.50 plus 37% of the excess over $612,350

TABLE 2 - Heads of Households

If Taxable Income Is:	The Tax Is:
Not over $13,850	10% of the taxable income

If Taxable Income Is:	The Tax Is:
Over $13,850 but not over $52,850	$1,385 plus 12% of the excess over $13,850
Over $52,850 but not over $84,200	$6,065 plus 22% of the excess over $52,850
Over $84,200 but not over $160,700	$12,962 plus 24% of the excess over $84,200
Over $160,700 but not over $204,100	$31,322 plus 32% of the excess over $160,700
Over $204,100 but not over $510,300	$45,210 plus 35% of the excess over $204,100
Over $510,300	$152,380 plus 37% of the excess over $510,300

TABLE 3 - Unmarried Individuals (other than Surviving Spouses and Heads of Households)

If Taxable Income Is:	The Tax Is:
Not over $9,700	10% of the taxable income
Over $9,700 but not over $39,475	$970 plus 12% of the excess over $9,700
Over $39,475 but not over $84,200	$4,543 plus 22% of the excess over $39,475
Over $84,200 but not over $160,725	$14,382.50 plus 24% of the excess over $84,200
Over $160,725 but not over $204,100	$32,748.50 plus 32% of the excess over $160,725
Over $204,100 but not over $510,300	$46,628.50 plus 35% of the excess over $204,100

If Taxable Income Is:	The Tax Is:
Over $510,300	$153,798.50 plus 37% of the excess over $510,300

TABLE 4 - Married Individuals Filing Separate Returns

If Taxable Income Is:	The Tax Is:
Not over $9,700	10% of the taxable income
Over $9,700 but not over $39,475	$970 plus 12% of the excess over $9,700
Over $39,475 but not over $84,200	$4,543 plus 22% of the excess over $39,475
Over $84,200 but not over $160,725	$14,382.50 plus 24% of the excess over $84,200
Over $160,725 but not over $204,100	$32,748.50 plus 32% of the excess over $160,725
Over $204,100 but not over $306,175	$46,628.50 plus 35% of the excess over $204,100
Over $306,175	$82,354.75 plus 37% of the excess over $306,175

TABLE 5 - Estates and Trusts

If Taxable Income Is:	The Tax Is:
Not over $2,600	10% of the taxable income
Over $2,600 but not over $9,300	$260 plus 24% of the excess over $2,600
Over $9,300 but not over $12,750	$1,868 plus 35% of the excess over $9,300
Over $12,750	$3,075.50 plus 37% of the excess over $12,750

.03. Maximum Capital Gains Rate. For taxable years beginning in 2019, the Maximum Zero Rate Amount is $78,750 in the case of a joint return or surviving spouse, $52,750 in the case of an individual who is a head of household, $39,375 in the case of any other individual (other than an estate or trust), and $2,650 in the case of an estate or trust. The Maximum 15% Rate Amount is $488,850 in the case of a joint return or surviving spouse (½ such amount in the case of a married individual filing a separate return), $461,700 in the case of an individual who is the head of a household, $434,550 in the case of any other individual (other than an estate or trust), and $12,950 in the case of an estate or trust. Amounts above the Maximum 15% Rate Amount are taxed at 20%.

.16. Standard Deduction.

In general. For taxable years beginning in 2019, the standard deduction amounts under §63(c)(2) are as follows:

Filing Status	**Standard Deduction**
Married Individuals Filing Joint Returns and Surviving Spouses	$24,400
Heads of Households	$18,350
Unmarried Individuals (other than Surviving Spouses and Heads of Households)	$12,200
Married Individuals Filing Separate Returns	$12,200

.27. Qualified Business Income. For taxable years beginning in 2019, the threshold amount under §199A(e)(2) is $321,400 for married filing joint returns, $160,725 for married filing separate returns, and $160,700 for single and head of household returns.

.41. Unified Credit Against Estate Tax. For an estate of any decedent dying in calendar year 2019, the basic exclusion amount is $11,400,000 for determining the amount of the unified credit against estate tax under §2010.

.42. Valuation of Qualified Real Property in Decedent's Gross Estate. For an estate of a decedent dying in calendar year 2019, if the executor elects to use the special use valuation method under §2032A for qualified real property, the aggregate decrease in the value of qualified real property resulting from electing to use §2032A for purposes of the estate tax cannot exceed $1,160,000.

.43. Annual Exclusion for Gifts.

(1) For calendar year 2019, the first $15,000 of gifts to any person (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §2503 made during that year.

(2) For calendar year 2019, the first $155,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §2503 and §2523(i)(2) made during that year.

.51. Interest on a Certain Portion of the Estate Tax Payable in Installments. For an estate of a decedent dying in calendar year 2019, the dollar amount used to determine the "2-percent portion" (for purposes of calculating interest under §6601(j)) of the estate tax extended as provided in §6166 is $1,550,000.

13. Chief Counsel Memorandum 201747005

Section 642(c)(1) provides generally that in the case of an estate or trust (other than a "simple trust"), there shall be allowed as a deduction in computing its taxable income (in lieu of the deduction allowed by §170(a), relating to deduction for charitable contributions) any amount of the gross income, without limitation, which pursuant to the terms of the governing instrument is, during the taxable year, paid for a purpose specified in §170(c). In this case, the Trust argues that the State court granted a child an inter vivos power of appointment through a modification order (the "Modification Order"), which he exercised in favor of charitable Foundations. Under the laws of the State, a modification order will be approved by the court if the modification is not inconsistent with a material purpose of the trust and is not contrary to the grantor's probable intention in order to achieve the grantor's tax objectives. Therefore, the Trust argues, the distributions made by the Trust to the Foundations were required by the Trust instrument. The Trust, as executed by the grantor, in this case did not authorize distributions to charity during the lifetime of the beneficiaries. This fact is undisputed. Rather, the Modification Order entered into by the parties did. The Modification Order is not treated as the governing instrument in this case. Specifically, the Modification Order was not the subject of a conflict and the terms of the Trust were unambiguous. Rev. Rul. 59-15 and case law provide that a settlement agreement arising from a Will contest qualifies as a governing instrument. However, those authorities do not hold that a modification to a governing instrument will be construed to be the governing instrument in situations where the modification does not stem from a conflict. When there is a conflict regarding the terms of the governing instrument, the court must resolve the conflict as to the true meaning of the terms of the governing instrument. Thus, court orders resulting from conflict are intended to clarify the terms of the original governing instrument. By contrast, modification orders such as the one in this case change the terms of the governing instrument beyond its original intended terms. Here there was no question as to the grantor's intent at the time the Trust was created. Although the standard for granting the Modification Order is that the changes to the trust not be inconsistent with a material purpose and not contrary to the grantor's probable intention in order to achieve the settlor's tax objectives, that is different than requiring that the modification be necessary in order to effectuate the grantor's intent. As the Service has noted, reformation that occurs prior to the event that would give rise to the federal tax will be respected when necessary to carry out the grantor's original

intent. The negative implication is that a post-event reformation will undergo much more rigorous scrutiny before it is respected for federal tax purposes. The Service was not arguing that the Modification Order was invalid or was not binding on the parties to the State law procedure. However, the decree does not determine the federal tax consequences of the modification. It only determines the rights of the parties under the Modification Order under the laws of the State. The charities will still receive the distributions, but for federal income tax purposes, the Trust will not receive a deduction for these distributions. Deductions are a matter of legislative grace, and the taxpayer bears the burden of proving entitlement to any deductions claimed.

14. Chief Counsel Memorandum 201745012

Donor formed Trust 1, an irrevocable discretionary trust for the benefit of Donor's first spouse and issue. Trust 1 terminates on the later of the death of Donor or his first spouse, at which time the principal and any accumulated income are distributed outright to Donor's issue, per stirpes. Donor's first spouse predeceased him. Donor formed Trust 2, an irrevocable trust for the benefit of Donor and his issue. Under the terms of Trust 2, an annuity is payable to Donor for the term of the trust, and the remainder is payable to Trust 1. On a date before the expiration of the respective terms of Trust 2, Donor purchased the remainder interest in Trust 2 from the trustees of Trust 1. Donor paid the purchase price with two unsecured promissory notes. Donor died the following day. Donor's executor filed Form 709 and reported the purchase of the remainder interest as a non-gift transfer, asserting that Donor received adequate and full consideration in money or money's worth in the form of the remainder interest in Trust 2. Donor's executor filed Form 706 and included the corpus of Trust 2 in the gross estate. I.R.C. §2036(a)(1). Donor's executor deducted the value of the outstanding promissory notes payable to the trustees of Trust 1 as claims against the estate.

Section 2512(b) provides that the amount of the gift is the value of the property transferred for less than an adequate and full consideration in money or money's worth on the date of the gift. Regulations, §25.2512-8 provide, in part, that transfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration to the extent that the value of the property transferred by the donor exceeds the value in money or money's worth of the consideration given therefor. In Commissioner v. Wemyss, 324 U.S. 303 (1945), the Supreme Court considered the meaning of the term "adequate and full consideration in money or money's worth" for gift tax purposes. Wemyss has come to stand for the general proposition that "adequate and full consideration in money or money's worth" for gift tax purposes is that which replenishes, or augments, the donor's taxable estate. Under the estate depletion theory, a donor receives consideration in money or money's worth only to the extent that the donor's estate has been replenished. Here, it cannot be disputed that Donor's liability on the promissory notes depleted Donor's taxable estate. However, in the context of a deathbed purchase of a remainder interest in transferred property in which a donor has retained a §2036 "string," the

receipt of the remainder does not increase the value of the donor's taxable estate, because the value of the entire property, including that of the remainder, will be includible in the donor's gross estate pursuant to §2036(a)(1). Thus, Donor's receipt of the remainder interest cannot constitute adequate and full consideration within the meaning of §2512(b). Accordingly, Donor has made a completed gift to the beneficiaries of Trust 1 in the amount of the value of the promissory notes transferred to Trust 1.

Section 2053(c)(1)(A) provides, in part, that the deduction allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. Regulations, §20.2053-1(b)(2)(i) provide, in part, that amounts allowed as deductions under §2053 must be expenses and claims that are bona fide in nature. No deduction is permissible to the extent it is founded on a transfer that is essentially donative in character (a mere cloak for a gift or bequest). Regulations, §20.2053-4(d)(5) provide in part, that the deduction for a claim founded upon a promise or agreement is limited to the extent that the promise or agreement was bona fide and in exchange for adequate and full consideration in money or money's worth. That is, the promise or agreement must have been bargained for at arm's length and the price must have been an adequate and full equivalent reducible to a money value. The phrase "adequate and full consideration" should be deemed to have the same meaning in both the estate tax and gift tax statutes. Consideration is that which replenishes the donor's taxable estate for transfer tax purposes. Where the purchase of the remainder occurs on the donor's deathbed while he is holding a §2036 "string" to the transferred property, the remainder does not increase the value of the donor's taxable estate. That is because the entire value of the transferred property, including that of the remainder, will be includible in the donor's gross estate pursuant to §2036(a)(1). For the same reason, Donor's deathbed receipt of the remainder interest cannot constitute adequate and full consideration within the meaning of §2053(c)(1)(A). On these facts, the promissory notes are a mere cloak for a gift. Accordingly, no deduction is allowable for Donor's liability on the outstanding promissory notes.

15. PLR 201736018

Decedent maintained an IRA and died after reaching age 70-1/2. Decedent designated his estate as the beneficiary of the IRA, and upon his death, the IRA became a part of Decedent's residuary estate. Decedent's wife, Surviving Spouse, is the executor of Decedent's estate. Under the terms of Decedent's Will, his entire residuary estate would be allocated to a Trust. The Trust had been established during Decedent's lifetime, with Decedent's daughter as trustee, but had not been funded. The Trust required that following Decedent's death, all income of the trust be paid to Surviving Spouse. Trust further permitted payments from the principal of the trust as necessary for Surviving Spouse's health, support, and maintenance. Upon Surviving Spouse's death, five percent of the principal of the Trust would be distributed to a church, and the balance would be distributed to the living issue of Decedent and of Surviving Spouse. Following the death

of Decedent, Surviving Spouse and Decedent's three children petitioned the State Court to terminate the Trust and to distribute the assets of Decedent's estate to Surviving Spouse. The State Court issued an order (the "Order") that terminated the Trust and ordered the executor of Decedent's estate to pay all probate funds to Surviving Spouse. In this case, Decedent's estate was designated as the beneficiary of the IRA. As a result of the Order, Surviving Spouse will obtain her interest in the proceeds of IRA as the sole beneficiary of Decedent's estate, not as a beneficiary of Trust, and is required by the Order to pay the proceeds of IRA to herself. Accordingly, for purposes of §408(d)(3)(A), Surviving Spouse is effectively the individual for whose benefit the IRA is maintained. Thus, when Surviving Spouse receives a distribution of the proceeds of the IRA, she may roll over the distribution (other than any amounts required to have been distributed or to be distributed in accordance with the required minimum distribution rules of §401(a)(9)) into an IRA established and maintained in her own name, provided all other applicable rules of §408(d)(3) are met. Surviving Spouse will be treated for purposes of §408(d)(3)(A) as a payee or distributee of the proceeds she receives from the IRA. The IRA will not be treated as an inherited IRA within the meaning of §408(d)(3) with respect to Surviving Spouse. Surviving Spouse is eligible to roll over the proceeds from IRA to an IRA set up and maintained in her own name.

16. PLR 201737008

Grantor created an irrevocable trust to benefit Grantor's spouse, and descendants (the "Trust"). Section 7.3 of the Trust is entitled "Special Power of Appointment" and provides that on the death of Spouse the trustee is to distribute such amounts of principal and income as Spouse is to direct to such persons, or charities, for such estates and interests and outright or upon such terms, trusts, conditions and limitations as Spouse is to appoint by her last Will. The terms of section 7.3, however, did not specifically limit the exercise of the power of appointment to persons other than Spouse, the estate of Spouse, the creditors of Spouse or the creditors of Spouse's estate. It is represented that Grantor intended for the power of appointment to be a limited power of appointment. Grantor filed a petition with County Court to reform section 7.3 of Trust to provide that the trustee is to distribute such amounts of principal and income as Spouse is to direct to such persons, or charities other than Spouse, the creditors of Spouse, the estate of Spouse, and the creditors of the estate of Spouse. County Court entered an order retroactively reforming and modifying section 7.3 of the Trust to conform to Grantor's intent consistent with the petition. State Statute provides that a court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement. State Statute provides that to achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect. In this case, it is represented that Grantor did not intend for Spouse to have a general power of appointment. The Service concluded that the County Court's order to reform the Trust

was to correct a scrivener's error. The order is consistent with applicable state law that would be applied by the highest court of State. The Service concluded that the power of appointment granted to Spouse by section 7.3 of Trust, as reformed by County Court to correct the scrivener's error, does not constitute a general power of appointment. Further, the Service concluded that the reformation of the Trust was not the exercise or release of a general power of appointment under §2514, so as to constitute a gift by Spouse for federal gift tax purposes.

17. PLR 201811002

Husband created four irrevocable trusts (the Trusts) for his four children. Each child is the primary beneficiary of a separate trust for the benefit of herself and her children. Under each trust, the income of that trust is to be paid to the child for whom the trust was created. On the child's death, the principal is to be held in further trust and distributed outright to her children upon their attaining age 35. Accounting Firm prepared Forms 709 for Husband and Wife. On his and her respective timely filed Forms 709, Husband and Wife signified their consent to treat their gifts as having been made one-half by each spouse under §2513. Nevertheless, Husband's Form 709 reported his portion of the total transfer to Trusts to be three-quarters (rather than one-half). Wife's Form 709 reported her portion of the total transfer to Trusts to be one-quarter (rather than one-half). Several years later, Accounting Firm realized that no GST exemption had been allocated to the transfers to the Trusts. Accounting Firm prepared Husband's Form 709 to include the late allocation of GST exemption to the transfers to the Trusts. The late allocation of Husband's GST exemption erroneously allocated an amount equal to one-hundred percent of the value of the transfers to the Trusts (such value determined as of the effective date of the allocation). Wife was not advised to make a late allocation of GST exemption to Wife's portion of the transfers to the Trusts. The period of limitations under §6501 has expired with respect to Husband's Forms 709. Under §2513, Husband's transfers to the Trusts are considered as made one-half by Husband and one-half by Wife. However, under §2504(c) and Regs., §25.2504-2(b), because the time has expired under §6501 within which a gift tax may be assessed, the amount of the taxable gift is the amount that is finally determined for gift tax purposes and may not thereafter be adjusted. In this case, the disproportionate gift split reported on Husband's and Wife's respective Forms 709 represents the amounts that are finally determined for gift tax purposes. However, under §26.2652-1(a)(4) of the Generation-Skipping Transfer Tax Regulations, Husband is regarded for GST tax purposes as the transferor of one-half of the total value of the property transferred to the Trusts regardless of the interest Husband is treated as transferring under §2513 for gift tax purposes. Accordingly, Husband's late allocation of GST exemption to the Trusts on the Form 709 is effective only to the one-half portion of the property transferred to the Trusts, of which he is considered the transferor for GST tax purposes. See §2631(a); Regs., §26.2632-1(b)(4)(i) (an allocation of GST exemption to a trust is void to the extent the amount allocated exceeds the amount necessary to obtain an inclusion ratio of zero).

18. PLR 201820007

Settlor established and funded an irrevocable Trust, to be administered under State law. Under the Trust, two separate trusts were established with identical terms for the benefit of Settlor's two sons, Son 1 and Son 2. Trust A is an irrevocable trust for the benefit of Son 1, and Trust B is an irrevocable trust for the benefit of Son 2. This Letter Ruling pertains to Trust B, and its successor, Trust C. The trustee may pay to or apply for the benefit of Son 2 all or any part of the net income of Trust B as the trustee shall determine to be necessary or advisable for the support, maintenance, education, and health of Son 2. The trustee may pay to or apply for the benefit of Son 2 all or any part of the principal of Trust B in such amounts and at such intervals as the trustee determines to be necessary or desirable for the support, maintenance, education, and health of Son 2. Upon the death of Son 2, Trust B shall be transferred and delivered to such appointee or appointees among the living issue of the Settlor and in such amounts or proportions and upon such terms and provisions as Son 2 shall appoint and direct in an effective Will or Codicil. If this limited power of appointment is not exercised as to all or any portion of Trust B, then the remaining trust property will vest in and be delivered and conveyed to Son 2's then living issue, per stirpes. If Son 2 leaves no surviving issue, the remaining trust property will be divided into equal shares: one share for each surviving son of Settlor and one share for the then living issue per stirpes of each son of Settlor who shall be deceased with issue then living. If any trust property vests in an issue of a deceased son of Settlor who is under 21 years old, then the property vesting in such issue will be held, in trust, as a separate trust. No trust shall continue beyond 21 years after the death of the last to die of the Settlor and the Settlor's sons who were living at the date of the execution of the Trust.

The trustee, pursuant to and in accordance with the requirements of a State Statute, appointed all of the principal and accumulated income of Trust B to a new trust, known as Trust C, effective upon the receipt of a favorable private letter ruling. The State Statute was not in effect on the date Trust B was established. During Son 2's lifetime, the distribution standard in Trust C is identical to the distribution standard in Trust B. However, the distributions will be in the discretion of an Independent Trustee. Under Trust C, Son 2 will continue to have a testamentary power to appoint. The class of permissible appointees of Son 2's limited power of appointment is identical under Trust B and Trust C. Trust C expressly provides that Son 2 may create new trusts for the benefit of the permissible appointees and establish the terms and conditions under which such new trusts will be administered. If Son 2 does not exercise his power of appointment, then the property remaining in Trust C at Son 2's death will be apportioned among Son 2's living issue, per stirpes. Trust C includes modifications to the administrative terms of Trust B. In particular, Trust C provides for the appointment of an Independent Trustee who is granted the authority to make discretionary distribution decisions, and the appointment of a Family Trustee whose authority will be limited to investment and administrative decisions. It is represented that Settlor and Spouse (who is treated as the transferor of one-half of the transfer pursuant to §2513 and §2652(a)(2)) allocated sufficient GST exemption to cause Trust B to have an

inclusion ratio of zero. The taxpayer requested a ruling that the proposed transfer of Trust B assets to a successor trust, Trust C, and the modifications caused by the distribution to Trust C will not cause Trust B or Trust C to lose their exempt status for purposes of the GST tax.

Section 26.2601-1(b)(4)(i) of the Generation-Skipping Transfer Tax Regulations provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the GST tax will not cause the trust to lose its exempt status. Regulations, §26.2601-1(b)(4)(i)(A) provides that the distribution of trust principal from an exempt trust to a new trust will not cause the new or continuing trust to be subject to the provisions of Chapter 13, if at the time the exempt trust became irrevocable, state law authorized distributions to the new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court; and the terms of the governing instrument of the new or continuing trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus a period of 21 years. Regulations, §26.2601-1(b)(4)(i)(D)(1) provides that a modification of the governing instrument of an exempt trust by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause the exempt trust to be subject to the provisions of Chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in §2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

State Statute provides that a trustee of an original trust may, without authorization by the court, exercise the discretionary power to distribute principal or income to or for the benefit of one or more current beneficiaries of the original trust by appointing all or part of the principal or income of the original trust subject to the power in favor of a trustee of a second trust. The trustee's special power to appoint trust principal or income in further trust under the State Statute includes the power to create the second trust. No guidance has been issued concerning the modification of a trust that may affect the status of a trust that is exempt from GST tax because sufficient GST exemption was allocated to the trust to result in an inclusion ratio of zero. At a minimum, modification that would not affect the GST status of a grandfathered trust will similarly not affect the exempt status of such a trust. In the instant case, Trust B does not expressly authorize the trustee to distribute principal from Trust B to Trust C. While State Statute authorizes the trustee to make such a distribution, to satisfy the requirement in Regs., §26.2601-1(b)(4)(i)(A)(1)(i), the state law must be in effect at the time the exempt trust became irrevocable. In this case, State Statute was enacted subsequent to the execution of Trust B. Accordingly, the effect of the proposed distribution of Trust B principal to Trust C on the exempt status of the trusts will be evaluated under the rules in Regs.,

§26.2601-1(b)(4)(i)(D). Under the facts, the distribution of principal from Trust B to Trust C will not cause a shift of a beneficial interest to a lower generation beneficiary nor extend the time for vesting of any beneficial interest beyond the period provided for in the original trust. Accordingly, based upon the facts submitted and the representations made, the Service concluded that the proposed distribution of assets from Trust B to Trust C satisfies the requirements of Regs., §26.2601-1(b)(4)(i)(D) and will not cause Trust B or Trust C to lose their exempt status for GST tax purposes.

19. PLR 201821008

Decedent was a participant in the Plan, and died before reaching age 70-1/2. The Plan was established by State under §457(b). Because Decedent did not designate a beneficiary under the Plan, Decedent's estate was the beneficiary of his account. Following Decedent's death, the Plan distributed Decedent's account to his estate in a lump sum. The Plan withheld federal and state taxes before paying the lump sum to Decedent's estate. Taxpayer is Decedent's surviving spouse and is the executor and sole beneficiary of his estate. As executor, she promptly distributed the net amount the estate received from the Plan to herself as sole beneficiary. Taxpayer then deposited this amount, plus an amount equal to the taxes that were withheld by the Plan, into an IRA established in her name. The amount deposited into the IRA which was deposited within 60 days of the date the lump sum was distributed from the Plan. Under these circumstances, Decedent's account under the Plan may be treated as paid from the Plan to Decedent's spouse for purposes of §402(c). Taxpayer may be treated as having received the distribution of the lump sum from the Plan for purposes of §402(c). Taxpayer was eligible to roll over the lump sum plus taxes to the IRA, which was established and maintained in her own name. Taxpayer will not be required to include the lump sum in her gross income for federal income tax purposes for the calendar year in which the distribution and rollover occurred.

20. PLR 201832005

Grantor created an irrevocable Trust for the benefit of himself, his Spouse, his descendants, his Father and Mother, and an Individual (collectively referred to as the Beneficiaries). During Grantor's lifetime, Trustee, pursuant to an appointment of the Committee or Grantor, while the Committee is in existence, shall distribute to the Beneficiaries such amounts of net income or principal of the Trust as the Committee or Grantor determines. Any appointment, determination, or action by the Committee requires either: (i) the unanimous written consent of the then serving members of the Committee, other than Grantor (Unanimous Member Power); or (ii) the written consent of Grantor and a majority of the other then serving members of the Committee (Grantor's Consent Power). In addition, Grantor, in a non-fiduciary capacity, may appoint such amounts of principal to one or more persons in the group consisting of Grantor's descendants, Father, Mother, and the Individual, as Grantor deems advisable to provide for such person's health, support, and education. (Grantor's Sole Power). The Trust agreement provides that if there is no Committee, the trustee may pay any one or

more of the beneficiaries such amount or amounts of the net income and principal for any purpose, as the trustee determines in his discretion and only with Grantor's written consent. Upon Grantor's death, the trustee shall distribute such amounts of trust property as Grantor appoints to or in favor of any one or more persons or entities, other than Grantor, Grantor's estate, the creditors of Grantor, or the creditors of Grantor's estate, as Grantor may appoint by Will (Grantor's Testamentary Power). Any balance which is not distributed pursuant to Grantor's Testamentary Power is to be distributed to certain named beneficiaries, if living.

Based on the facts submitted and representations made, the Service concluded that none of the circumstances were present that would cause Grantor to be treated as the owner of any portion of Trust under §673, §674, §676, §677 or §679 as long as Trust is a domestic trust and the Committee remains in existence and serving. Because none of the members of Committee have a power exercisable by himself to vest trust income or corpus in himself, none shall be treated as the owner of Trust under §678(a). It was further concluded that none of the circumstances were present that would cause administrative controls to be considered exercisable primarily for the benefit of Grantor under §675. Thus, the circumstances attendant on the operation of Trust will determine whether Grantor will be treated as the owner of any portion of Trust under §675. This is a question of fact. In this case, Grantor retained the Grantor's Consent Power over the net income and principal of Trust. Under Regs., §25.2511-2(e), a donor is considered as himself having a power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. The Committee members are not takers in default for purposes of Regs., §25.2514-3(b)(2). They are merely co-holders of the power. Accordingly, the Committee members do not have interests adverse to Grantor. Therefore, Grantor is considered as possessing the power to distribute net income and principal to any beneficiary because he retained the Grantor's Consent Power. Grantor also retained the Grantor's Sole Power over the principal of Trust. Under Regs., §25.2511-2(c), a gift is incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. In this case, the Grantor's Sole Power gives Grantor the power to change the interests of the beneficiaries. Even though Grantor's power is limited by an ascertainable standard, i.e., health, education, and support, Grantor's power is not a fiduciary power. Accordingly, the retention of Grantor's Consent Power and Grantor's Sole Power causes the transfer of property to Trust to be wholly incomplete for federal gift tax purposes. Further, Grantor retained the Grantor's Testamentary Power to appoint the property in Trust to any persons, other than to the Grantor's estate, Grantor's creditors, or the creditors of Grantor's estate. Accordingly, the retention of this power causes the transfer of property to Trust to be incomplete with respect to the remainder for federal gift tax purposes. Based on the facts submitted and the representations made, it was concluded that the contribution of property to Trust by Grantor was not a completed gift subject to federal gift tax. Any distribution from Trust to Grantor is merely a return of Grantor's property. Therefore, any distribution of property from Trust by the Committee to Grantor will not

be a completed gift subject to federal gift tax, by any member of the Committee. Further, upon the death of Grantor, the fair market value of the property in Trust is includible in his gross estate for federal estate tax purposes. The power held by the Committee members under the Grantor's Consent Power is a power that is exercisable only in conjunction with the creator, Grantor. Accordingly, under §2514(b) and §2041(a)(2), the Committee members do not possess general powers of appointment by virtue of possessing this power. Further, the power held by the Committee members under the Unanimous Member Power is not a general power of appointment for purposes of §2514(b) and §2041(a)(2). Accordingly, any distribution made from Trust to a beneficiary, other than to Grantor, pursuant to the exercise of these powers, the Grantor's Consent Power and the Unanimous Member Power, are not gifts by the Committee members. Instead, such distributions are gifts by Grantor. Any distribution of property by the Committee from Trust to any beneficiary of Trust, other than Grantor, will not be a completed gift subject to federal gift tax, by any member of the Committee. Accordingly, any distribution of property from Trust to a beneficiary, other than to Grantor, will be completed gifts by Grantor. Finally, the powers held by the Committee are not general powers of appointment for purposes of §2041(a)(2) and, accordingly, no member of the Committee upon his or her death will include in his or her estate any property held in Trust because such member is deemed to have a general power of appointment within the meaning of §2041 over property held in Trust.

21. Estate of Powell v. Commissioner, 148 T.C. 18

Nancy Powell (the "decedent") died on August 15, 2008. On August 8, 2008, cash and securities were transferred from decedent's revocable trust to a limited partnership ("NHP") in exchange for a 99% limited partner interest. On that date, the transferred assets were worth $10,000,752. NHP had been formed two days earlier, on August 6, 2008, when the decedent's son, Jeffrey Powell, as general partner, executed and filed a certificate of limited partnership. NHP's limited partnership agreement gives Mr. Powell, as general partner, sole discretion to determine the amount and timing of partnership distributions. That agreement also allows for the partnership's dissolution with the written consent of all partners. On August 8, 2008, Mr. Powell, purportedly acting on behalf of decedent under a power of attorney (POA), assigned to a charitable lead annuity trust (the "CLAT") decedent's 99% limited partner interest in NHP. The terms of the CLAT entitled the Nancy H. Powell Foundation, a Delaware nonprofit corporation, to an annuity of a specified amount for the remainder of decedent's life. Upon decedent's death, the remaining assets in the CLAT were to be divided equally between two trusts for the benefit of Mr. Powell and his brother. The POA also authorized Mr. Powell "[t]o make gifts on the principal's behalf, including, but not limited to, forgiveness of loans, to a class composed of the principal's children, any of such children's issue, or any or all to the full extent of the federal annual gift tax exclusion". Decedent's gift tax return for 2008 reported a taxable gift of $1,661,422 as a result of the purported transfer to the CLAT of her 99% limited partner interest in NHP. The amount of the taxable gift—that is, the remainder interest in the CLAT given to decedent's sons—was computed on the basis that the trust corpus (the 99% limited

partner interest in NHP) was worth $7,516,773. The value assigned to the limited partner interest, in turn, was based on an appraisal conducted by Duff & Phelps, LLC. In determining the value of the limited partner interest, Duff & Phelps applied a 25% discount for lack of control and lack of marketability. The IRS issued notices of deficiency in both estate and gift tax. In the gift tax notice, the IRS determined that the 99% limited partner interest in NHP was worth $8,518,993 on August 8, 2008, and that the remainder interest in the CLAT was worth $8,363,095. The IRS determined the value of the remainder interests on the premise that decedent was terminally ill when the gift was made.

The estate tax notice increased the value of decedent's gross estate by $12,983,936. The notice explains the principal adjustment, an increase of $10,022,570, on three alternative grounds: First, it was determined that the decedent retained at her death the possession, enjoyment, or right to the income from property she transferred to NHP or the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income from the property transferred to the partnership, valued at $10,022,570 on the valuation date and includible in the gross estate under §2036(a). Alternatively, it was determined that the decedent retained at her death a power to change the enjoyment of property transferred to NHP through exercise of a power by the decedent alone or in conjunction with any other person to alter, amend, revoke, or terminate the property transferred to the partnership, valued at $10,022,570 on the valuation date and includible in the gross estate under §2038(a). Alternatively, the IRS determined that the decedent retained at her death a power to change the enjoyment of a 99% limited partnership interest in NHP through exercise of a power by the decedent alone or in conjunction with any other person to alter, amend, revoke, or terminate such that the value of the 99% limited partnership interest is includible in her gross estate under §2038(a) at its fair market value of $10,022,570. The fair market value of the 99% partnership interest is determined without regard to certain rights and restrictions identified in §2703(a). The remaining increase to the value of decedent's estate of $2,961,366 equals the gift tax deficiency that the IRS determined, which was added to the value of decedent's gross estate because the taxable gift resulting from the purported transfer to the CLAT of decedent's limited partner interest occurred within three years of her death. Although the IRS increased the value of decedent's gross estate by the gift tax deficiency, the IRS did not increase the amount of the deduction allowed under §2053(a)(3) for claims against the estate.

The IRS argued that §2036(a)(1) and (2) applied to decedent's transfer of cash and securities to NHP. The IRS argued that §2036(a)(1) applied to the transfer in issue because it was subject to an implied agreement under which decedent retained the possession or enjoyment of the transferred property or the right to income from that property. The IRS also argued that §2036(a)(2) applied to the transfer because of decedent's ability, acting with her sons, to dissolve NHP and thereby designate those who would possess the transferred property or the income from the property. The IRS claimed that the bona fide sale exception to §2036(a) did not apply because the estate failed to demonstrate a significant nontax purpose for the creation of NHP and because,

in the light of the claimed valuation discount, the transfer was not made for full and adequate consideration. The Court agreed with the IRS that the transfer of cash and securities to NHP was subject to a right described in §2036(a)(2), and did not need to consider the IRS's argument regarding §2036(a)(1). The estate's only response to the IRS's §2036(a)(2) argument was that, upon her death, decedent did not retain her interest in NHP. The estate overlooked §2035(a). Assuming its validity, the transfer of decedent's NHP interest to the CLAT relinquished a power over the disposition of the cash and securities transferred to the partnership. The transfer of her NHP interest occurred less than three years before her death (indeed, only a week before). The estate did not deny that, if decedent had retained her NHP interest on the date of her death, the value of the cash and securities transferred to the partnership would have been included in the value of her gross estate under §2036(a)(2). Thus, even if decedent's NHP interest were validly transferred to the CLAT before her death, the plain terms of §2035(a) would require inclusion in the value of her gross estate of the value of the cash and securities that would have been included under §2036(a)(2) in the absence of that transfer. The Court's opinion in Estate of Strangi v. Commissioner supported the conclusion that decedent's ability to dissolve NHP with the cooperation of her son constituted a "right in conjunction with others to designate the persons who shall possess or enjoy the property [she transferred to the partnership] or the income therefrom", within the meaning of §2036(a)(2). The ability to dissolve the partnership carried with it the ability to direct the disposition of its assets. In fact, because the decedent was a 99% partner in the partnership, its dissolution would likely revest in decedent herself the majority of the contributed property. Therefore, the Court concluded that the decedent's ability to join with others to dissolve the partnership justified the application of §2036(a)(2) to the property she transferred in exchange for her partnership interest. In addition to noting the decedent's ability to act with others to dissolve the partnership, the decedent held the right, through her son, to determine the amount and timing of partnership distributions. In the present cases, NHP's limited partnership agreement gave Mr. Powell, as general partner, sole discretion to determine the amount and timing of partnership distributions. The person with authority to determine distributions also served as decedent's attorney-in-fact.

The Court noted that the inclusion in decedent's gross estate required by §2036(a)(2) (or, if applicable, §2035(a)) differs in amount from the inclusion that would be required by a determination that the gift of decedent's NHP interest was either void or revocable. The Court stated that neither §2036(a)(2) nor §2035(a) justifies the inclusion in the value of decedent's gross estate of the full date-of-death value of the cash and securities transferred to NHP in exchange for decedent's limited partner interest. Although the terms of each section, read in isolation, would require that result, those sections must be read in conjunction with §2043(a). The Court stated that §2043(a) complements the bona fide sale exception to the inclusionary rules provided in §2035 through §2038. The bona fide sale exception limits the reach of the inclusionary rules to transactions that deplete a decedent's estate. Section 2043(a) serves a purpose similar to that of the bona fide sale exception, limiting the scope of the various inclusionary rules so that they apply only to the extent necessary to prevent depletion of the transferor's estate. The Court

stated that §2043(a) was plainly designed to deal with the situation where the decedent has received some, but not 'adequate and full,' consideration for the transfer. Thus, if a transfer depletes a decedent's estate to any extent, the bona fide sale exception will generally not apply. But if the decedent receives some consideration, §2043(a) limits the required inclusion to the amount by which the transfer depletes the decedent's estate. In the present case, because of the limitation provided by §2043(a), §2036(a)(2), if applicable, would include in the value of decedent's gross estate only the excess of the fair market value at the time of her death of the cash and securities transferred to NHP over the value of the 99% limited partner interest in NHP issued in exchange for those assets. If, instead, §2035(a) applies, it would require inclusion in the value of decedent's gross estate of the same amount. Therefore, §2043(a) limits the amount includible in the value of decedent's gross estate, by reason of §2036(a)(2) (either alone or in conjunction with §2035(a)), to "the excess of the fair market value at the time of death of [the cash and securities], over the value of the consideration received therefor by the decedent." Put differently, §2036(a)(2) or §2035(a), in either case as limited by §2043(a), includes in the value of decedent's gross estate the amount of any discounts applicable in valuing the 99% limited partner interest in NHP issued in exchange for the cash and securities (an amount the Court characterized as the "hole" in the doughnut). Only if the gift to the CLAT of decedent's limited partner interest in NHP were either void or revocable (and thus subject to §2038(a)) would the value of her gross estate also include value of that interest (the "doughnut"). The Court felt that allowing §2043(a) to limit the amount includible in the value of a decedent's gross estate by reason of the application of §2036(a) to a transfer to a family limited partnership carried out the purposes of those provisions. To the extent that the value of assets transferred to a family limited partnership does not exceed the value of the partnership interest received in return, the exchange does not deplete the transferor's estate or allow for the avoidance of transfer taxes. If, after formation of a family limited partnership, a decedent transfers her interest in the partnership inter vivos by gift, the value of that interest (taking into account any applicable valuation discounts) will be subject to gift tax. If the decedent instead retains her partnership interest until death, §2033 will include the value of that interest (again, subject to applicable discounts) in the value of her gross estate. In either case, §2036(a), as limited by §2043(a), would bring back into the estate the amount of any discounts (that is, the doughnut hole) allowed in valuing the partnership interest. The Court stated that applying §2043(a) to limit the inclusion required by §2036(a) simply prevents "double taxation of the same economic interest", precisely in accord with the "obvious" purpose underlying §2043(a). The Court stated that the illogic of including in the value of a decedent's gross estate both the assets transferred to a family limited partnership and the partnership interest received in return seems to have been widely recognized, but the precise legal grounds that prevent such illogical "double taxation" had gone unarticulated. The Court concluded that, when §2036(a) (either alone or in conjunction with §2035(a)) requires the inclusion in the value of a decedent's gross estate of the value of assets transferred to a family limited partnership in exchange for an interest in that partnership, the amount of the required inclusion must be reduced under §2043(a), by the value of the partnership interest received by the decedent-transferor. Consequently, when applicable, §2036(a) (or

§2035(a)) will include in the value of a decedent's gross estate only the excess of the value of the transferred assets (as of the date of the decedent's death) over the value of the partnership interest issued in return (as of the date of the transfer). Under §2043(a), the consideration received is to be valued at the time of receipt by the decedent.

Judge Lauber concurred in the result only. Judge Lauber stated that the Court correctly concluded that §2036(a)(2) applied here. He noted that the Court concluded that §2036(a) does not require "the inclusion in the value of decedent's gross estate of the full date-of-death value of the cash and securities," while admitting that the statute, "read in isolation, would require that result." Judge Lauber stated that §2036(a) effectively includes in the gross estate the full fair market value of all property transferred in which the decedent had retained an interest. Instead, the Court held that §2036(a)(2) brings into the gross estate a much smaller sum: the value of the cash and securities ($10 million) minus the value of the limited partnership interest that the decedent got in exchange. Otherwise, the Court concluded, the $10 million would be included in her estate twice: first via §2036(a)(2) and again via her partnership interest, which would be separately includible as property of the estate under §2033. "This is where I part company with the Court, because I do not see any 'double inclusion' problem." Judge Lauber felt that once that $10 million is included in the gross estate under Section 2036(a)(2), it was perfectly reasonable to regard the partnership interest as having no distinct value, because it was an alter ego for the $10 million of cash and securities.

This is the approach that the Court had previously taken to this problem. Concluding that the decedent's interest in the partnership had no value apart from the assets he contributed to the partnership. There is no double-counting problem if §2036(a)(2) is read, as it always has been read, to disregard a "transfer with a string" and include in the decedent's estate what she held before the purported transfer—the $10 million in cash and securities. The Court recognized that it had not previously applied §2043(a), as the Court did here, to limit the amount includible in a decedent's gross estate under §2036(a). Invoking §2043(a), the Court divided the $10 million into a "doughnut" and a "doughnut hole." The "doughnut" consists of the limited partnership interest allegedly received by the decedent. On the Court's theory, this is pulled back into the gross estate via §2035 or §2038, and its value then included under §2033. As a result, §2036(a), paired with §2043(a), had the much-reduced function of bringing back into the gross estate, not the full value of the $10 million as that Section by its terms required, but only the amount of any discounts (that is, the doughnut hole) allowed in valuing the partnership interest. This theory seemingly validated the estate's claimed discount for lack of marketability, which seemed highly suspect to Judge Lauber on the facts presented. "The Court's exploration of §2043(a) seems to me a solution in search of a problem." It was not necessary; the parties did not think it was necessary; and the Court's prior cases show that it was unnecessary. And even if the §2043(a) issue were properly presented, Judge Lauber was not sure that the Court's application of that provision was correct. Indeed, the Court seemed to acknowledge the analytical

infirmities of its approach, conceding that its formulation could "result in a duplicative reduction in transfer tax."

Footnote #6. In Estate of Bongard v. Commissioner, 124 T.C. 95 (2005), we adopted a limited exception to the proposition that any depletion of a decedent's estate precludes application of the bona fide sale exception. In Estate of Bongard, we held: "In the context of family limited partnerships, the bona fide sale for adequate and full consideration exception is met where the record establishes the existence of a legitimate and significant nontax reason for creating the family limited partnership, and the transferors received partnership interests proportionate to the value of the property transferred." Under Estate of Bongard's "proportionality" test, a transfer of assets to a family limited partnership can be treated as having been made for adequate and full consideration even if discounts for such factors as lack of control or lack of marketability cause the value of the partnership interest received by a decedent to be less than the value of the assets he transferred to the partnership. Thus, a transfer by a decedent to a family limited partnership that depletes the decedent's estate to the extent of any applicable discounts allowed in valuing the partnership interest can satisfy the bona fide sale exception from §2036(a), but only if the partnership was created for a legitimate and significant nontax reason.

Footnote #7. More precisely, the net inclusion required by applying §2036(a) to a transfer to a family limited partnership would equal any discounts applied in valuing the partnership interest the decedent received plus any appreciation (or less any depreciation) in the value of the transferred assets between the date of the transfer and the decedent's date of death. Changes in the value of the transferred assets would affect the required inclusion because §2036(a) includes in the value of decedent's gross estate the date-of-death value of those assets while §2043(a) reduces the required inclusion by the value of the partnership interest on the date of the transfer. To the extent that any post-transfer increase in the value of the transferred assets is reflected in the value of the partnership interest the decedent received in return, the appreciation in the assets would generally be subject to a duplicative transfer tax. Conversely, a post-transfer decrease in value would generally result in a duplicative reduction in transfer tax. In the present cases, however, the parties appear to have agreed to disregard any change in the value of the cash and securities transferred to NHP between the date of their transfer, on August 8, 2008, and decedent's death one week later. Therefore, if no discount appropriately applies to value the interest in NHP issued in exchange for decedent's cash and securities, as respondent claimed in the estate tax notice of deficiency, then the application of either §2036(a) or §2038(a) to the transfer of those assets to NHP would add nothing to her gross estate.

22. Grainger v. Commissioner, T.C. Memo, 2018-17

Taxpayer is a retired grandmother who is fond of shopping. Seeking to combine her love of shopping with a desire for a tax cut, she developed in 2010 what she described at trial as her "personal tax shelter." Having learned that a taxpayer may generally claim a

charitable contribution deduction in an amount equal to the fair market value (FMV) of donated property, she assumed that the FMV of a retail item is the dollar amount shown on the price tag when the retailer first offers the item for sale. Petitioner thus saw an opportunity. If she could find items that had been heavily discounted from the amounts shown on their original price tags, she could achieve a net tax benefit simply by buying and immediately donating those items. Virtually all of the property for which the taxpayer claimed charitable contribution deductions consisted of clothing she had purchased at Talbots. She would look for clothing that had been heavily discounted (e.g., out-of-season items) and purchase dozens or hundreds of these items over the course of a year. As a valued customer, she thus became entitled to Talbots "points" or "appreciation dividends," which she could then deploy to get further discounts. As a result of successive markdowns and use of "points," taxpayer might purchase for $10 an item that had an original retail price of $99. She would donate that item to Goodwill Industries (Goodwill) and claim a charitable contribution deduction of $99 on her Federal income tax return. Taxpayer attached to her return six Forms 8283, Noncash Charitable Contributions. She described her donations as "dresses," "jackets," and other items of clothing, and she listed the donees as various Goodwill donation centers. She described her valuation method as "FMV". None of the Forms 8283 was executed by a Goodwill official, as the Forms explicitly require. While the examination was pending, the taxpayer filed for bankruptcy under Chapter 13 of the Bankruptcy Code. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. The FMV of an item is not the price at which a hopeful retailer initially lists that item for sale. Even if the taxpayer could establish that the FMV of the donated clothing exceeded her acquisition cost, she would have no right to a greater charitable contribution deduction. Section 170(e)(1)(A) reduces the allowable deduction by "the amount of gain which would not have been long-term capital gain if the property contributed had been sold by the taxpayer at its fair market value (determined at the time of such contribution)." Since the taxpayer donated all or most of the items shortly after purchasing them, she would have realized short-term capital gain if she had sold them.

23. Wendell Falls Development, LLC v. Commissioner, T.C. Memo 2018-45

Wendell Falls was organized as a North Carolina LLC by two individual land developers and a corporation based in Myrtle Beach, South Carolina. Between 2004 and 2007, Wendell Falls bought 27 contiguous parcels of unimproved land, comprising 1,280 acres. The 1,280 acres is in Wake County, North Carolina. When Wendell Falls bought the parcels, they were outside the boundaries of the town of Wendell. The town of Wendell is roughly 15 miles east of Raleigh, North Carolina. Wendell Falls planned to subdivide the 1,280 acres into a master-planned community with residential areas, commercial spaces, an elementary school, and a park. Wendell Falls planned to then sell the residential lots to homebuilders and commercial lots to commercial builders. Wendell Falls identified 125 acres of the 1,280 acres as the land upon which the park would be placed. The 125 acres is on the eastern shore of Lake Myra, a man-made lake.

The 125 acres includes both sides of Marks Creek, a creek that runs into Lake Myra. In mid-2005, Wendell Falls and Wake County began discussing the possibility of Wake County's purchasing the 125 acres for use as a county park. Wendell Falls planned to have the remainder of the 1,280 acres annexed by the town of Wendell before it was developed. Sometime after discussions regarding the purchase of the 125 acres began, Wendell Falls proposed placing a conservation easement on the 125 acres before the sale. Wendell Falls wanted the easement, which would be held by a conservation organization, in order to restrict the 125 acres to park use. On March 17, 2006, Wendell Falls submitted for approval to the town of Wendell a planned unit development ("PUD") on the 1,280 acres. At some point, the town of Wendell annexed the 1,280 acres except for the 125 acres. On October 9, 2006, the PUD was approved by the town of Wendell. Under the PUD, the master-planned community, when completed, would have up to 4,000 residential lots. The PUD stated that the 125 acres would be dedicated to the creation of "Wendell Falls Park". On November 27, 2006, an appraiser, C.P. Shaw, appraised the 125 acres at $3,219,000. On December 4, 2006, the Wake County Board of Commissioners authorized the county to buy land for a future park facility for $3,186,000. The purchase agreement stated that placing a mutually agreeable conservation easement on the land was a precondition to the sale. On June 4, 2007, the Wake County Board of Commissioners reauthorized the purchase of the 125 acres for $3,020,000. On June 7, 2007, the Wake County Register of Deeds recorded the following two instruments in its deed book: (1) a conservation easement on the 125 acres granted by Wendell Falls in favor of Smokey Mountain National Land Trust and (2) a general warranty deed transferring ownership of the 125 acres from Wendell Falls to Wake County. Wendell Falls filed a timely Form 1065. Wendell Falls reported a $1,798,000 charitable-contribution deduction for its contribution of the conservation easement. Attached to the return was an appraisal of the conservation easement, which was prepared by Bruce Sauter. The appraisal valued the easement at $4,818,000. The return reported the resulting deduction as if Wake County had paid $3,020,000 to Wendell Falls for a $4,818,000 easement. Therefore, the return reported that the amount of the deduction was $1,798,000. In actuality, Wake County paid the $3,020,000 to Wendell Falls for the land, not the easement. Wendell Falls filed an amended Form 1065. Wendell Falls reported that the charitable-contribution deduction for the contribution of the conservation easement was $4,818,000.

The IRS determined that the amount of the charitable contribution deduction was zero. No deduction for a charitable contribution is allowed if the taxpayer expects a substantial benefit from the contribution. The IRS argued that: (1) Wendell Falls' contribution of the conservation easement on the 125 acres to Smokey Mountain National Land Trust ensured that Wake County, as the owner of the underlying land, could practically use the 125 acres only for a county park; and (2) Wendell Falls expected a substantial benefit from the easement because the prospect of a public park on the 125 acres would increase the value of the rest of the adjoining 1,280 acres owned by Wendell Falls. That Wendell Falls expected a substantial benefit from the contribution of the easement was supported by the record. Wendell Falls expected to receive value from the park and intended the easement to ensure that there would be a

park on the 125 acres. The Court found that Wendell Falls donated the easement with the expectation of receiving a substantial benefit. A charitable-contribution deduction was not allowable because of this expectation. In the alternative, the Court also considered the value of the easement. The easement must have value in order for it to generate a charitable-contribution deduction. In the Court's opinion, the value of the easement was zero. The amount of the allowable charitable-contribution deduction is the value of the contributed property. This is also the case when the contributed property is a conservation easement. The value of the easement is equal to the value of the land before the easement, minus the value of the land after the easement. The land itself is valued at its highest and best use. The best use of the 125 acres was as parkland in the midst of a master-planned community. The conservation easement therefore did not diminish the value of the 125 acres because it did not prevent it from being put to its best use. The value of the easement was therefore zero. That the easement did not diminish the value of the 125 acres was confirmed by Wake County's actions. Wake County valued the 125 acres without the easement at $3,020,000. It then bought the 125 acres for that amount even though it was burdened by the easement.

24. Marks v. Commissioner, T.C. Memo 2018-49

Taxpayer owned a retirement account, the custodian of which was the Argent Trust Co. Before 2005, the Argent account qualified as an IRA. In 2005, the Argent account made a $40,000 loan to the taxpayer's father. It received a promissory note in exchange. In 2012, the Argent account made another loan, of $60,000, to one of the taxpayer's friends. It received a promissory note in exchange. As of December 2013, the Argent account had the following assets: (1) the two notes (with a combined face value of $100,000) and (2) $96,508 in cash. In December 2013, the taxpayer attempted to roll over the assets of the Argent account to the Equity account. On her 2013 tax return, the taxpayer did not report that she had received a taxable distribution from the Argent account. Under §408(e)(2)(A), if an IRA engages in a prohibited transaction, the account ceases to be an IRA as of the first day of the taxable year in which the prohibited transaction occurs. The IRS argued as follows: in 2013 the Argent account was an IRA; in 2013 the Argent account made a $196,508 distribution to the taxpayer consisting of $96,508 cash and the two notes; the $96,508 cash is excludable from the taxpayer's income because it was successfully rolled over from one IRA account to another (i.e., from the Argent account to the Equity account); however, the two notes were not successfully rolled over and therefore the taxpayer's income for 2013 includes the value of the two notes. After the parties filed their briefs, the Court ordered them to file additional memoranda addressing the effect of the prohibited-transaction rule of §408(e)(2)(A). In their memoranda, both parties agreed that by making the $40,000 loan to the taxpayer's father in 2005, the Argent account had engaged in a prohibited transaction and ceased to be an IRA. They also agreed that the taxpayer's income for 2013 should not include a taxable distribution from the Argent account because that account was not an IRA in 2013. Because the taxpayer did not receive an amount includable in income from an IRA in 2013, she was not liable for the 10% additional tax of §72(t) for 2013.

25. Estate of Richard F. Cahill v. Commissioner, T.C. Memo 2018-84

Richard F. Cahill (the decedent) resided in California when he died on December 12, 2011. The split-dollar agreements described below were executed the year before decedent died, in 2010, when he was 90 years old and unable to manage his own affairs. Decedent was settlor of a revocable trust, (Survivor Trust). Decedent's involvement in the three split-dollar life insurance arrangements in question was effected solely through the Survivor Trust and was directed by Patrick Cahill, either as decedent's attorney-in-fact or as trustee of Survivor Trust. The parties agreed that everything in Survivor Trust on decedent's date of death is included in decedent's gross estate. Decedent was also settlor of an irrevocable trust, (MB Trust), which was created on September 9, 2010, by Patrick Cahill as decedent's attorney-in-fact. MB Trust was formed to take legal ownership of three whole life insurance policies (policies). Two policies were on the life of Shannon Cahill, Patrick Cahill's wife, and one policy was on the life of Patrick Cahill. Policy premiums were paid in lump sums, as follows:

Policy/Insured	Premium	Policy Amount
On Patrick Cahill	$5,580,000	$40,000,000
On Shannon Cahill	$2,531,570	$25,000,000
On Shannon Cahill	$1,888,430	$14,800,000
Total	$10,000,000	$79,800,000

To fund these policies, three separate split-dollar agreements (one for each policy) were executed by Patrick Cahill, as trustee of Survivor Trust, and William Cahill, as trustee of MB Trust. Under these agreements, Survivor Trust promised to pay the policy premiums listed above. Survivor Trust paid the premiums using funds from a $10 million loan from Northern Trust, N.A. (loan). The obligors on the loan were decedent personally and Patrick Cahill, as trustee of Survivor Trust. The loan had a five year term. No principal payments were required during the five year term. Each split-dollar agreement provided that, upon the death of the insured, Survivor Trust would receive a portion of the death benefit equal to the greatest of: any remaining balance on the loan as relates to the relevant policy, the total premiums paid by Survivor Trust with respect to that policy, or the cash surrender value of the policy immediately before the insured's death. MB Trust would retain any excess of the death benefit over the amount paid to Survivor Trust. Each split-dollar agreement also provided that it could be terminated during the insured's life by written agreement between the trustees of Survivor Trust and MB Trust. If one of the split-dollar agreements were terminated during the insured's life, MB Trust could opt to retain the policy. In that case MB Trust would be obligated to pay Survivor Trust the greater of the total premiums Survivor Trust had paid on the policy or the policy's cash surrender value. If MB Trust did not opt to retain the policy, it would be required to transfer its interest in the policy to Northern Trust, N.A. In that case Survivor Trust would be entitled to any excess of the cash surrender value over the outstanding loan balance with respect to the policy. In 2010, Richard Cahill reported total gifts to MB Trust of $7,578, as determined under the economic benefit regime set forth in Regs., §1.61-22. As of the date of decedent's death, the

aggregate cash surrender value of the policies was $9,611,624. The estate's tax return reported the total value of decedent's interests in the split-dollar agreements as $183,700.

The estate contends that: (1) because decedent's right to terminate the split-dollar agreements was held in conjunction with the trustee of MB Trust and (2) because it would allegedly never make economic sense for MB Trust to allow termination of the split-dollar agreements, termination was so unlikely that the termination rights had no value as of decedent's date of death. On this basis, the estate contends that the value of decedent's interests in the split dollar agreements is limited to the value of decedent's death benefit rights. The estate further contends that on decedent's date of death these rights were worth only $183,700, because Patrick and Shannon Cahill, the insured persons, were then projected to live for many years, with the result that decedent's rights had only a relatively small present value. In the notice of deficiency the IRS adjusted the total value of decedent's rights in the split-dollar agreements from $183,700 to $9,611,624; i.e., to the aggregate cash surrender value of the policies as of decedent's date of death. In support of this adjustment, the IRS presented alternative theories applying §2036(a)(2), §2038(a)(1), and §2703(a)(1) and (2).

Regulations §1.61-22, provides rules for split-dollar life insurance arrangements for purposes of the income, gift, employment, and self-employment taxes. In general, under Regs., §1.61-22(b)(1), a split-dollar life insurance arrangement is any arrangement between an owner and a nonowner of a life insurance contract, where either party pays any portion of the premiums and at least one of the parties is entitled to recover, either conditionally or unconditionally, all or any portion of those premiums. The parties did not dispute that the agreements at issue were split-dollar life insurance arrangements within the meaning of this Regulation. Regulations, §1.61-22, provides two mutually exclusive regimes for taxing split-dollar life insurance arrangements: the economic benefit regime and the loan regime. The determination of which regime applies depends on which party owns, or is deemed to own, the life insurance policy subject to the arrangement. Generally, the Regulations treat the person named as the legal owner in the insurance contract as the contract's owner. Under this general rule, MB Trust would be considered the owner of the policies, and the loan regime would apply. As an exception, however, Regs., §1.61-22(c)(1)(ii), provides a special ownership rule: if the only economic benefit provided to the donee (MB Trust, in this case) under the split-dollar life insurance arrangement is current life insurance protection, then the donor (decedent, in this case) will be deemed the owner of the life insurance contract, irrespective of formal policy ownership, and the economic benefit regime will apply. In general, the economic benefit regime treats the cost of current life insurance protection as a transfer each year from the donor/owner to the donee/nonowner.

The estate asked for summary judgment that §2036(a)(2) and §2038(a)(1) do not apply to include the cash surrender value in the gross estate because decedent retained no rights with respect to the amounts transferred sufficient to justify application of those sections. On the undisputed facts, however, the rights to terminate and recover at least

the cash surrender value were clearly rights, held in conjunction with another person (MB Trust), both to designate the persons who would possess or enjoy the transferred property under §2036(a)(2) and to alter, amend, revoke, or terminate the transfer under §2038(a)(1). Cf. Estate of Powell v. Commissioner. The estate argued that decedent had no such right because he held the right to terminate only in conjunction with MB Trust, and MB Trust could therefore prevent decedent from terminating the split-dollar agreements. The Court concluded that if the estate were correct, then the words "in conjunction with any person" in §2036(a)(2), and "in conjunction with any other person" in §2038(a)(1), would have no force or meaning. The estate contended that neither §2036 nor §2038 applied because decedent's transfer of $10 million was part of a bona fide sale for adequate and full consideration. The IRS answered that the undisputed facts strongly suggested that decedent's son Patrick stood on both sides of the transactions in question and that the arrangements were therefore not bona fide sales resulting from arm's-length transactions. The Court noted that whether a transfer was a bona fide sale is a question of business purpose; i.e., did decedent have a legitimate and significant nontax reason, established by the record, for transferring the $10 million? Whether a transfer was for adequate and full consideration is a question of value; i.e., did what decedent transferred roughly equal the value of what he received in return? The estate alleged that decedent's death benefit rights are worth less than 2% of the cash surrender value (i.e., $183,700 ÷ $9,611,624 < 2%). Consequently, this alleged 98% discount must have been present from the execution of these agreements. Therefore, according to the estate's valuation theory, the initial transfer of $10 million in value cannot have been in exchange for property worth that amount. The Court concluded the requirements of §2036(a)(2) and §2038(a)(1) were met. The bona fide sale for adequate and full consideration exception was not satisfied because the value of what decedent received was not even close to the value of what decedent paid.

The IRS contended--as an alternative theory to its arguments under §2036 and §2038--that MB Trust's ability to veto termination of the split-dollar agreements should be disregarded under §2703(a)(1) or (2) for purposes of valuing decedent's rights in the split-dollar agreements. On the basis of the undisputed facts, the Court concluded that under §2703(a)(1) the split-dollar agreements, and specifically the provisions that prevent decedent from immediately withdrawing his investment, were agreements to acquire or use property at a price less than fair market value. Next, it was clear that under §2703(a)(2) the split-dollar agreements, and specifically MB Trust's ability to prevent termination, also significantly restrict decedent's right to use the termination rights. On the basis of the undisputed facts, the Court concluded that the requirements of §2703(a)(1) and (2) were each met.

Finally, the estate argued that the difference between the $10 million that decedent paid and the approximately $183,700 that he allegedly received in return (the difference) would be accounted for as gifts and that to count the difference as part of the estate under §2036, §2038, or §2703 would essentially double count that amount as both a gift and as part of the gross estate. The estate pointed out that pursuant to Regs., §1.61-22, the economic benefit regime applied to the split-dollar agreements. Accordingly, the

estate argued that the economic benefit regime dictated the estate tax consequences of the split-dollar agreements. The IRS countered that the Regulations do not apply for estate tax purposes, observing, "the economic benefit regime [r]ules * * * are gift tax rules, not estate tax rules." Where (as here) the only benefit to the donee was current life insurance protection, the economic benefit regime clearly treats decedent as the owner of the cash surrender value. The estate agreed that the benefit of current life insurance protection was treated (in accordance with the Regulations) as a gift from decedent to MB Trust out of the cash surrender value. Consistency between the Regulations and the estate tax Code sections would therefore demand that the cash surrender value remaining as of decedent's date of death be valued as part of, or included in, decedent's gross estate. In short, the Court concluded that the consistency the estate demanded seemed to require the result the IRS sought.

26. Estate of Sower v. Commissioner, 149 T.C. No. 11

At the time of Frank's death, Frank and Minnie were married. During their lifetimes, Frank and Minnie gave $997,920 and $997,921 in taxable gifts, respectively. The Sowers filed a Form 709 for each year in which they gave taxable gifts. Frank died on February 23, 2012. His estate filed a timely return reporting that it had no estate tax liability. The estate also reported zero in taxable gifts. Frank's estate reported a DSUE of $1,256,033 and elected portability of the DSUE to allow the surviving spouse to use it. The Commissioner issued an initial Letter 627, Estate Tax Closing Document, to Frank's estate. Minnie died on August 7, 2013. Her estate filed a timely return claiming a DSUE of $1,256,033 from Frank's estate. Like Frank's estate, Minnie's estate did not include the lifetime taxable gifts on the return. The Commissioner began an examination of the return filed by Minnie's estate. In connection with that examination, the Commissioner also opened an examination of the return filed by Frank's estate to determine the proper DSUE amount available to Minnie's estate. As a result of the examination of the return filed by Frank's estate, the Commissioner reduced the DSUE available to Minnie's estate from $1,256,033 to $282,690. The Commissioner also adjusted Minnie's taxable estate by the amount of her lifetime taxable gifts.

Minnie's estate advanced several arguments. It argued that the first Estate Tax Closing Document should be treated as a closing agreement under §7121 and that the Commissioner should be estopped from reopening the estate by the text of the document. Minnie's estate also argued that the examination that took place after the Commissioner had sent the first Estate Tax Closing Document was an improper second examination. The estate further argued that the effective date of §2010(c)(5)(B) and the text of the Regulations preclude the Commissioner from adjusting the DSUE amount of the predeceased spouse for gifts made before 2010. Section 2010(c)(5)(B) gives the Commissioner the power to examine the estate tax return of the predeceased spouse to determine the DSUE amount, regardless of whether the period of limitations on assessment has expired for the predeceased spouse's estate. Section 7602 gives the Commissioner broad discretion to examine a range of materials to "ascertain the correctness of any return". Under §7602(a)(1), Congress gave the Commissioner specific

authority "[t]o examine any books, papers, records, or other data which may be relevant or material". Here, the Commissioner properly exercised the power conferred by §2010(c)(5)(B) and §7602(a)(1). The Commissioner examined the return filed by the estate of the predeceased spouse. Minnie's estate asserted that the Court and the Commissioner should treat the Estate Tax Closing Document as a closing agreement under §7121. Under §7121(a) the Commissioner is explicitly authorized to enter into written agreements "with any person relating to the liability of such person". Agreements under §7121 are final. Under the applicable Regulations, only the prescribed forms, Form 866, Agreement as to Final Determination of Tax Liability, and Form 906, Closing Agreement on Final Determination Covering Specific Matters, qualify as closing agreements. There was no evidence of a closing agreement. Without citing §7605(b), which protects taxpayers from an impermissible second examination, the estate argued that there was an impermissible second examination of the return filed by Frank's estate. Section 7605(b) provides that "[n]o taxpayer shall be subjected to unnecessary examination or investigation, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary, after investigation, notifies the taxpayer in writing that an additional inspection is necessary." Here, it was clear that there was no second examination.

27. Millstein v. Millstein, Court of Appeals of Ohio

Appellant filed a petition for declaratory and equitable relief in the Ohio, Cuyahoga County Court of Common Pleas. Appellant's petition stated that he was the grantor of two irrevocable trust agreements established for the benefit of his children: the "Al-Jo" trust and the "Kevan Millstein" trust. Defendant-appellee Kevan Millstein ("Kevan") was the sole trustee of the trusts and one of the beneficiaries of the Kevan Millstein trust. Appellant alleged that under federal income tax law, the two trusts were designed so appellant would personally report the federal taxable income, deductions and credits realized from the investments of the trusts under the "grantor trust" rules of, §671 et seq. Although appellant was responsible for reporting any net taxable income associated with the trusts, he retained no rights as a beneficiary of the trusts. Appellant alleged that, in 2010, he requested that Kevan provide him reimbursement from the trusts for "substantial income taxes" owed by him due to the taxable income generated by the trusts. Kevan declined, but reached an agreement whereby the assets of a third, unrelated trust were used to defray appellant's personal income tax liabilities. In 2013, Kevan informed appellant that the third trust no longer had liquid assets. Appellant alleged he paid federal and state income taxes of $5,225,837 for the "Kevan Millstein" trust in 2013 and $1,261,068 for the "Al-Jo" trust for the tax years of 2013, 2014 and 2015. Appellant's petition sought "equitable reimbursement of income taxes" from the two trusts. Kevan and the trust beneficiaries argued that: (1) appellant lacked standing to request that the trusts make any payment to him; (2) that there is no cognizable claim in Ohio for equitable reimbursement to a grantor for tax liability incurred under the terms of a trust the grantor created. The Court of Appeals held that trial court correctly dismissed appellant's petition for failure to state a claim upon which relief can be granted. The Ohio Trust Code provided for "Modification to achieve settlor's tax

objectives". However, only a trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification. The Ohio Trust Code specifically limited a settlor's ability to commence a proceeding to approve a proposed modification or termination of a trust to certain situations involving the consent of the trust's beneficiaries. Appellant was precluded from unilaterally seeking modification to achieve his tax objectives. Appellant, without citing authority, asked the court to utilize equity to directly contradict the legislative intent. No court may employ equitable principles to circumvent valid legislative enactments. When the rights of parties are clearly defined and established by law, the courts usually apply the maxim "equity follows the law." In this instance, the legislature clearly considered the circumstances in which it intended to allow parties to a trust to modify the terms of the trust to achieve a settlor's tax objectives and decided to reserve the power to initiate such an action to the trustee or beneficiary. Appellant had not alleged that Kevan or any of the other parties named in this suit had taken any action inconsistent with the terms of the trust that he himself created. The Court of Appeals agreed with the appellee's position that appellant voluntarily created the situation that he now claims is inequitable.

28. Kaestner Family Trust v. NC Department of Revenue

The issue before the Supreme Court of North Carolina was whether the North Carolina Department of Revenue could tax the income of The Kimberly Rice Kaestner 1992 Family Trust, solely based on the North Carolina residence of the beneficiaries during tax years 2005 through 2008. The Joseph Lee Rice, III Family 1992 Trust was created in New York in 1992 for the benefit of the children of the settlor. Pursuant to the trust agreement, David Bernstein, a resident of Connecticut became trustee. Bernstein remained in the position of trustee and remained a Connecticut resident during the entire period of time relevant to this case. The trust was governed by the laws of the State of New York, of which Rice was a resident. No party to the trust resided in North Carolina until Rice's daughter, a primary beneficiary of the trust, Kimberly Rice Kaestner, moved to North Carolina in 1997. During the tax years at issue, the assets held by the trust consisted of various financial investments, and the custodians of those assets were located in Boston, Massachusetts. Documents related to the trust, such as ownership documents, financial books and records, and legal records were all kept in New York. All of the trust's tax returns and accountings were prepared in New York. None of the beneficiaries of the trust had an absolute right to any of the trust's assets or income because distributions could only be made at the discretion of Bernstein, who had broad authority to manage the property held by the trust. No distributions were made to beneficiaries in North Carolina, including Kaestner, during the tax years at issue. During tax years 2005 through 2008, the North Carolina Department of Revenue (NCDR) taxed the trust on income accumulated each year, regardless of whether any of that income was distributed to any of the North Carolina beneficiaries. The trust sought a refund of those taxes totaling more than $1.3 million. The NCDR denied the refund request. The trust claimed that the taxes collected violate the Due Process Clause because the trust did not have sufficient minimum contacts with the State of North Carolina. The trust also claimed that the taxes violate the Commerce Clause on several grounds, including

that the tax was not applied to an activity with a substantial nexus to the taxing state. The Court held that the trust and its North Carolina beneficiaries had legally separate, taxable existences. That was critical to the outcome here because a taxed entity's minimum contacts with the taxing state cannot be established by a third party's minimum contacts with the taxing state. The "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State". Here it was the trust's beneficiaries, not the trust, who reaped the benefits and protections of North Carolina's laws by residing there. Because the trust and the trust's beneficiaries are separate legal entities, due process was not satisfied solely from the beneficiaries' contacts with North Carolina. The Court reasoned that a trust has a legal existence apart from the beneficiary and that, consequently, for taxation to satisfy due process the trust itself must have "some definite link, some minimum connection" with the taxing state by "purposefully avail[ing] itself of the benefits of an economic market" in that state. Mere contact with a North Carolina beneficiary does not suffice.

North Carolina filed a petition for writ of certiorari with the United States Supreme Court, citing the Wayfair case. On January 11, 2019, the United States Supreme Court granted the petition.

Exhibit A
Section 199A Deduction
Definitions

1. Section 199A Deduction: Section 199A applies to taxable years beginning in 2018 and ending in 2025. Section 199A provides a deduction of up to 20% of income from a domestic (U.S.) business operated as a sole proprietorship, partnership, S corporation, trust, or estate. The §199A deduction may be taken by individuals and by some estates and trusts. A §199A deduction is not available for wage income or for business income earned through a C corporation. The §199A deduction is applied at the partner or shareholder level and does not affect the adjusted basis of a partner's interest in a partnership, the adjusted basis of a shareholder's stock in an S corporation, or an S corporation's accumulated adjustments account.

2. Qualified Trade or Business: An IRC, §162 trade or business other than the trade or business of performing services as an employee. Rental or licensing of tangible or intangible property (rental activity) that does not rise to the level of a business may qualify. The §199A deduction is not based on the level of a taxpayer's involvement in the trade or business. That is, both active and passive owners of a trade or business may be entitled to the §199A deduction.

3. Aggregated Trade or Business: Two or more qualified trades or businesses that have been aggregated pursuant to the Regulations. Aggregation is permitted but is not required. An individual may aggregate trade or businesses operated directly and the individual's share of QBI, W-2 Wages, and UBIA of qualified property from trades or businesses operated through RPE's. Multiple owners of an RPE need not aggregate in the same manner.

4. Qualified Business Income (QBI): For any taxable year, the net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business of the taxpayer. QBI does not include capital gain or loss, dividends, interest income, or reasonable compensation paid to the taxpayer. If an individual has multiple trades or businesses, the individual must calculate the QBI from each trade or business and then net the amounts.

5. Total QBI Amount: The net total QBI from all trades or businesses (including the individual's share of QBI from trades or businesses conducted by RPE's).

6. Relevant Passthrough Entity (RPE): A partnership (other than a PTP) or an S Corporation that is owned, directly or indirectly, by at least one individual, estate, or trust. A trust or estate is treated as an RPE to the extent it passes through QBI, W-2 Wages, UBIA of qualified property, qualified REIT dividends, or qualified PTP income. RPE's must compute QBI, W-2 Wages, and UBIA of qualified property for each trade or business for their owners to determine their §199A deduction.

7. Individual: An individual, trust, estate, or other person eligible to claim the §199A deduction.

8. Allocable Share: Generally equivalent to the partner's allocable share of partnership items or the shareholder's pro rata share of S corporation items.

9. W-2 Wages: A qualified trade or business's W-2 wages properly allocable to QBI. The W-2 Wage limitation applies separately for each trade or business. Notice 2018-64 released a proposed Revenue Procedure addressing alternative methods for calculating W-2 Wages.

10. Qualified Property: Tangible property subject to the allowance for depreciation, held by the qualified trade or business at the close of the taxable year, and which is used in the production of QBI and for which the depreciation period has not ended before the close of the taxable year. Depreciation period is the period beginning on the date the property was first placed in service and ending on the later of: (i) 10 years after such date; or (ii) the last full year in the applicable recovery period.

11. Unadjusted Basis Immediately After Acquisition of Qualified Property (UBIA of Qualified Property): Is generally the cost basis of the qualified property as of the date the property is placed in service, unadjusted by depreciation.

12. Specified Service Trade or Business (SSTB): Any trade or business involving the performance of services in one or more of the following fields: health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, investing, investment management, trading, dealing in securities, or a business where the principal asset is the reputation or skill of its employees or owners. If the individual's taxable income exceeds the phase-in range, then none of the individual's share of QBI, W-2 Wages, or UBIA of qualified property attributable to an SSTB may be taken into account for purposes of determining the individual's §199A deduction. However, the SSTB limitation does not apply to individuals with taxable income below the threshold amount.

13. Threshold Amount: For 2018, $157,500; or $315,000 for a joint return; indexed with inflation. For 2019, $321,400 for married filing joint returns; $160,725 for married filing separate returns; and $160,700 for single and head of household returns.

14. Phase-In Amount: $50,000; or $100,000 for a joint return.

15. Phase-In Range: Between $157,500 and $207,500; or between $315,000 and $415,000 for a joint return.

16. Phase-In Ratio:

$$\frac{\text{Taxable Income in Excess of Threshold Amount}}{\text{Phase-In Amount}}$$

17. Applicable Percentage: 100% less the Phase-In Ratio.

18. Excess Amount: The amount by which 20% of QBI exceeds the greater of:
(i) 50% of W-2 Wages; or
(ii) 25% of W-2 Wages, plus 2.5% of UBIA of qualified property.

19. Reduction Amount: Excess Amount times the Phase-In Ratio.

20. REIT: A Real Estate Investment Trust.

21. QPTP: A Qualified Publicly Traded Partnership.

22. Trusts and Estates: A non-grantor trust or estate computes its §199A deduction based on the QBI, W-2 Wages, and UBIA of qualified property that are allocated to the trust or estate. An individual beneficiary of a trust or estate takes into account any QBI, W-2 Wages, UBIA of qualified property allocated from a trust or estate in calculating the beneficiary's §199A deduction, in the same manner as though the items had been allocated from an RPE. A trust or estate is treated as an RPE to the extent it allocates QBI and other items to its beneficiaries, and is treated as an individual to the extent it retains the QBI and other items. In the case of a non-grantor trust or estate, the QBI and expenses properly allocable to the business, including W-2 Wages and UBIA of qualified property must be allocated among the trust or estate and its beneficiaries. The allocation is based on the ratio of the trust's or estate's DNI that is distributed or deemed to be distributed to the beneficiaries bears to the trust's or estate's total DNI for the taxable year. Any DNI not distributed is allocated to the trust or estate itself.

23. Multiple Trusts: If multiple trusts have substantially the same grantors and beneficiaries, and a principal purpose for establishing such trusts or contributing additional cash or other property to such trusts is the avoidance of Federal income tax, then the various trusts will be generally considered one trust, including for §199A purposes.

24. Negative QBI Amount: If the total QBI amount is less than zero, the portion of the individual's §199A deduction related to QBI is zero for the taxable year. The negative total QBI amount is treated as negative QBI from a separate trade or business in the succeeding taxable year of the individual for purposes of §199A. This carryover rule does not affect the deductibility of the loss for purposes of other Code provisions.

Section 199A Deduction
General Rules

I.

For individuals not exceeding the Threshold Amount, and with no REIT dividends and no QPTP income, the §199A Deduction is 20% of the individual's allocable share of QBI with respect to each Qualified Trade or Business (including QBI attributable to an SSTB). However, the §199A Deduction cannot exceed 20% of the individual's ordinary taxable income (taxable income – net capital gain).

The Threshold Account is $157,500, or $315,000 in the case of a taxpayer filing a joint return; Indexed with Inflation.

II.

For individuals exceeding the Threshold Amount by the Phase-In Amount, and with no REIT Dividends and no QPTP income, the §199A Deduction is the lesser of:

1) 20% of the individual's allocable share of QBI with respect to each Qualified Trade or Business; or
2) The W-2 Wage and UBIA of qualified property limitations.

The Phase-In Amount is $50,000, or $100,000 in the case of a joint return ($157,500 + $50,000 = $207,500; $315,000 + $100,000 = $415,000).

The W-2 Wage and UBIA of qualified property limitations are the greater of:

(i) 50% of the individual's allocable share of W-2 Wages with respect to the Qualified Trade or Business; or
(ii) The sum of 25% of the individual's allocable share of W-2 Wages with respect to the Qualified Trade or Business; plus 2.5% of the individual's allocable share of unadjusted basis immediately after acquisition (UBIA) of all qualified property.

However, the §199A Deduction cannot exceed 20% of the individual's ordinary taxable income (taxable income – net capital gain).

III.

For individuals exceeding the Threshold Amount by less than the Phase-In Amount, and with no REIT Dividends and no QPTP income, the §199A Deduction is equal to:

1) 20% of the individual's allocable share of QBI with respect to each Qualified Trade or Business; less
2) The Reduction Amount.

The Reduction Amount is the Excess Amount times the Phase-In Ratio.

The Excess Amount is the amount by which:

(i) 20% of the individual's allocable share of QBI with respect to each Qualified Trade or Business; exceeds

(ii) The W-2 Wage and UBIA of qualified property limitations.

The Phase-In Ratio is that fraction, the numerator of which is the amount by which the individual's taxable income for the taxable year exceeds the Threshold Amount, and the denominator of which is the Phase-In Amount. (i.e. the percentage the individual is "through" the phase-in range).

However, the §199A Deduction cannot exceed 20% of the individual's ordinary taxable income (taxable income – net capital gain).

IV.

For individuals not exceeding the Threshold Amount, a Specified Service Trade or Business (SSTB) is a Qualified Trade or Business. Therefore, income from the SSTB is Qualified Business Income.

V.

For individuals exceeding the Threshold Amount by the Phase-In Amount, an SSTB is not a Qualified Trade or Business. Therefore, income from the SSTB is not Qualified Business Income.

VI.

For individuals exceeding the Threshold Amount by less than the Phase-In Amount, only the applicable percentage of qualified items of income, gain, deduction or loss and the W-2 Wage and UBIA of qualified property of the individual allocable to such SSTB shall be taken into account. These reduced numbers must then be used to determine how the individual's §199A Deduction is limited.

The Applicable Percentage is equal to:

(i) 100%; less

(ii) The Phase-In Ratio.

Example 3

E, unmarried individual, owns 30% of LLC and is allocated 30% of all items of the LLC. LLC has $3,000,000 QBI. LLC has W-2 wages of $1,000,000. LLC has UBIA of qualified property of $100,000. E's taxable income is $880,000 (outside the Phase-In Range).

E's QBI component of the §199A deduction is the lesser of A, or B1 or B2, whichever is greater:

A. 20% of E's allocable share of QBI of the LLC:
$3,000,000 x 30% = $900,000 x 20% = $180,000

B1. 50% of E's allocable share of W-2 Wages with respect to the LLC:
$1,000,000 x 30% = $300,000 x 50% = $150,000

OR

B2. 25% of E's allocable share of W-2 Wages with respect to the LLC:
$1,000,000 x 30% = $300,000 x 25% = $75,000; plus 2.5% of E's allocable share of UBIA of qualified property
$100,000 x 30% = $30,000 x 2.5% = $750

The QBI component of E's §199A deduction is limited to $150,000 (capped by the W-2 Wage limit)

20% of E's ordinary taxable income
$880,000 x 20% = $176,000

E's §199A deduction is $150,000

Example 4

F, unmarried individual, owns 50% of S Corporation. S Corp has $6,000,000 of QBI. S Corp has W-2 Wages of $2,000,000. S Corp has UBIA of qualified property of $200,000. F's taxable income is $1,880,000. F has a deductible qualified net loss from a PTP of $10,000.

F's QBI component of the §199A deduction is the lesser of A, or B1 or B2, whichever is greater:

A. 20% of F's allocable share of QBI of the S Corp:
$6,000,000 x 50% = $3,000,000 x 20% = $600,000

B1. 50% of F's allocable share of W-2 Wages with respect to the S Corp:
$2,000,000 x 50% = $1,000,000 x 50% = $500,000

OR

B2. 25% of F's allocable share of W-2 Wages with respect to the S Corp:
$2,000,000 x 50% = $1,000,000 x 25% = $250,000; plus 2.5% of F's allocable share of UBIA of qualified property
$200,000 x 50% = $100,000 x 2.5% = $2,500

The QBI component of F's §199A deduction is limited to $500,000 (capped by the W-2 Wage limit)

20% of F's ordinary taxable income
$1,880,000 x 20% = $376,000

F's §199A deduction is $376,000

F does not net the $10,000 qualified loss from a PTP against QBI. F must carry forward the qualified loss to the next year.

Example 5

B & C are married filing jointly. B is shareholder in S Corp. S Corp has no qualified property. B's allocable share of S Corp's QBI is $300,000. B's allocable share of S Corp's W-2 Wages is $40,000. B & C's taxable income is $375,000 (within the Phase-In Range). B & C exceed the $315,000 Threshold Amount by $60,000, which is less than the $100,000 Phase-In Amount. B & C are 60% through the $100,000 Phase-In Range. That is, their taxable income exceeds the threshold amount by $60,000 and their Phase-In Amount is $100,000.

B's QBI component of the §199A deduction is the lesser of A, or B1 or B2, whichever is greater:

A. 20% of B's allocable share of QBI of the S Corp:
$300,000 x 20% = $60,000

B1. 50% of B's allocable share of W-2 Wages with respect to the S Corp:
$40,000 x 50% = $20,000

OR

B2. 25% of B's allocable share of W-2 Wages with respect to the S Corp:
$40,000 x 25% = $10,000; plus 2.5% of B's allocable share of UBIA of qualified property
$0.00 x 2.5% = $0.00

The QBI component of B's §199A deduction is:
20% of B's allocable share of QBI of the S Corp = $60,000 Less the Reduction Amount

Reduction Amount is Excess Amount times the Phase-In Ratio

Excess Amount:
$60,000 (20% of B's allocable share of QBI of the S Corp)
<$20,000> (50% of B's allocable share of S Corp's W-2 Wages)
$40,000 Excess Amount

Phase-In Ratio:
$60,000 (excess of taxable income over Threshold Amount)
$100,000 (Phase-In Amount) = 60%

$40,000 Excess Amount
x60% Phase-In Ratio
$24,000 Reduction Amount

$60,000
<$24,000> Reduction Amount
$36,000 QBI Component of B & C's §199A Deduction

20% of B & C's ordinary taxable income
$375,000 x 20% = $75,000

B & C's §199A deduction is $36,000

The difference between $60,000 and $20,000 is a $40,000 decrease in the potential §199A deduction. But B should not suffer the full $40,000 decrease if he is only 60% through the Phase-In Amount. He should suffer 60% of the potential $40,000 decrease, or $24,000.

Example 6

Assume the same facts as in Example 5, except that the S Corp is an SSTB as to B. Because B & C are within the Phase-In Range, B must reduce the QBI and W-2 Wages allocable to B from the SSTB to the Applicable Percentage of those items.

The Applicable Percentage is equal to:
(i) 100%; less
(ii) The Phase-In Ratio

Phase-In Ratio
$60,000 (excess of taxable income over Threshold Amount)
$100,000 (Phase-In Amount) = 60%

100%
<60%> Phase-In Ratio
40% Applicable Percentage

Applicable Percentage of B's allocable share of SSTB's QBI:
$300,000 x 40% = $120,000

Applicable Percentage of B's allocable share of SSTB's W-2 Wages:
$40,000 x 40% = $16,000

These reduced numbers must then be used to determine how B's §199A Deduction is limited. B's QBI component of the §199A deduction is the lesser of A or B1:

A. 20% of B's allocable share of QBI of SSTB (as adjusted)
$120,000 x 20% = $24,000

OR

B1. 50% of B's allocable share of W-2 Wages of SSTB (as adjusted)
$16,000 x 50% = $8,000

The QBI component of B's §199A Deduction is:
$24,000, less the Reduction Amount

Reduction Amount is Excess Amount times the Phase-In Ratio

Excess Amount
$24,000 (20% of B's allocable share of QBI of SSTB (as adjusted)
<$8,000> (50% of B's allocable share of W-2 Wages of SSTB (as adjusted)
$16,000 Excess Amount

$16,000 Excess Amount
x60% Phase-In Ratio
$9,600 Reduction Amount

$24,000
<$9,600> Reduction Amount
$14,400 QBI Component of B & C's §199A Deduction

20% of B & C's ordinary taxable income
$375,000 x 20% = $75,000

B & C's §199A deduction is $14,400

Trust Example

Trust is an irrevocable testamentary complex trust. Trust has a 25% Partnership interest. Partnership operates a restaurant. Trust has a 100% interest in an LLC. LLC is a disregarded entity that operates a bakery. Trust's share of UBIA of qualified property of Partnership is $125,000. Partnership distributes $5,000 of cash to Trust. Trust has no UBIA of qualified property of LLC. Trust distributes $1,000 to discretionary beneficiary A. Trust distributes $500 to current income beneficiary B.

Income & Expenses of Trust

Restaurant/Partnership Items Allocated to Trust:

Gross Restaurant Income	55,000
W-2 Restaurant Wages	<25,000>
Miscellaneous Restaurant Expenses	<20,000>
Restaurant Depreciation	<5,000>
Net Income	5,000

Bakery/LLC Items Allocated to Trust:

Gross Bakery Income	100,000
W-2 Bakery Wages	<50,000>
Bakery Rental Expense	<75,000>
Miscellaneous Bakery Expenses	<25,000>
Net Loss	<50,000>

Dividends	25,000
Interest	15,000
Tax Exempt Interest	15,000
Trustees Commissions	3,000
State and Local Taxes	5,000

Fiduciary Accounting Income (FAI)

Gross FAI

Gross Restaurant Income	55,000
Gross Bakery Income	100,000
Dividends	25,000
Interest	15,000
Tax Exempt Income	15,000
	210,000

Charges Against FAI

W-2 Restaurant Wages	25,000
Miscellaneous Restaurant Expenses	20,000
Restaurant Depreciation	5,000
W-2 Bakery Wages	50,000
Bakery Rental Expense	75,000
Miscellaneous Bakery Expenses	25,000
Trustees Commission	3,000
State & Local Taxes	5,000
	208,000

Net FAI	2,000

Tentative Taxable Income

Federal Gross Income (FGI)	
Gross Restaurant Income	55,000
Gross Bakery Income	100,000
Dividends	25,000
Interest	15,000
Tax Exempt Income	N/A
	195,000

Deductions From FGI	
W-2 Restaurant Wages	25,000
Miscellaneous Restaurant Expenses	20,000
Restaurant Depreciation	5,000
W-2 Bakery Wages	50,000
Bakery Rental Expenses	75,000
Miscellaneous Bakery Expenses	25,000
Trustees Commissions	3,000
State & Local Taxes	5,000
	208,000

Tentative Taxable Income	<13,000>

DNI	
Tentative Taxable Income	<13,000>
Add Back: Tax Exempt Interest	+15,000
DNI	2,000

Note: DNI consists entirely of Tax Exempt Income. As a result neither the discretionary beneficiary, nor the current income beneficiary have taxable income. Trust gets no distribution deduction. Tax exempt dollars are "wrung-out" of the distribution deduction.

Net DNI Items

Items entering into DNI Computation

Gross Restaurant Income	55,000
Deductions Directly Attributable	<55,000>
Net DNI Item	5,000
Gross Bakery Income	100,000
Deductions Directly Attributable	<150,000>
Net DNI Item	<50,000>
Dividends	25,000
Interest	15,000
Tax Exempt Income	15,000

Floating Deductions

Excess Bakery Expenses	50,000
Trustees Commissions	3,000
State & Local Taxes	5,000

Note: $1,000 of the Trustee Commissions and $1,000 of the State and Local Taxes are directly attributable to the Trust's business income. Accordingly, the Trust has excess business deductions of $47,000. (5,000 – 50,000 – 1,000 – 1,000 = <47,000>). The balance of the Floating Deductions in the amount of $56,000 are to be allocated against: Net Restaurant Income, Dividends, Interest, and Tax Exempt Income.

§199A Deduction

Trust has negative QBI of $47,000
Trust has W-2 Wages of $75,000
Trust has UBIA of qualified property of $125,000

The QBI (including any amounts that may be less than zero as calculated at the trust or estate level), W-2 Wages, UBIA of qualified property, qualified REIT dividends, and qualified PTP income of a trust or estate are allocated to each beneficiary and to the trust or estate based on the relative proportion of the trust's or estate's distributable net income DNI, as defined by section 643(a), for the taxable year that is distributed or required to be distributed to the beneficiary or is retained by the trust or estate. Proposed Regulations, §1.199A-6(d)(3)(i).

Discretionary Beneficiary A:

DNI distributed to A	1,000	
Total DNI	2,000	50%

A's share of the Trust negative QBI is $23,500
($47,000 x 50% = $23,500)

A's share of the Trust W-2 Wages is $37,500
($75,000 x 50% = $37,500)

Income Beneficiary B:

DNI distributed to B	500	
Total DNI	2,000	25%

B's share of the Trust negative QBI is $11,875
($47,500 x 25% = $11,875)

B's share of the Trust W-2 Wages is $18,750
($75,000 x 25% = $18,750)

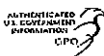
Trust:

Residual DNI	500	
Total DNI	2,000	25%

Trust's share of the Trust negative QBI is $11,875
($47,500 x 25% = $11,875)

Trust's share of the Trust W-2 Wages is $18,750
($75,000 x 25% = $18,750)

The Trust's §199A Deduction is zero. The $11,875 negative QBI is carried over to the next Trust year as a loss from a qualified business in the hands of the Trust.



Short name	Commenter
MISO Transmission Owners	Ameren Services Company, as agent for Union Electric Company d/b/a Ameren Missouri, Ameren Illinois Company d/b/a Ameren Illinois and Ameren Transmission Company of Illinois; American Transmission Company LLC; Central Minnesota Municipal Power Agency; City Water, Light & Power (Springfield, IL); Cleco Power LLC; Cooperative Energy; Dairyland Power Cooperative; Duke Energy Business Services, LLC for Duke Energy Indiana, LLC; East Texas Electric Cooperative; Entergy Arkansas, Inc.; Entergy Louisiana, LLC; Entergy Mississippi, Inc.; Entergy New Orleans, LLC; Entergy Texas, Inc.; Great River Energy; Indiana Municipal Power Agency; Indianapolis Power & Light Company; International Transmission Company d/b/a ITC *Transmission;* ITC Midwest LLC; Lafayette Utilities System; Michigan Electric Transmission Company, LLC; MidAmerican Energy Company; Minnesota Power (and its subsidiary Superior Water, L&P); Missouri River Energy Services; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company LLC; Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Prairie Power Inc.; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); Southern Minnesota Municipal Power Agency; Wabash Valley Power Association, Inc.; and Wolverine Power Supply Cooperative, Inc.
National Grid	National Grid USA.
Natural Gas Indicated Shippers	Aera Energy, LLC; Anadarko Energy Services Company; Apache Corporation; BP Energy Company; ConocoPhillips Company; Hess Corporation; Occidental Energy Marketing, Inc.; Petrohawk Energy Corporation; and XTO Energy, Inc.
New York Transco	New York Transco LLC.
Oklahoma Attorney General	Mike Hunter, Oklahoma Attorney General.
PJM	PJM Interconnection, L.L.C.
Plains	Plains Pipeline, L.P.
Process Gas and American Forest and Paper.	Process Gas Consumers Group and American Forest and Paper Association.
PSEG	Public Service Electric and Gas Company.
Tallgrass Pipelines	Trailblazer Pipeline Company LLC; Tallgrass Interstate Gas Transmission, LLC; and Rockies Express Pipeline LLC.
TAPS	Transmission Access Policy Study Group.
TransCanada	TransCanada Corporation.
United Airlines Petitioners	United Airlines, Inc.; American Airlines, Inc.; Delta Air Lines, Inc.; Southwest Airlines, Co.; BP West Coast Products LLC; ExxonMobil Oil Corporation; Chevron Products Company; HollyFrontier Refining & Marketing LLC; Valero Marketing and Supply Company; Airlines for America; and the National Propane Gas Association.
Williams	Williams Companies, Inc.

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BILLING CODE 6717–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[REG–106706–18]

RIN 1545–B072

Estate and Gift Taxes; Difference in the Basic Exclusion Amount

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notification of public hearing.

SUMMARY: This document contains proposed regulations addressing the effect of recent legislative changes to the basic exclusion amount used in computing Federal gift and estate taxes. The proposed regulations will affect donors of gifts made after 2017 and the estates of decedents dying after 2017.

DATES: Written and electronic comments must be received by February 21, 2019. Outlines of topics to be discussed at the public hearing scheduled for March 13, 2019, must be received by February 21, 2019. If no outlines of topics are received by February 21, 2019, the hearing will be cancelled.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–106706–18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:PA:LPD:PR (REG–106706–18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking portal at *http://www.regulations.gov* (IRS REG–106706–18). The public hearing will be held in the Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Deborah S. Ryan, (202) 317–6859; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina L. Johnson at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Overview

In computing the amount of Federal gift tax to be paid on a gift or the amount of Federal estate tax to be paid at death, the gift and estate tax provisions of the Internal Revenue Code (Code) apply a unified rate schedule to the taxpayer's cumulative taxable gifts and taxable estate on death to arrive at a net tentative tax. The net tentative tax then is reduced by a credit based on the applicable exclusion amount (AEA), which is the sum of the basic exclusion amount (BEA) within the meaning of section 2010(c)(3) of the Code and, if applicable, the deceased spousal unused exclusion (DSUE) amount within the meaning of section 2010(c)(4). In certain cases, the AEA also includes a restored exclusion amount pursuant to Notice 2017–15, 2017–6 I.R.B. 783. Prior to January 1, 2018, for estates of decedents dying and gifts made beginning in 2011, section 2010(c)(3) provided a BEA of $5 million, indexed for inflation after 2011. The credit is applied first against the gift tax, on a cumulative basis, as taxable gifts are made. To the extent that any credit remains at death, it is applied against the estate tax.

This document contains proposed regulations to amend the Estate Tax Regulations (26 CFR part 20) under section 2010(c)(3) of the Code. The proposed regulations would update § 20.2010–1 to conform to statutory changes to the determination of the BEA enacted on December 22, 2017, by sections 11002 and 11061 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2504 (2017) (TCJA).

II. Federal Gift Tax Computation Generally

The Federal gift tax is imposed by section 2501 of the Code on an individual's transfers by gift during each calendar year. The gift tax is determined under a seven-step computation required under sections 2502 and 2505 using the rate schedule set forth in section 2001(c) as in effect for the calendar year in which the gifts are made.

First, section 2502(a)(1) requires the determination of a tentative tax (that is, a tax unreduced by a credit amount) on the sum of all taxable gifts, whether made in the current year or in one or more prior periods (Step 1).

Second, section 2502(a)(2) requires the determination of a tentative tax on the sum of the taxable gifts made in all prior periods (Step 2).

Third, section 2502(a) requires the tentative tax determined in Step 2 to be subtracted from the tentative tax determined in Step 1 to arrive at the net tentative gift tax on the gifts made in the current year (Step 3).

Fourth, section 2505(a)(1) requires the determination of a credit equal to the applicable credit amount within the meaning of section 2010(c). The applicable credit amount is the tentative tax on the AEA determined as if the donor had died on the last day of the current calendar year. The AEA is the sum of the BEA as in effect for the year in which the gift was made, any DSUE amount as of the date of the gift as computed pursuant to § 25.2505–2, and any restored exclusion amount as of the date of the gift as computed pursuant to Notice 2017–15 (Step 4).

Fifth, section 2505(a)(2) and the flush language at the end of section 2505(a) require the determination of the sum of the amounts allowable as a credit to offset the gift tax on gifts made by the donor in all preceding calendar periods. For purposes of this determination, the allowable credit for each preceding calendar period is the tentative tax, computed at the tax rates in effect for the current period, on the AEA for such prior period, but not exceeding the tentative tax on the gifts actually made during such prior period. Section 2505(c). (Step 5).

Sixth, section 2505(a) requires that the total credit allowable for prior periods determined in Step 5 be subtracted from the credit for the current period determined in Step 4. (Step 6).

Finally, section 2505(a) requires that the credit amount determined in Step 6 be subtracted from the net tentative gift tax determined in Step 3 (Step 7).

III. Federal Estate Tax Computation Generally

The Federal estate tax is imposed by section 2001(a) on the transfer of a decedent's taxable estate at death. The estate tax is determined under a five-step computation required under sections 2001 and 2010 using the same rate schedule used for gift tax purposes (thus referred to as the unified rate schedule) as in effect at the decedent's death.

First, section 2001(b)(1) requires the determination of a tentative tax (again, a tax unreduced by a credit amount) on the sum of the taxable estate and the adjusted taxable gifts, defined as all taxable gifts made after 1976 other than those included in the gross estate (Step 1).

Second, section 2001(b)(2) and (g) require the determination of a hypothetical gift tax (a gift tax reduced, but not to below zero, by the credit amounts allowable in the years of the gifts) on all post-1976 taxable gifts, whether or not included in the gross estate. The credit amount allowable for each year during which a gift was made is the tentative tax, computed using the tax rates in effect at the decedent's death, on the AEA for that year, but not exceeding the tentative tax on the gifts made during that year. Section 2505(c). The AEA is the sum of the BEA as in effect for the year in which the gift was made, any DSUE amount as of the date of the gift as computed pursuant to § 25.2505–2, and any restored exclusion amount as of the date of the gift as computed pursuant to Notice 2017–15. This hypothetical gift tax is referred to as the gift tax payable (Step 2).

Third, section 2001(b) requires the gift tax payable determined in Step 2 to be subtracted from the tentative tax determined in Step 1 to arrive at the net tentative estate tax (Step 3).

Fourth, section 2010(a) and (c) require the determination of a credit equal to the tentative tax on the AEA as in effect on the date of the decedent's death. This credit may not exceed the net tentative estate tax. Section 2010(d). (Step 4).

Finally, section 2010(a) requires that the credit amount determined in Step 4 be subtracted from the net tentative estate tax determined in Step 3. (Step 5).

IV. TCJA Amendments

Section 11061 of the TCJA amended section 2010(c)(3) to provide that, for decedents dying and gifts made after December 31, 2017, and before January 1, 2026, the BEA is increased by $5 million to $10 million as adjusted for inflation (increased BEA). On January 1, 2026, the BEA will revert to $5 million. Thus, an individual or the individual's estate may utilize the increased BEA to shelter from gift and estate taxes an additional $5 million of transfers made during the eight-year period beginning on January 1, 2018, and ending on December 31, 2025 (increased BEA period).

In addition, section 11002 of the TCJA amended section 1(f)(3) of the Code to base the determination of annual cost-of-living adjustments, including those for gift and estate tax purposes, on the Chained Consumer Price Index for All Urban Consumers for all taxable years beginning after December 31, 2017. Section 11002 of the TCJA also made conforming changes in sections 2010(c)(3)(B)(ii), 2032A(a)(3)(B), and 2503(b)(2)(B).

Section 11061 of the TCJA also added section 2001(g)(2) to the Code, which, in addition to the necessary or appropriate regulatory authority granted in section 2010(c)(6) for purposes of section 2010(c), directs the Secretary to prescribe such regulations as may be necessary or appropriate to carry out section 2001 with respect to any difference between the BEA applicable at the time of the decedent's death and the BEA applicable with respect to any gifts made by the decedent.

V. Summary of Concerns Raised by Changes in BEA

1. In General

Given the cumulative nature of the gift and estate tax computations and the differing manner in which the credit is applied against these two taxes, commenters have raised two questions regarding a potential for inconsistent tax treatment or double taxation of transfers resulting from the temporary nature of the increased BEA. First, in cases in which a taxpayer exhausted his or her BEA and paid gift tax on a pre-2018 gift, and then either makes an additional gift or dies during the increased BEA period, will the increased BEA be absorbed by the pre-2018 gift on which gift tax was paid so as to deny the taxpayer the full benefit of the increased BEA during the increased BEA period? Second, in cases in which a taxpayer

made a gift during the increased BEA period that was fully sheltered from gift tax by the increased BEA but makes a gift or dies after the increased BEA period has ended, will the gift that was exempt from gift tax when made during the increased BEA period have the effect of increasing the gift or estate tax on the later transfer (in effect, subjecting the earlier gift to tax even though it was exempt from gift tax when made)?

As discussed in the remainder of this Background section, the Treasury Department and the IRS have analyzed the statutorily required steps for determining Federal gift and estate taxes in the context of several different situations that could occur either during the increased BEA period as a result of an increase in the BEA, or thereafter as a result of a decrease in the BEA. Only in the last situation discussed below was a potential problem identified, and a change intended to correct that problem is proposed in this notice of proposed rulemaking. This preamble, however, also includes a brief explanation of the reason why no potential problem is believed to exist in any of the first three situations discussed below. For the sake of simplicity, the following discussion assumes that, as may be the more usual case, the AEA includes no DSUE or restored exclusion amount and thus, refers only to the BEA.

2. Effect of Increase in BEA on Gift Tax

The first situation considered is whether, for gift tax purposes, the increased BEA available during the increased BEA period is reduced by pre-2018 gifts on which gift tax actually was paid. This issue arises for donors, who made both pre-2018 gifts exceeding the then-applicable BEA, thus making gifts that incurred a gift tax liability, and additional gifts during the increased BEA period. The concern raised is whether the gift tax computation will apply the increased BEA to the pre-2018 gifts, thus reducing the BEA otherwise available to shelter gifts made during the increased BEA period and, in effect, allocating credit to a gift on which gift tax in fact was paid.

Step 3 of the gift tax determination requires the tentative tax on all gifts from prior periods to be subtracted from the tentative tax on the donor's cumulative gifts (including the current gift). The gifts from prior periods include the pre-2018 gifts on which gift tax was paid. In this way, the full amount of the gift tax liability on the pre-2018 gifts is removed from the current year gift tax computation, regardless of whether that liability was sheltered from gift tax by the BEA and/or was satisfied by a gift tax payment. Steps 4 through 6 of the gift tax determination then require, in effect, that the BEA for the current year be reduced by the BEA allowable in prior periods against the gifts that were made by the donor in those prior periods. The increased BEA was not available in the years when the pre-2018 gifts were made and thus, was not allowable against those gifts. Accordingly, the gift tax determination appropriately reduces the increased BEA only by the amount of BEA allowable against prior period gifts, thereby ensuring that the increased BEA is not reduced by a prior gift on which gift tax in fact was paid.

3. Effect of Increase in BEA on Estate Tax

The second situation considered is whether, for estate tax purposes, the increased BEA available during the increased BEA period is reduced by pre-2018 gifts on which gift tax actually was paid. This issue arises in the context of estates of decedents who both made pre-2018 gifts exceeding the then allowable BEA, thus making gifts that incurred a gift tax liability, and die during the increased BEA period. The concern raised is whether the estate tax computation will apply the increased BEA to the pre-2018 gifts, thus reducing the BEA otherwise available against the estate tax during the increased BEA period and, in effect, allocating credit to a gift on which gift tax in fact was paid.

Step 3 of the estate tax determination requires that the hypothetical gift tax on the decedent's post-1976 taxable gifts be subtracted from the tentative tax on the sum of the taxable estate and adjusted taxable gifts. The post-1976 taxable gifts include the pre-2018 gifts on which gift tax was paid. In this way, the full amount of the gift tax liability on the pre-2018 gifts is removed from the estate tax computation, regardless of whether that liability was sheltered from gift tax by the BEA and/or was satisfied by a gift tax payment. Step 4 of the estate tax determination then requires that a credit on the amount of the BEA for the year of the decedent's death be subtracted from the net tentative estate tax. As a result, the only time that the increased BEA enters into the computation of the estate tax is when the credit on the amount of BEA allowable in the year of the decedent's death is netted against the tentative estate tax, which in turn already has been reduced by the hypothetical gift tax on the full amount of all post-1976 taxable gifts (whether or not gift tax was paid). Thus, the increased BEA is not reduced by the portion of any prior gift on which gift tax was paid, and the full amount of the increased BEA is available to compute the credit against the estate tax.

4. Effect of Decrease in BEA on Gift Tax

The third situation considered is whether the gift tax on a gift made after the increased BEA period is inflated by a theoretical gift tax on a gift made during the increased BEA period that was sheltered from gift tax when made. If so, this would effectively reverse the benefit of the increased BEA available for gifts made during the increased BEA period. This issue arises in the case of donors who both made one or more gifts during the increased BEA period that were sheltered from gift tax by the increased BEA in effect during those years, and made a post-2025 gift. The concern raised is whether the gift tax determination on the post-2025 gift will treat the gifts made during the increased BEA period as gifts not sheltered from gift tax by the credit on the BEA, given that the post-2025 gift tax determination is based on the BEA then in effect, rather than on the increased BEA.

Just as in the first situation considered in part V(2) of this Background section, Step 3 of the gift tax determination directs that the tentative tax on gifts from prior periods be subtracted from the tentative tax on the donor's cumulative gifts (including the current gift). The gift tax from prior periods includes the gift tax attributable to the gifts made during the increased BEA period. In this way, the full amount of the gift tax liability on the increased BEA period gifts is removed from the computation, regardless of whether that liability was sheltered from gift tax by the BEA or was satisfied by a gift tax payment. All that remains is the tentative gift tax on the donor's current gift. Steps 4 through 6 of the gift tax determination then require that the credit based on the BEA for the current year be reduced by such credits allowable in prior periods. Even if the sum of the credits allowable for prior periods exceeds the credit based on the BEA in the current (post-2025) year, the tax on the current gift cannot exceed the tentative tax on that gift and thus will not be improperly inflated. The gift tax determination anticipates and avoids this situation, but no credit will be available against the tentative tax on the post-2025 gift.

5. Effect of Decrease in BEA on Estate Tax

The fourth situation considered is whether, for estate tax purposes, a gift made during the increased BEA period that was sheltered from gift tax by the increased BEA inflates a post-2025 estate tax liability. This will be the case

if the estate tax computation fails to treat such gifts as sheltered from gift tax, in effect reversing the benefit of the increased BEA available for those gifts. This issue arises in the case of estates of decedents who both made gifts during the increased BEA period that were sheltered from gift tax by the increased BEA in effect during those years, and die after 2025. The concern raised is whether the estate tax computation treats the gifts made during the increased BEA period as post-1976 taxable gifts not sheltered from gift tax by the credit on the BEA, given that the post-2025 estate tax computation is based on the BEA in effect at the decedent's death rather than the BEA in effect on the date of the gifts.

In this case, the statutory requirements for the computation of the estate tax, in effect, retroactively eliminate the benefit of the increased BEA that was available for gifts made during the increased BEA period. This can be illustrated by the following examples.

Example 1. Individual A made a gift of $11 million in 2018, when the BEA was $10 million. A dies in 2026, when the BEA is $5 million, with a taxable estate of $4 million. Based on a literal application of section 2001(b), the estate tax would be approximately $3,600,000, which is equal to a 40 percent estate tax on $9 million (specifically, the $9 million being the sum of the $4 million taxable estate and $5 million of the 2018 gift sheltered from gift tax by the increased BEA). This in effect would impose estate tax on the portion of the 2018 gift that was sheltered from gift tax by the increased BEA allowable at that time.

Example 2. The facts are the same as in *Example 1*, but A dies in 2026 with no taxable estate. Based on a literal application of section 2001(b), A's estate tax is approximately $2 million, which is equal to a 40 percent tax on $5 million. Five million dollars is the amount by which, after taking into account the $1 million portion of the 2018 gift on which gift tax was paid, the 2018 gift exceeded the BEA at death. This, in effect, would impose estate tax on the portion of the 2018 gift that was sheltered from the gift tax by the excess of the 2018 BEA over the 2026 BEA.

This problem occurs as a result of the interplay between Steps 2 and 4 of the estate tax determination, and the differing amounts of BEA taken into account in those steps. Step 2 determines the credit against gift taxes payable on all post-1976 taxable gifts, whether or not included in the gross estate, using the BEA amounts allowable on the dates of the gifts but determined using date of death tax rates. Step 3 subtracts gift tax payable from the tentative tax on the sum of the taxable estate and the adjusted taxable gifts. The result is the net tentative estate tax. Step 4 determines a credit based on the BEA as in effect on the date of the decedent's death. Step 5 then reduces the net tentative estate tax by the credit determined in Step 4. If the credit amount applied at Step 5 is less than that allowable for the decedent's post-1976 taxable gifts at Step 2, the effect is to increase the estate tax by the difference between those two credit amounts. In this circumstance, the statutory requirements have the effect of imposing an estate tax on gifts made during the increased BEA period that were sheltered from gift tax by the increased BEA in effect when the gifts were made.

Explanation of Provisions

To implement the TCJA changes to the BEA under section 2010(c)(3), the proposed regulations would amend § 20.2010–1 to provide that, in the case of decedents dying or gifts made after December 31, 2017, and before January 1, 2026, the increased BEA is $10 million. The proposed regulations also would conform the rules of § 20.2010–1 to the changes made by the TCJA regarding the cost of living adjustment.

Pursuant to section 2001(g)(2), the proposed regulations also would amend § 20.2010–1 to provide a special rule in cases where the portion of the credit as of the decedent's date of death that is based on the BEA is less than the sum of the credit amounts attributable to the BEA allowable in computing gift tax payable within the meaning of section 2001(b)(2). In that case, the portion of the credit against the net tentative estate tax that is attributable to the BEA would be based upon the greater of those two credit amounts. In the view of the Treasury Department and the IRS, the most administrable solution would be to adjust the amount of the credit in Step 4 of the estate tax determination required to be applied against the net tentative estate tax. Specifically, if the total amount allowable as a credit, to the extent based solely on the BEA, in computing the gift tax payable on the decedent's post-1976 taxable gifts, whether or not included in the gross estate, exceeds the credit amount, again to the extent based solely on the BEA in effect at the date of death, the Step 4 credit would be based on the larger amount of BEA. As modified, Step 4 of the estate tax determination therefore would require the determination of a credit equal to the tentative tax on the AEA as in effect on the date of the decedent's death, where the BEA included in that AEA is the larger of (i) the BEA as in effect on the date of the decedent's death under section 2010(c)(3), or (ii) the total amount of the BEA allowable in determining Step 2 of the estate tax computation (that is, the gift tax payable).

For example, if a decedent had made cumulative post-1976 taxable gifts of $9 million, all of which were sheltered from gift tax by a BEA of $10 million applicable on the dates of the gifts, and if the decedent died after 2025 when the BEA was $5 million, the credit to be applied in computing the estate tax is that based upon the $9 million of BEA that was used to compute gift tax payable.

The proposed regulations ensure that a decedent's estate is not inappropriately taxed with respect to gifts made during the increased BEA period. Congress' grant of regulatory authority in section 2001(g)(2) to address situations in which differences exist between the BEA applicable to a decedent's gifts and the BEA applicable to the decedent's estate clearly permits the Secretary to address the situation in which a gift is made during the increased BEA period and the decedent dies after the increased BEA period ends.

Commenters have noted that this problem is similar to that involving the application of the AEA addressed in the DSUE regulations. Section 20.2010–3(b). The DSUE amount generally is what remains of a decedent's BEA that can be used to offset the gift and/or estate tax liability of the decedent's surviving spouse. At any given time, however, a surviving spouse may use only the DSUE amount from his or her last deceased spouse—thus, only until the death of any subsequent spouse. Without those regulations, if a DSUE amount was used to shelter a surviving spouse's gifts from gift tax before the death of a subsequent spouse, and if the surviving spouse also survived the subsequent spouse, those gifts would have had the effect of absorbing the DSUE amount available to the surviving spouse at death, effectively resulting in a taking back of the DSUE amount that had been allocated to the earlier gifts. The DSUE regulations resolve this problem by providing that the DSUE amount available at the surviving spouse's death is the sum of the DSUE amount from that spouse's last deceased spouse, and any DSUE amounts from other deceased spouses that were "applied to one or more taxable gifts" of the surviving spouse.

Proposed Effective Date

The amendment to § 20.2010–1 is proposed to be effective on and after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. These proposed regulations apply to donors of gifts made after 2017 and to the estates of decedents dying after 2017, and implement an increase in the amount that is excluded from gift and estate tax. Neither an individual nor the estate of a deceased individual is a small entity within the meaning of 5 U.S.C. 601(6). Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written or electronic comments that are submitted timely (in the manner described under the ADDRESSES heading) to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available at *http://www.regulations.gov,* or upon request. A public hearing on these proposed regulations has been scheduled for March 13, 2019, beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC 20224. Due to building security procedures, visitors must enter the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments by February 21, 2019, and submit an outline of the topics to be discussed and the time devoted to each topic by February 21, 2019.

A period of 10 minutes will be allotted to each person for making comments. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Deborah S. Ryan, Office of the Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in their development.

Statement of Availability of IRS Documents

Notice 2017–15 is published in the Internal Revenue Bulletin (or Cumulative Bulletin) and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 20 is proposed to be amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

■ **Par. 1.** The authority citation for part 20 is amended by revising the entry for § 20.2010–1 to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 20.2010–1 also issued under 26 U.S.C. 2001(g)(2) and 26 U.S.C. 2010(c)(6).

* * * * *

■ **Par. 2.** Section 20.2010–1 is amended by:

■ 1. Redesignating paragraphs (c) through (e) as paragraphs (d) through (f) respectively;

■ 2. Adding a new paragraph (c); and

■ 3. Revising newly redesignated paragraphs (e)(3) and (f).

The addition and revisions read as follows:

§ 20.2010–1 Unified credit against estate tax; in general.

* * * * *

(c) *Special rule in the case of a difference between the basic exclusion amount applicable to gifts and that applicable at the donor's date of death*—(1) *Rule.* Changes in the basic exclusion amount that occur between the date of a donor's gift and the date of the donor's death may cause the basic exclusion amount allowable on the date of a gift to exceed that allowable on the date of death. If the total of the amounts allowable as a credit in computing the gift tax payable on the decedent's post-1976 gifts, within the meaning of section 2001(b)(2), to the extent such credits are based solely on the basic exclusion amount as defined and adjusted in section 2010(c)(3), exceeds the credit allowable within the meaning of section 2010(a) in computing the estate tax, again only to the extent such credit is based solely on such basic exclusion amount, in each case by applying the tax rates in effect at the decedent's death, then the portion of the credit allowable in computing the estate tax on the decedent's taxable estate that is attributable to the basic exclusion amount is the sum of the amounts attributable to the basic exclusion amount allowable as a credit in computing the gift tax payable on the decedent's post-1976 gifts. The amount allowable as a credit in computing gift tax payable for any year may not exceed the tentative tax on the gifts made during that year, and the amount allowable as a credit in computing the estate tax may not exceed the net tentative tax on the taxable estate. Sections 2505(c) and 2010(d).

(2) *Example.* Individual A (never married) made cumulative post-1976 taxable gifts of $9 million, all of which were sheltered from gift tax by the cumulative total of $10 million in basic exclusion amount allowable on the dates of the gifts. A dies after 2025 and the basic exclusion amount on A's date of death is $5 million. A was not eligible for any restored exclusion amount pursuant to Notice 2017–15. Because the total of the amounts allowable as a credit in computing the gift tax payable on A's post-1976 gifts (based on the $9 million basic exclusion amount used to determine those credits) exceeds the credit based on the $5 million basic exclusion amount applicable on the decedent's date of death, under paragraph (c)(1) of this section, the credit to be applied for purposes of computing the estate tax is based on a basic exclusion amount of $9 million, the amount used to determine the credits allowable in computing the gift tax payable on the post-1976 gifts made by A.

* * * * *

(e) * * *

(3) *Basic exclusion amount.* Except to the extent provided in paragraph (e)(3)(iii) of this section, the basic exclusion amount is the sum of the

amounts described in paragraphs (e)(3)(i) and (ii) of this section.

(i) For any decedent dying in calendar year 2011 or thereafter, $5,000,000; and

(ii) For any decedent dying after calendar year 2011, $5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year of decedent's death by substituting "calendar year 2010" for "calendar year 2016" in section 1(f)(3)(A)(ii) and rounded to the nearest multiple of $10,000.

(iii) In the case of the estates of decedents dying after December 31, 2017, and before January 1, 2026, paragraphs (e)(3)(i) and (ii) of this section will be applied by substituting "$10,000,000" for "$5,000,000."

(f) *Applicability dates*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, this section applies to the estates of decedents dying after June 11, 2015. For the rules applicable to estates of decedents dying after December 31, 2010, and before June 12, 2015, see § 20.2010–1T, as contained in 26 CFR part 20, revised as of April 1, 2015.

(2) *Exceptions.* Paragraph (c) of this section applies to estates of decedents dying on and after the date of publication of a Treasury decision adopting these rules as final regulations. Paragraph (e)(3) of this section applies to the estates of decedents dying after December 31, 2017.

§ 20.2010–3 [Amended]

■ Par. 3. Section 20.2010–3 is amended by removing "§ 20.2010–1(d)(5)" wherever it appears and adding in its place "§ 20.2010–1(e)(5)".

Kirsten Wielobob,

Deputy Commissioner for Service and Enforcement.

[FR Doc. 2018–25538 Filed 11–20–18; 4:15 pm]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2018–0700; FRL–9986–80–Region 7]

Air Plan Approval; Missouri; Emissions Inventory for the Missouri Jackson County and Jefferson County 2010 Sulfur Dioxide National Ambient Air Quality Standard Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve two submissions from the Missouri Department of Natural Resources (MoDNR) revising the State Implementation Plan (SIP) for the State of Missouri. The SIP revision submissions address the Clean Air Act (CAA) section 172 requirement to submit a base year emissions inventory for Missouri's partial Jackson County and partial Jefferson County nonattainment areas of the 2010 1-hour Sulfur Dioxide (SO_2) National Ambient Air Quality Standard (NAAQS).

DATES: Comments must be received on or before December 24, 2018.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–R07–OAR–2018–0700 to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *https://www.regulations.gov/*, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Written Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tracey Casburn, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219, by telephone at (913) 551–7016, or by email at *casburn.tracey@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," and "our" refer to the EPA.

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II. Background Information
III. Have the requirements for approval of a SIP revision been met?
IV. What is the EPA's analysis of the SIP revision submissions?
V. What action is the EPA taking?
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I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2018–0700, at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. Background Information

On June 22, 2010, the EPA promulgated a new 1-hour primary SO_2 NAAQS of 75 parts per billion (ppb). *See* 75 FR 35520, codified at 40 CFR 50.17(a)–(b). On August 5, 2013, the EPA finalized designations for the 2010 SO_2 NAAQS, including the partial Jackson County and partial Jefferson County nonattainment areas in the State of Missouri. *See* 78 FR 47191, codified at 40 CFR part 81, subpart C. These area designations were effective October 4, 2013. Section 191 of the CAA directs states to submit SIP revisions for areas designated as nonattainment for the SO_2 NAAQS to the EPA within 18 months of the effective date of the designation (*i.e.*, no later than April 4, 2015). Submittal of the state's nonattainment plan SIP revision submissions is discussed in more detail in the "Have the requirements for approval of a SIP revision been met?" section of this document.

CAA section 172(c)(3) requires states to develop and submit a comprehensive, accurate, current emissions inventory for all areas designated as nonattainment. An emissions inventory is an estimation of actual emissions of air pollutants in an area that provides data for a variety of air quality planning tasks including establishing baseline emission levels, calculating Federally required emission reduction targets, emission inputs into air quality simulation models, and for tracking emissions over time. The EPA's April 2014 guidance document "Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions" (April 2014 guidance) recommends that the state develop an accurate emissions inventory of current emissions for all sources of SO_2 (*i.e.*, point, area and mobile sources) within the nonattainment area as well as any sources located outside the nonattainment area which may affect attainment in the area.[1]

[1] See page 8 of the April 2014 guidance.

<u>Exhibit B</u>
<u>Clawback</u>

I have an Old Exclusion Amount of $5,590,000.00. I have a Trump Exclusion Amount of $5,590,000.00. Combined, I have a Basic Exclusion Amount of $11,180,000.00. The Trump Exclusion Amount "vanishes" January 1, 2026. Assume no inflation adjustment to the Basic Exclusion Amount. Assume I have $11,180,000.00 of wealth.

I give away my $11,180,000.00 of wealth prior to 2026. I pay no gift tax because my Basic Exclusion Amount of $11,180,000.00 covers the gift. I die in 2026 owning nothing. What is the Estate Tax occasioned at my death in 2026?

<u>Estate Tax Calculation</u>

Gross Estate	$0.00
Adjusted Taxable Gifts	+$11,180,000.00
Estate Tax Base	$11,180,000.00

Estate Tax Base	$11,180,000.00
2026 Basic/Old Exclusion Amount	<$5,590,000.00>
Exposed to Estate Tax	$5,590,000.00
Estate Tax Rate	x 40%
Estate Tax	$2,236,000.00

The 2017 Act amends IRC §2001(g) to add a new IRC §2001(g)(2) directing the Treasury to prescribe Regulations to address the Clawback issue. The use of the $5,590,000.00 Trump Exclusion Amount should <u>not</u> be clawed back in my estate and I should owe no death tax at my death. The Proposed Regulations, §20.2010-1(c) confirm there is no clawback in this situation.

<u>OFF THE TOP GIFTS</u>

I have an Old Exclusion Amount of $5,590,000.00. I have a Trump Exclusion Amount of $5,590,000.00. Combined, I have a Basic Exclusion Amount of $11,180,000.00. The Trump Exclusion Amount "vanishes" January 1, 2026. Assume no inflation adjustment to the Basic Exclusion Amount. Assume I have $11,180,000.00 of wealth.

I give away $5,590,000.00 of wealth prior to 2026. I pay no gift tax because my Basic Exclusion Amount of $11,180,000.00 covers the gift. I die in 2026 owning $5,590,000.00. What is the Estate Tax occasioned at my death in 2026?

Estate Tax Calculation

Gross Estate	$5,590,000.00
Adjusted Taxable Gifts	+$5,590,000.00
Estate Tax Base	$11,180,000.00
Estate Tax Base	$11,180,000.00
2026 Basic/Old Exclusion Amount	<$5,590,000.00>
Exposed to Estate Tax	$5,590,000.00
Estate Tax Rate	x 40%
Estate Tax	$2,236,000.00

Do gifts during the period that the Basic Exclusion Amount is $11,180,000.00 (indexed) "come off the top" of the $11,180,000.00 (indexed) Basic Exclusion Amount that applies before 2026? For example, under current law if a donor who has not previously made a taxable gift makes a gift of $5,590,000.00, and if the donor dies after the Basic Exclusion Amount has been reduced to $5,590,000.00 (indexed), the donor effectively will be treated as having used the $5,590,000.00 of the Old Exclusion Amount, and the donor will not have made any use of the extra $5,590,000.00 (indexed) Trump Exclusion Amount available in 2018-2025. To take advantage of the "window of opportunity", in case the Basic Exclusion Amount is later decreased, the donor must make a gift in excess of the $5,590,000.00 Old Exclusion Amount, at least under current law. The Treasury might issue Regulations providing that gifts come "off the top", (i.e. first, off the Trump Exclusion Amount) so that a donor who makes a $5,590,000.00 gift when the Basic Exclusion Amount is $11,180,000.00 (indexed) would still have all of his or her $5,590,000.00 Old Exclusion Amount after the Basic Exclusion Amount is reduced to $5,590,000.00 (indexed) after 2025. By analogy, the portability regulations provide that a surviving spouse "shall be considered to apply [the] DSUE amount to the taxable gift before the surviving spouse's own basic exclusion amount". That could be analogous to current law which treats the Trump Exclusion Amount as disappearing after 2025. The Proposed Regulations do not deal with this issue.

THREE EXCLUSION AMOUNTS

My spouse dies in 2018 leaving everything to me. I file a Form 706 claiming DSUEA of $11,180,000.00. Assume no inflation adjustment to the Basic Exclusion Amount. The DSUEA is not indexed with inflation.

I have $5,590,000.00 of Old Exclusion Amount.
I have $5,590,000.00 of Trump Exclusion Amount.
I have $11,180,000.00 of DSUEA.

1. I die in 2025 having made no Adjusted Taxable Gifts.
   I have total Exclusions of $22,360,000.00 available at death.

2. I die in 2026 having made no Adjusted Taxable Gifts.
   My Trump Exclusion Amount "vanishes" January 1, 2026.
   My Trump augmented DSUEA does not vanish January 1, 2026. *
   I have total Exclusions of $16,770,000.00 available at death.

3. I die in 2025 having made a $5,590,000.00 Adjusted Taxable Gift.
   I have total Exclusions of $22,360,000.00.
   I have a $5,590,000.00 Adjusted Taxable Gift.
   I have "net" Exclusions of $16,770,000.00 available at death.

4. I die in 2026 having made a $5,590,000.00 Adjusted Taxable Gift.
   My Trump Exclusion Amount vanishes January 1, 2026.
   My adjusted taxable gift did not use my Trump Exclusion Amount.
   My adjusted taxable gift used my Old Exclusion Amount.
   I have total Exclusions of $16,770,000.00.
   I have a $5,590,000.00 Adjusted Taxable Gift.
   I have "net" Exclusions of $11,180,000.00 available at death.

* See Regs. §20.2010-2(c)(1)

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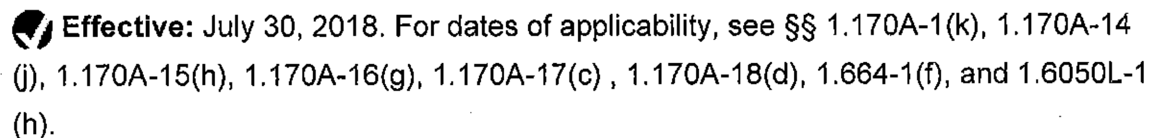
Reg §1.170A-15 Substantiation requirements for charitable contribution of a cash, check, or other monetary gift.

Federal Regulations

Reg § 1.170A-15. Substantiation requirements for charitable contribution of a cash, check, or other monetary gift.



Effective: July 30, 2018. For dates of applicability, see §§ 1.170A-1(k), 1.170A-14(j), 1.170A-15(h), 1.170A-16(g), 1.170A-17(c) , 1.170A-18(d), 1.664-1(f), and 1.6050L-1(h).

(a) In general.

(1) Bank record or written communication required. No deduction is allowed under sections 170(a) and 170(f)(17) for a charitable contribution in the form of a cash, check, or other monetary gift, as described in paragraph (b)(1) of this section, unless the donor substantiates the deduction with a bank record, as described in paragraph (b)(2) of this section, or a written communication, as described in paragraph (b)(3) of this section, from the donee showing the name of the donee, the date of the contribution, and the amount of the contribution.

(2) Additional substantiation required for contributions of $250 or more. No deduction is allowed under section 170(a) for any contribution of $250 or more unless the donor substantiates the contribution with a contemporaneous written

acknowledgment, as described in section 170(f)(8) and §1.170A-13(f), from the donee.

(3) Single document may be used. The requirements of paragraphs (a)(1) and (2) of this section may be met by a single document that contains all the information required by paragraphs (a)(1) and (2) of this section, if the document is obtained by the donor no later than the date prescribed by paragraph (c) of this section.

(b) Terms.

(1) Monetary gift includes a transfer of a gift card redeemable for cash, and a payment made by credit card, electronic fund transfer (as described in section 5061(e)(2)), an online payment service, or payroll deduction.

(2) Bank record includes a statement from a financial institution, an electronic fund transfer receipt, a canceled check, a scanned image of both sides of a canceled check obtained from a bank website, or a credit card statement.

(3) Written communication includes email.

(c) Deadline for receipt of substantiation. The substantiation described in paragraph (a) of this section must be received by the donor on or before the earlier of—

(1) The date the donor files the original return for the taxable year in which the contribution was made; or

(2) The due date, including any extension, for filing the donor's original return for that year.

(d) Special rules.

(1) Contributions made by payroll deduction. In the case of a charitable contribution made by payroll deduction, a donor is treated as meeting the requirements of section 170(f)(17) and paragraph (a) of this section if, no later than the date described in paragraph (c) of this section, the donor obtains—

(i) A pay stub, Form W-2, "Wage and Tax Statement," or other employerfurnished document that sets forth the amount withheld during the taxable year for payment to a donee; and

(ii) A pledge card or other document prepared by or at the direction of the donee that shows the name of the donee.

(2) Distributing organizations as donees. The following organizations are treated as donees for purposes of section 170(f)(17) and paragraph (a) of this section, even if the organization (pursuant to the donor's instructions or otherwise) distributes the amount received to one or more organizations described in section 170(c):

(i) An organization described in section 170(c).

(ii) An organization described in 5 CFR 950.105 (a Principal Combined Fund Organization (PCFO) for purposes of the Combined Federal Campaign (CFC)) and acting in that capacity. For purposes of the requirement for a written communication under section 170(f)(17), if the donee is a PCFO, the name of the local CFC campaign may be treated as the name of the donee organization.

(e) Substantiation of out-of-pocket expenses. Paragraph (a)(1) of this section does not apply to a donor who incurs unreimbursed expenses of less than $250 incident to the rendition of services, within the meaning of §1.170A-1(g). For substantiation of unreimbursed out-of-pocket expenses of $250 or more, see §1.170A-13(f)(10).

(f) Charitable contributions made by partnership or S corporation. If a partnership or an S corporation makes a charitable contribution, the partnership or S corporation is treated as the donor for purposes of section 170(f)(17) and paragraph (a) of this section.

(g) Transfers to certain trusts. The requirements of section 170(f)(17) and paragraphs (a)(1) and (3) of this section do not apply to a transfer of a cash, check, or other monetary gift to a trust described in section 170(f)(2)(B); a charitable remainder annuity trust, as described in section 664(d)(1) and the corresponding regulations; or a charitable remainder unitrust, as described in section 664(d)(2) or (d)(3) and the corresponding regulations. The requirements of section 170(f)(17) and paragraphs (a)(1) and (2) of this section do apply, however, to a transfer to a pooled income fund, as defined in section 642(c)(5).

(h) Effective/applicability date. This section applies to contributions made after July 30, 2018. Taxpayers may rely on the rules of this section for contributions made in taxable years beginning after August 17, 2006.

T.D. 9836, 07/27/2018 .

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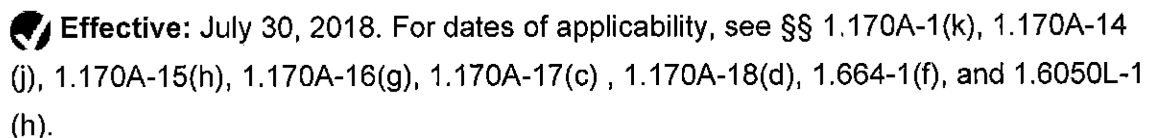
Federal Regulations

Reg § 1.170A-16. Substantiation and reporting requirements for noncash charitable contributions.



Effective: July 30, 2018. For dates of applicability, see §§ 1.170A-1(k), 1.170A-14(j), 1.170A-15(h), 1.170A-16(g), 1.170A-17(c) , 1.170A-18(d), 1.664-1(f), and 1.6050L-1(h).

(a) Substantiation of charitable contributions of less than $250.

(1) Individuals, partnerships, and certain corporations required to obtain receipt. Except as provided in paragraph (a)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of less than $250 by an individual, partnership, S corporation, or C corporation that is a personal service corporation or closely held corporation unless the donor maintains for each contribution a receipt from the donee showing the following information:

(i) The name and address of the donee;

(ii) The date of the contribution;

(iii) A description of the property in sufficient detail under the circumstances (taking into account the value of the property) for a person who is not

generally familiar with the type of property to ascertain that the described property is the contributed property; and

(iv) In the case of securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities within the meaning of §1.170A-13(c)(7)(xi).

(2) Substitution of reliable written records.

(i) In general. If it is impracticable to obtain a receipt (for example, where a donor deposits property at a donee's unattended drop site), the donor may satisfy the recordkeeping rules of this paragraph (a) by maintaining reliable written records, as described in paragraphs (a)(2)(ii) and (iii) of this section, for the contributed property.

(ii) Reliable written records. The reliability of written records is to be determined on the basis of all of the facts and circumstances of a particular case, including the proximity in time of the written record to the contribution.

(iii) Contents of reliable written records. Reliable written records must include—

(A) The information required by paragraph (a)(1) of this section;

(B) The fair market value of the property on the date the contribution was made;

(C) The method used in determining the fair market value; and

(D) In the case of a contribution of clothing or a household item as defined in §1.170A-18(c), the condition of the item.

(3) Additional substantiation rules may apply. For additional substantiation rules, see paragraph (f) of this section.

(b) Substantiation of charitable contributions of $250 or more but not more than $500. No deduction is allowed under section 170(a) for a noncash charitable contribution of $250 or more but not more than $500 unless the donor substantiates the contribution with a contemporaneous written acknowledgment, as described in section 170(f)(8) and §1.170A-13(f).

(c) Substantiation of charitable contributions of more than $500 but not more than $5,000.

(1) In general. No deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500 but not more than $5,000 unless the donor substantiates the contribution with a contemporaneous written acknowledgment, as described in section 170(f)(8) and §1.170A-13(f), and meets the applicable requirements of this section.

(2) Individuals, partnerships, and certain corporations also required to file Form 8283 (Section A). No deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500 but not more than $5,000 by an individual, partnership, S corporation, or C corporation that is a personal service corporation or closely held corporation unless the donor completes Form 8283 (Section A), "Noncash Charitable Contributions," as provided in paragraph (c)(3) of this section, or a successor form, and files it with the return on which the deduction is claimed.

(3) Completion of Form 8283 (Section A). A completed Form 8283 (Section A) includes—

(i) The donor's name and taxpayer identification number (for example, a social security number or employer identification number);

(ii) The name and address of the donee;

(iii) The date of the contribution;

(iv) The following information about the contributed property:

(A) A description of the property in sufficient detail under the circumstances, taking into account the value of the property, for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property;

(B) In the case of real or tangible personal property, the condition of the property;

(C) In the case of securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities within the meaning of §1.170A-13(c)(7)(xi);

(D) The fair market value of the property on the date the contribution was made and the method used in determining the fair market value;

(E) The manner of acquisition (for example, by purchase, gift, bequest, inheritance, or exchange), and the approximate date of acquisition of the property by the donor (except that in the case of a contribution of publicly traded securities as defined in §1.170A- 13(c)(7)(xi), a representation that the donor held the securities for more than one year is sufficient) or, if the property was created, produced, or manufactured by or for the donor, the approximate date the property was substantially completed;

(F) The cost or other basis, adjusted as provided by section 1016, of the property (except that the cost or basis is not required for contributions of publicly traded securities (as defined in §1.170A-13(c)(7)(xi)) that would have resulted in long-term capital gain if sold on the contribution date, unless the donor has elected to limit the deduction to basis under section 170(b)(1)(C)(iii));

(G) In the case of tangible personal property, whether the donee has certified it for a use related to the purpose or function constituting the donee's basis for exemption under section 501, or in the case of a governmental unit, an exclusively public purpose; and

(v) Any other information required by Form 8283 (Section A) or the instructions to Form 8283 (Section A).

(4) Additional requirement for certain vehicle contributions. In the case of a contribution of a qualified vehicle described in section 170(f)(12)(E) for which an acknowledgment by the donee organization is required under section 170(f)(12)(D), the donor must attach a copy of the acknowledgment to the Form 8283 (Section A) for the return on which the deduction is claimed.

(5) Additional substantiation rules may apply. For additional substantiation rules, see paragraph (f) of this section.

(d) Substantiation of charitable contributions of more than $5,000.

(1) In general. Except as provided in paragraph (d)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of more than $5,000 unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment, as described in section 170(f)(8) and §1.170A-13(f);

(ii) Obtains a qualified appraisal, as defined in §1.170A-17(a)(1), prepared by a qualified appraiser, as defined in §1.170A-17(b)(1); and

(iii) Completes Form 8283 (Section B), as provided in paragraph (d)(3) of this section, or a successor form, and files it with the return on which the deduction is claimed.

(2) Exception for certain noncash contributions. A qualified appraisal is not required, and a completed Form 8283 (Section A) containing the information required in paragraph (c)(3) of this section meets the requirements of paragraph (d)(1)(iii) of this section for contributions of—

(i) Publicly traded securities as defined in §1.170A-13(c)(7)(xi);

(ii) Property described in section 170(e)(1)(B)(iii) (certain intellectual property);

(iii) A qualified vehicle described in section 170(f)(12)(A)(ii) for which an acknowledgment under section 170(f)(12)(B)(iii) is provided; and

(iv) Property described in section 1221(a)(1) (inventory and property held by the donor primarily for sale to customers in the ordinary course of the donor's trade or business).

(3) Completed Form 8283 (Section B). A completed Form 8283 (Section B) includes—

(i) The donor's name and taxpayer identification number (for example, a social security number or employer identification number);

(ii) The donee's name, address, taxpayer identification number, signature, the date signed by the donee, and the date the donee received the property;

(iii) The appraiser's name, address, taxpayer identification number, appraiser declaration, as described in paragraph (d)(4) of this section, signature, and the date signed by the appraiser;

(iv) The following information about the contributed property:

(A) The fair market value on the valuation effective date, as defined in §1.170A-17(a)(5)(i).

(B) A description in sufficient detail under the circumstances, taking into account the value of the property, for a person who is not generally familiar with the type of property to ascertain that the described property is the contributed property.

(C) In the case of real property or tangible personal property, the condition of the property;

(v) The manner of acquisition (for example, by purchase, gift, bequest, inheritance, or exchange), and the approximate date of acquisition of the property by the donor, or, if the property was created, produced, or manufactured by or for the donor, the approximate date the property was substantially completed;

(vi) The cost or other basis of the property, adjusted as provided by section 1016;

(vii) A statement explaining whether the charitable contribution was made by means of a bargain sale and, if so, the amount of any consideration received for the contribution; and

(viii) Any other information required by Form 8283 (Section B) or the instructions to Form 8283 (Section B).

(4) Appraiser declaration. The appraiser declaration referred to in paragraph (d)(3)(iii) of this section must include the following statement: "I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been

at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. 330(c)."

(5) Donee signature.

(i) Person authorized to sign. The person who signs Form 8283 (Section B) for the donee must be either an official authorized to sign the tax or information returns of the donee, or a person specifically authorized to sign Forms 8283 (Section B) by that official. In the case of a donee that is a governmental unit, the person who signs Form 8283 (Section B) for the donee must be an official of the governmental unit.

(ii) Effect of donee signature. The signature of the donee on Form 8283 (Section B) does not represent concurrence in the appraised value of the contributed property. Rather, it represents acknowledgment of receipt of the property described in Form 8283 (Section B) on the date specified in Form 8283 (Section B) and that the donee understands the information reporting requirements imposed by section 6050L and §1.6050L-1.

(iii) Certain information not required on Form 8283 (Section B) before donee signs. Before Form 8283 (Section B) is signed by the donee, Form 8283 (Section B) must be completed (as described in paragraph (d)(3) of this section), except that it is not required to contain the following:

(A) The appraiser declaration or information about the qualified appraiser.

(B) The manner or date of acquisition.

(C) The cost or other basis of the property.

(D) The appraised fair market value of the contributed property.

(E) The amount claimed as a charitable contribution.

(6) Additional substantiation rules may apply. For additional substantiation rules, see paragraph (f) of this section.

(7) More than one appraiser. More than one appraiser may appraise the donated property. If more than one appraiser appraises the property, the donor does not

have to use each appraiser's appraisal for purposes of substantiating the charitable contribution deduction under this paragraph (d). If the donor uses the appraisal of more than one appraiser, or if two or more appraisers contribute to a single appraisal, each appraiser shall comply with the requirements of this paragraph (d) and the requirements in §1.170A-17, including signing the qualified appraisal and appraisal summary.

(e) Substantiation of noncash charitable contributions of more than $500,000.

(1) In general. Except as provided in paragraph (e)(2) of this section, no deduction is allowed under section 170(a) for a noncash charitable contribution of more than $500,000 unless the donor—

(i) Substantiates the contribution with a contemporaneous written acknowledgment, as described in section 170(f)(8) and §1.170A-13(f);

(ii) Obtains a qualified appraisal, as defined in §1.170A-17(a)(1), prepared by a qualified appraiser, as defined in §1.170A-17(b)(1);

(iii) Completes, as described in paragraph (d)(3) of this section, Form 8283 (Section B) and files it with the return on which the deduction is claimed; and

(iv) Attaches the qualified appraisal of the property to the return on which the deduction is claimed.

(2) Exception for certain noncash contributions. For contributions of property described in paragraph (d)(2) of this section, a qualified appraisal is not required, and a completed Form 8283 (Section A), containing the information required in paragraph (c)(3) of this section, meets the requirements of paragraph (e)(1)(iii) of this section.

(3) Additional substantiation rules may apply. For additional substantiation rules, see paragraph (f) of this section.

(f) Additional substantiation rules.

(1) Form 8283 (Section B) furnished by donor to donee. A donor who presents a Form 8283 (Section B) to a donee for signature must furnish to the donee a copy of the Form 8283 (Section B).

(2) Number of Forms 8283 (Section A or Section B).

(i) In general. For each item of contributed property for which a Form 8283 (Section A or Section B) is required under paragraphs (c), (d), or (e) of this section, a donor must attach a separate Form 8283 (Section A or Section B) to the return on which the deduction for the item is claimed.

(ii) Exception for similar items. The donor may attach a single Form 8283 (Section A or Section B) for all similar items of property, as defined in §1.170A-13(c)(7)(iii), contributed to the same donee during the donor's taxable year, if the donor includes on Form 8283 (Section A or Section B) the information required by paragraph (c)(3) or (d)(3) of this section for each item of property.

(3) Substantiation requirements for carryovers of noncash contribution deductions. The rules in paragraphs (c), (d), and (e) of this section (regarding substantiation that must be submitted with a return) also apply to the return for any carryover year under section 170(d).

(4) Partners and S corporation shareholders.

(i) Form 8283 (Section A or Section B) must be provided to partners and S corporation shareholders. If the donor is a partnership or S corporation, the donor must provide a copy of the completed Form 8283 (Section A or Section B) to every partner or shareholder who receives an allocation of a charitable contribution deduction under section 170 for the property described in Form 8283 (Section A or Section B). Similarly, a recipient partner or shareholder that is a partnership or S corporation must provide a copy of the completed Form 8283 (Section A or Section B) to each of its partners or shareholders who receives an allocation of a charitable contribution deduction under section 170 for the property described in Form 8283 (Section A or Section B).

(ii) Partners and S corporation shareholders must attach Form 8283 (Section A or Section B) to return. A partner of a partnership or shareholder of an S corporation who receives an allocation of a charitable contribution deduction under section 170 for property to which paragraph (c), (d), or (e) of this section applies must attach a copy of the partnership's or S corporation's completed Form 8283 (Section A or Section B) to the return on which the deduction is claimed.

(5) Determination of deduction amount for purposes of substantiation rules.

(i) In general. In determining whether the amount of a donor's deduction exceeds the amounts set forth in section 170(f)(11)(B) (noncash contributions exceeding $500), 170(f)(11)(C) (noncash contributions exceeding $5,000), or 170(f)(11)(D) (noncash contributions exceeding $500,000), the rules of paragraphs (f)(5)(ii) and (iii) of this section apply.

(ii) Similar items of property must be aggregated. Under section 170(f)(11)(F), the donor must aggregate the amount claimed as a deduction for all similar items of property, as defined in §1.170A-13(c)(7)(iii), contributed during the taxable year. For rules regarding the number of qualified appraisals and Forms 8283 (Section A or Section B) required if similar items of property are contributed, see §1.170A-13(c)(3)(iv)(A) and (4)(iv)(B).

(iii) For contributions of certain inventory and scientific property, excess of amount claimed over cost of goods sold taken into account—

(A) In general. In determining the amount of a donor's contribution of property to which section 170(e)(3) (relating to contributions of inventory and other property) or (e)(4) (relating to contributions of scientific property used for research) applies, the donor must take into account only the excess of the amount claimed as a deduction over the amount that would have been treated as the cost of goods sold if the donor had sold the contributed property to the donee.

(B) Example. The following example illustrates the rule of this paragraph (f)(5)(iii):

Example. X Corporation makes a contribution of inventory described in section 1221(a)(2). The contribution, described in section 170(e)(3), is for the care of the needy. The cost of the property to X Corporation is $5,000 and the fair market value of the property at the time of the contribution is $11,000. Pursuant to section 170(e)(3)(B), X Corporation claims a charitable contribution deduction of $8,000 ($5,000 + 1/2 × ($11,000 ¥ 5,000) = $8,000). The amount taken into account for purposes of determining the $5,000 threshold of paragraph (d) of this section is $3,000 ($8,000¥$5,000).

(g) Effective/applicability date. This section applies to contributions made after July 30, 2018. Taxpayers may rely on the rules of this section for contributions made after June 3, 2004, or appraisals prepared for returns or submissions filed after August 17, 2006.

T.D. 9836, 07/27/2018 .

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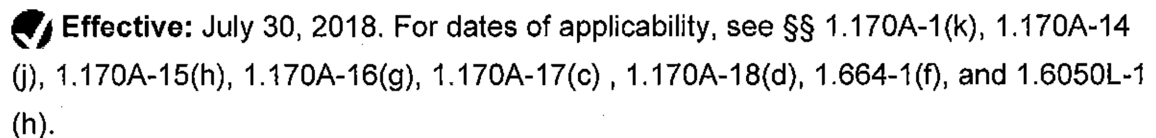
Federal Regulations

Reg § 1.170A-17. Qualified appraisal and qualified appraiser.



Effective: July 30, 2018. For dates of applicability, see §§ 1.170A-1(k), 1.170A-14 (j), 1.170A-15(h), 1.170A-16(g), 1.170A-17(c) , 1.170A-18(d), 1.664-1(f), and 1.6050L-1 (h).

(a) Qualified appraisal.

(1) Definition. For purposes of section 170(f)(11) and §1.170A-16(d)(1)(ii) and (e) (1)(ii), the term qualified appraisal means an appraisal document that is prepared by a qualified appraiser (as defined in paragraph (b)(1) of this section) in accordance with generally accepted appraisal standards (as defined in paragraph (a)(2) of this section) and otherwise complies with the requirements of this paragraph (a).

(2) Generally accepted appraisal standards defined. For purposes of paragraph (a)(1) of this section, generally accepted appraisal standards means the substance and principles of the Uniform Standards of Professional Appraisal Practice, as developed by the Appraisal Standards Board of the Appraisal Foundation.

(3) Contents of qualified appraisal. A qualified appraisal must include—

(i) The following information about the contributed property:

(A) A description in sufficient detail under the circumstances, taking into account the value of the property, for a person who is not generally familiar with the type of property to ascertain that the appraised property is the contributed property.

(B) In the case of real property or tangible personal property, the condition of the property.

(C) The valuation effective date, as defined in paragraph (a)(5)(i) of this section.

(D) The fair market value, within the meaning of §1.170A-1(c)(2), of the contributed property on the valuation effective date;

(ii) The terms of any agreement or understanding by or on behalf of the donor and donee that relates to the use, sale, or other disposition of the contributed property, including, for example, the terms of any agreement or understanding that—

(A) Restricts temporarily or permanently a donee's right to use or dispose of the contributed property;

(B) Reserves to, or confers upon, anyone, other than a donee or an organization participating with a donee in cooperative fundraising, any right to the income from the contributed property or to the possession of the property, including the right to vote contributed securities, to acquire the property by purchase or otherwise, or to designate the person having income, possession, or right to acquire; or

(C) Earmarks contributed property for a particular use;

(iii) The date, or expected date, of the contribution to the donee;

(iv) The following information about the appraiser:

(A) Name, address, and taxpayer identification number.

(B) Qualifications to value the type of property being valued, including the appraiser's education and experience.

(C) If the appraiser is acting in his or her capacity as a partner in a partnership, an employee of any person, whether an individual, corporation, or partnership, or an independent contractor engaged by a person other than the donor, the name, address, and taxpayer identification number of the partnership or the person who employs or engages the qualified appraiser;

(v) The signature of the appraiser and the date signed by the appraiser (appraisal report date);

(vi) The following declaration by the appraiser: "I understand that my appraisal will be used in connection with a return or claim for refund. I also understand that, if there is a substantial or gross valuation misstatement of the value of the property claimed on the return or claim for refund that is based on my appraisal, I may be subject to a penalty under section 6695A of the Internal Revenue Code, as well as other applicable penalties. I affirm that I have not been at any time in the three-year period ending on the date of the appraisal barred from presenting evidence or testimony before the Department of the Treasury or the Internal Revenue Service pursuant to 31 U.S.C. 330(c)";

(vii) A statement that the appraisal was prepared for income tax purposes;

(viii) The method of valuation used to determine the fair market value, such as the income approach, the market-data approach, or the replacement-cost-lessdepreciation approach; and

(ix) The specific basis for the valuation, such as specific comparable sales transactions or statistical sampling, including a justification for using sampling and an explanation of the sampling procedure employed.

(4) Timely appraisal report. A qualified appraisal must be signed and dated by the qualified appraiser no earlier than 60 days before the date of the contribution and no later than—

(i) The due date, including extensions, of the return on which the deduction for the contribution is first claimed;

(ii) In the case of a donor that is a partnership or S corporation, the due date, including extensions, of the return on which the deduction for the contribution is first reported; or

(iii) In the case of a deduction first claimed on an amended return, the date on which the amended return is filed.

(5) Valuation effective date.

(i) Definition. The valuation effective date is the date to which the value opinion applies.

(ii) Timely valuation effective date. For an appraisal report dated before the date of the contribution, as described in §1.170A-1(b), the valuation effective date must be no earlier than 60 days before the date of the contribution and no later than the date of the contribution. For an appraisal report dated on or after the date of the contribution, the valuation effective date must be the date of the contribution.

(6) Exclusion for donor knowledge of falsity. An appraisal is not a qualified appraisal for a particular contribution, even if the requirements of this paragraph (a) are met, if the donor either failed to disclose or misrepresented facts, and a reasonable person would expect that this failure or misrepresentation would cause the appraiser to misstate the value of the contributed property.

(7) Number of appraisals required. A donor must obtain a separate qualified appraisal for each item of property for which an appraisal is required under section 170(f)(11)(C) and (D) and paragraph (d) or (e) of §1.170A-16 and that is not included in a group of similar items of property, as defined in §1.170A-13(c)(7)(iii). For rules regarding the number of appraisals required if similar items of property are contributed, see section 170(f)(11)(F) and §1.170A-13(c)(3)(iv)(A).

(8) Time of receipt of qualified appraisal. The qualified appraisal must be received by the donor before the due date, including extensions, of the return on which a deduction is first claimed, or reported in the case of a donor that is a partnership or S corporation, under section 170 with respect to the donated property, or, in the case of a deduction first claimed, or reported, on an amended return, the date on which the return is filed.

(9) Prohibited appraisal fees. The fee for a qualified appraisal cannot be based to any extent on the appraised value of the property. For example, a fee for an appraisal will be treated as based on the appraised value of the property if any part of the fee depends on the amount of the appraised value that is allowed by the Internal Revenue Service after an examination.

(10) Retention of qualified appraisal. The donor must retain the qualified appraisal for so long as it may be relevant in the administration of any internal revenue law.

(11) Effect of appraisal disregarded pursuant to 31 U.S.C. 330(c). If an appraiser has been prohibited from practicing before the Internal Revenue Service by the Secretary under 31 U.S.C. 330(c) at any time during the three-year period ending on the date the appraisal is signed by the appraiser, any appraisal prepared by the appraiser will be disregarded as to value, but could constitute a qualified appraisal if the requirements of this section are otherwise satisfied, and the donor had no knowledge that the signature, date, or declaration was false when the appraisal and Form 8283 (Section B) were signed by the appraiser.

(12) Partial interest. If the contributed property is a partial interest, the appraisal must be of the partial interest.

(b) Qualified appraiser.

(1) Definition. For purposes of section 170(f)(11) and §1.170A-16(d)(1)(ii) and (e)(1)(ii), the term qualified appraiser means an individual with verifiable education and experience in valuing the type of property for which the appraisal is performed, as described in paragraphs (b)(2) through (4) of this section.

(2) Education and experience in valuing the type of property.

(i) In general. An individual is treated as having education and experience in valuing the type of property within the meaning of paragraph (b)(1) of this section if, as of the date the individual signs the appraisal, the individual has—

(A) Successfully completed (for example, received a passing grade on a final examination) professional or college-level coursework, as described in paragraph (b)(2)(ii) of this section, in valuing the type of property, as described in paragraph (b)(3) of this section, and has two

or more years of experience in valuing the type of property, as described in paragraph (b)(3) of this section; or

(B) Earned a recognized appraiser designation, as described in paragraph (b)(2)(iii) of this section, for the type of property, as described in paragraph (b)(3) of this section.

(ii) Coursework must be obtained from an educational organization, generally recognized professional trade or appraiser organization, or employer educational program. For purposes of paragraph (b)(2)(i)(A) of this section, the coursework must be obtained from—

(A) A professional or college-level educational organization described in section 170(b)(1)(A)(ii);

(B) A generally recognized professional trade or appraiser organization that regularly offers educational programs in valuing the type of property; or

(C) An employer as part of an employee apprenticeship or educational program substantially similar to the educational programs described in paragraphs (b)(2)(ii)(A) and (B) of this section.

(iii) Recognized appraiser designation defined. A recognized appraiser designation means a designation awarded by a generally recognized professional appraiser organization on the basis of demonstrated competency.

(3) Type of property defined.

(i) In general. The type of property means the category of property customary in the appraisal field for an appraiser to value.

(ii) Examples. The following examples illustrate the rule of paragraphs (b)(2)(i) and (b)(3)(i) of this section:

Example (1). Coursework in valuing type of property. There are very few professionallevel courses offered in widget appraising, and it is customary in the appraisal field for personal property appraisers to appraise widgets. Appraiser A has successfully completed professional-level coursework in

valuing personal property generally but has completed no coursework in valuing widgets. The coursework completed by Appraiser A is for the type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

Example (2). Experience in valuing type of property. It is customary for professional antique appraisers to appraise antique widgets. Appraiser B has 2 years of experience in valuing antiques generally and is asked to appraise an antique widget. Appraiser B has obtained experience in valuing the type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

Example (3). No experience in valuing type of property. It is not customary for professional antique appraisers to appraise new widgets. Appraiser C has experience in appraising antiques generally but no experience in appraising new widgets. Appraiser C is asked to appraise a new widget. Appraiser C does not have experience in valuing the type of property under paragraphs (b)(2)(i) and (b)(3)(i) of this section.

(4) Verifiable. For purposes of paragraph (b)(1) of this section, education and experience in valuing the type of property are verifiable if the appraiser specifies in the appraisal the appraiser's education and experience in valuing the type of property, as described in paragraphs (b)(2) and (3) of this section, and the appraiser makes a declaration in the appraisal that, because of the appraiser's education and experience, the appraiser is qualified to make appraisals of the type of property being valued.

(5) Individuals who are not qualified appraisers. The following individuals are not qualified appraisers for the appraised property:

(i) An individual who receives a fee prohibited by paragraph (a)(9) of this section for the appraisal of the appraised property.

(ii) The donor of the property.

(iii) A party to the transaction in which the donor acquired the property (for example, the individual who sold, exchanged, or gave the property to the donor, or any individual who acted as an agent for the transferor or for the donor for the sale, exchange, or gift), unless the property is contributed within 2 months of the date of acquisition and its appraised value does not exceed its acquisition price.

(iv) The donee of the property.

(v) Any individual who is either—

(A) Related, within the meaning of section 267(b), to, or an employee of, an individual described in paragraph (b)(5)(ii), (iii), or (iv) of this section;

(B) Married to an individual described in paragraph (b)(5)(v)(A) of this section; or

(C) An independent contractor who is regularly used as an appraiser by any of the individuals described in paragraph (b)(5)(ii), (iii), or (iv) of this section, and who does not perform a majority of his or her appraisals for others during the taxable year.

(vi) An individual who is prohibited from practicing before the Internal Revenue Service by the Secretary under 31 U.S.C. 330(c) at any time during the three-year period ending on the date the appraisal is signed by the individual.

(c) Effective/applicability date. This section applies to contributions made on or after January 1, 2019. Taxpayers may rely on the rules of this section for appraisals prepared for returns or submissions filed after August 17, 2006.

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