CURRENT DEVELOPMENTS IN FEDERAL TRANSFER TAXES

ABA MEETING OF THE SECTION OF TAXATION

ESTATE AND GIFT TAXES COMMITTEE OF THE SECTION OF TAXATION

WASHINGTON, D.C.

May 9, 2019

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By: Beth J. Kerwin & Megan M. Curran

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I.  TREASURY MATTERS AND LEGISLATIVE UPDATE

A.  Treasury Notice 83 Fed. Reg. 54279¹

On October 19, 2018 Treasury issued Proposed Regulations on Qualified Opportunity Funds (“QOF”) under Code Section 1400Z-2. Section 1400Z-2 provides for a new tax incentive program that promotes investment in economically-distressed communities (referred to as Opportunity Zones). Under this new law, investors can obtain the following tax benefits: (1) the deferral of gain on the disposition of property to an unrelated person until the earlier of (a) the later sale of the investment or (b) Dec. 31, 2026, so long as the gain is reinvested in a QOF within 180 days of the disposition of the property; (2) if certain holding period requirements are satisfied, elimination of up to 15% of the gain that has been reinvested in a QOF; and (3) if the investment in the QOF is held for at least ten years, the potential elimination of tax on gains associated with the appreciation of the value in the QOF. A QOF is an investment vehicle that invests in Opportunity Zone properties and it must meet certain requirements to qualify as a QOF.

The American College of Trust and Estate Counsel (ACTEC) submitted comments on the Proposed Regulations, which raised the following points for further clarification by Treasury:

1. The income tax consequences resulting from the death of a taxpayer who has deferred gain through a timely reinvestment of gain in a QOF, and to provide relief for successors-in-interest;

2. The income tax consequences resulting from the gift of an interest in a QOF where the donor has deferred gain through a timely reinvestment of gain in a QOF;

3. Confirmation that a transaction with a grantor trust that is disregarded for income tax purposes pursuant to Rev. Rul. 85-13 should not be considered a sale or exchange of an interest in a QOF; and

4. An extension of the 180-day period for rollover of gain to a QOF should be granted to partners, S corporation shareholders and beneficiaries of estates and trusts because they may not receive a Schedule K-1 indicating capital gains until more than 180 days after the end of the taxable year.

B.  Second Quarter Update to IRS 2018-2019 Priority Guidance Plan

The second quarter update to the IRS 2018-2019 Priority Guidance Plan was released on April 5, 2019. The Priority Guidance Plan notes that the second quarter update reflects 38 additional projects which have been published (or released) during the period from November 8, 2018 through December 31, 2018. It further noted that, due to the partial government shutdown that impacted the 2nd quarter between December 21 and December 31, 2018, certain projects that might otherwise have been published and released during the second quarter were not published and released until the 3rd quarter.

¹ October 19, 2018
Under the general gifts, estates and trusts heading, the same four items are listed, which were included in the last Priority Guidance Plan. They are as follows:

1. Guidance on basis of grantor trust assets at death under §1014.

2. Final regulations under §2032(a) regarding imposition of restrictions on estate assets during the six-month alternate valuation period. Proposed regulations were published on November 18, 2011.

3. Regulations under §2053 regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate.

4. Regulations under §7520 regarding the use of actuarial tables in valuing annuities, interests for life or terms of years, and remainder or reversionary interests.

C. Treasury Department Released Final IRC §199A Regulations and Additional Guidance

On January 18, 2019, the Treasury Department released the final IRC §199A regulations to implement the new qualified business income (“QBI”) deduction under IRC §199A. Additionally, the Treasury Department released proposed regulations to provide guidance on different aspects of the QBI deduction including qualified REIT dividends received by RICs, a revenue procedure (Rev. Proc. 2019-11) to provide methods for calculating W-2 wages as defined in IRC §199A(b)(4) and Treas. Reg. §1.99A-2, and Notice 2019-07 on the safe harbor for rental real estate enterprises.

Some key differences between the proposed IRC §199A regulations and the final regulations, as they apply to estates and trusts are as follows:

1. Estates and trusts may take the distribution deduction when computing taxable income for purposes of determining whether the trust’s or estate’s income exceeds the threshold amount.

2. The final regulations clarified whether an ESBT holding S corporation stock and non-S corporation stock must be treated as two separate trusts when applying the threshold amount and specified that an ESBT is treated as one trust regardless of whether it has S corporation stock and non-S corporation stock.

3. The final regulations revised the anti-abuse rule “significant purpose test” under the proposed regulations to an inquiry of whether the trust or estate is formed or funded with the “principal purpose of avoiding, or of using more than one, threshold amount.”
II. STATE LAW


1. **Summary**

The New York budget bill, which was enacted on March 31, 2019, made the following changes to New York law: (1), in response to Matter of Seiden, 2018 NY Slip Op 32541 (Oct. 9, 2018), amended New York law to require that QTIP property not otherwise included in the federal gross estate be included in the surviving spouse’s New York gross estate if a New York marital deduction previously was allowed with respect to that property and to require that the QTIP election for New York estate tax purposes be made on the New York estate tax return of the transferring spouse (applying to estates of individuals dying on or after April 1, 2019) and (2) amended New York law to reinstate the three-year look back rule for taxable gifts made within three years of death in a New York decedent’s estate for estate tax purposes for gift made before Dec. 31, 2025 (with retroactive effect to Jan. 15, 2019).

2. **Facts and Analysis**

*Response to Matter of Evelyn Seiden.* In Matter of Seiden, the New York Surrogate’s Court ruled that a QTIP trust created for New York estate tax purposes in 2010 (when the federal estate tax lapsed for one year) was not includible in the surviving spouse’s New York estate upon her death in 2014. Husband died in 2010, survived by Wife. Wife was a beneficiary of a marital trust under Husband’s Will. Wife died in 2014. Since there was no federal estate tax in 2010, the executor of Husband’s Will did not elect federal QTIP treatment. The Husband’s executor did file a New York estate tax return, made a New York QTIP election on a pro-forma federal return, and the marital deduction was permitted for New York estate tax purposes. Upon Wife’s death, her executor did not include the marital trust property on Wife’s federal estate tax return or New York estate tax return. The executor relied on New York’s tax law which defined a New York gross estate by reference to the federal gross estate. Since there was no federal QTIP election made with respect to the husband’s estate, Section 2044 was not triggered to cause inclusion in the surviving spouse’s estate. The Surrogate’s court agreed and pointed out that the legislature could amend the tax law to apply to future estates with QTIP property.

The new law amends New York’s Tax Law Sec. 954 to require that, if a New York marital deduction previously was allowed with respect to QTIP property, such property would be included in the surviving spouse’s New York gross estate (whether or not a federal estate tax return was required to be filed by the estate of the first spouse to die). The bill also amends the Tax Law Sec. 955 to require that, for New York estate tax purposes, the QTIP election must be made on the first

\(^2\) March 31, 2019.
spouse to die’s New York estate tax return where no federal estate tax return is required to be filed. The new law applies to estates of decedents dying on or after Apr. 1, 2019.

**Gift Tax Look Back.** Although New York does not have a gift tax, New York previously had a law which required the New York gross estate of a New York decedent to be increased by the amount of any taxable gift made within three years of death. This gift add-back rule expired for decedents dying on or after Jan. 1, 2019. However, the new law amends New York Tax Law Sec. 954 to apply this rule through Jan. 1, 2026 with retroactive effect for decedents dying on or after Jan. 15, 2019.

3. **Bottom Line**

With respect to the QTIP property inclusion, if the surviving spouse passed before April 1, 2019, this new law does not apply. Similarly, with respect to the gift add-back, this rule does not apply for a gift made between January 1 and January 15 of this year.

Also, the top rate for New York estate tax is 16% but, with the federal estate tax deduction for state estate tax paid, the top effective rate is 9.6% (16% - [16% * 40%]). However, if the New York gift add-back rule applies because an individual dies within three years of making a gift, the gifts do not qualify for the federal state estate tax deduction and, therefore, the gifts added back to the decedent’s estate under the new law will be subject to an additional tax of 6.4%.

III. **FEDERAL CASE LAW**

A. **Dieringer v. Comm’r.**\(^3\) – The 9th Circuit panel affirmed the Tax Court’s decision sustaining a deficiency against an estate for overstating the amount of a charitable deduction and sustaining an accuracy-related penalty.

1. **Summary**

The 9th Circuit panel affirmed the Tax Court’s decision sustaining a deficiency against an estate for overstating the amount of a charitable deduction, and sustaining an accuracy-related penalty in light of the holding in *Ahmanson Foundation v. United States*, where the 9th Circuit underscored “the principal that the testator may only be allowed a deduction for estate tax purposes for what is actually received by the charity.” 674 F.2d 761, 772 (9th Cir. 1981).

2. **Facts**

Victoria, the matriarch, died owning shares of Dieringer Properties, Inc. (“DPI”), a closely held corporation, which mainly manages commercial and residential properties. Victoria, three of her children and one unrelated individual made up the board of directors. Before Victoria’s death, only Victoria and two of her sons were shareholders of DPI. Victoria owned a majority of the shares (425 out of 525 voting shares; 7,736.5 out of 9,220.5 nonvoting shares), while her son

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\(^3\) No. 16-72640 (9th Cir. Mar. 12, 2019).
Eugene owned 100 voting shares and Eugene and her son Patrick owned 742 nonvoting shares each.

Under Victoria’s Will, all her assets passed to a trust (the “Trust”). Upon her death, the Trust disposed of the assets as follows: (i) personal effects to children, (ii) $600,000 in bequests to various charities and (iii) the balance to the family’s foundation (the “Foundation”).

Eugene was appointed as the sole Trustee of the Trust and Foundation and, upon Victoria’s death, as the executor of Victoria’s estate (the “Estate”).

For the Estate administration, an independent appraisal was obtained for the DPI shares as of Victoria’s date of death and concluded that the net asset value of DPI was $17,777,626 and Victoria’s shares were worth $14,182,471.

The DPI board of directors decided to redeem Victoria’s shares from the Trust that were to pass to the Foundation. For the purpose of redemption, DPI obtained another appraisal from the same valuation firm and Eugene instructed the appraisers to value Victoria’s DPI shares as if they were a minority interest. Therefore, the redemption appraisal included a 15% lack of control discount and a 35% lack of marketability discount. As a result, the DPI shares were valued significantly less in the redemption appraisal than in the date-of-death appraisal. Note that the appraisers worked on producing the appraisals simultaneously (they were dated March 24, 2010 and March 25, 2010).

DPI redeemed all of the Trust’s 425 voting shares and 5,600.5 nonvoting shares for a total price of $5,263,462, which was satisfied by DPI with two promissory notes (the trust also retained 2,136 nonvoting shares with a value of $1,858,961). The Trust distributed the promissory notes and the remaining DPI shares to the Foundation. Eugene and his two brothers entered into subscription agreements for additional DPI shares to fund the required payments under the promissory notes. The probate court approved the redemption agreement and found that the transaction would not constitute prohibited self-dealing under Section 4941. The 9th Circuit noted that the total value of the assets received by the Foundation from the Estate/Trust was $6,434,578.

The Estate claimed a charitable deduction on the Form 706 for $18,812,181, based on the date of death value of Victoria’s DPI shares. The IRS issued a notice of deficiency in the amount of $4,124,717 and imposed an accuracy related penalty of $824,943 under Section 662 for error and negligence in using the date-of-death appraisal as the value of the charitable contribution of Victoria’s DPI shares. The Estate filed a petition in Tax Court. The Tax Court upheld the IRS’s deficiency assessment and penalty.

3. Analysis

The first issue was whether the Estate’s charitable deduction should have been valued at the time of Victoria’s death, or whether the post-death events that decreased the value of the property delivered to the Foundation should be considered. In general, post death events are not considered in determining an estate’s gross value for purposes of the estate tax (here, the executor did not elect to use the alternative valuation date). Under Section 2055(a), a deduction from the value of the gross estate is permitted for transfers of assets to qualified charitable entities.
Deductions are valued separately from the valuation of the gross estate under *Ahmanson, supra.* In *Ahmanson,* the 9th Circuit held that a discount should be applied for the value of the charitable deduction to account for the fact that the shares donated to charity had been stripped of their voting power. The fact that a discount was not applied to the value of the nonvoting shares in the gross estate did not impact the holding. The Court emphasized that the testator may only be able to deduct what the charity actually receives.

The Court distinguished two cases, *Ithaca Trust Co. v. U.S.,* 279 U.S.151 (1929) and *Wells Fargo Bank & Union Tr. Co. v. Comm'r,* 145 F.2d 132 (9th Cir. 1944), which relied on the date of death value for a charitable deduction where the remainder of an estate was donated to charity after a post-death contingency (a life interest). These cases did not establish a universal rule for all charitable deductions.

Since Eugene improperly directed the appraiser to apply a minority interest discount (even though he knew a majority interest applied) with respect to the DPI shares purchased in the redemption, he manipulated the charitable deduction so that the Foundation only would receive a fraction of the charitable deduction claimed by the Estate. The Court noted that Eugene could commit unchecked abuses of the Estate since he was the Executor, Trustee of the Trust and Trustee of the Foundation in addition to his roles as president, director and majority shareholder of DPI.

The Court also rejected the Estate’s argument that the decline in value of the DPI shares was due to, in part, market forces. Lastly, the Court upheld the accuracy-related penalty and agreed with the Tax Court that the Estate had acted negligently and did not have reasonable cause or good faith for its negligent act.

4. **Bottom Line**

The court seems to suggest that a market decline in assets may lead to a reduced charitable deduction (and not only a decline in value based on a breach of the trustee’s fiduciary duties). Based on the Court’s reasoning, it may be prudent to distribute out a charity’s bequest sooner rather than later to hedge against changed circumstances that may impact the value of what the charity actually receives.

The court also pointed out that Eugene had complete control to abuse the Estate because of all of his fiduciary hats, which allowed the manipulation of the stock value to occur. Therefore, it may be prudent to have different individuals wearing different fiduciary hats.

If corporate interests will pass to charity on the death of the decedent and such interests need to be restructured, it may be desirable to have the decedent set forth the restructuring arrangements before death and not leave this in the hands of the estate fiduciaries.

The reliance on *Ahmanson, supra* also serves as a reminder that, if the gross estate includes a majority interest in an entity, but only a minority interest in the entity is used to fund a charitable or marital deduction bequest, the deduction will be limited to the value of the minority interest.

In general, where a beneficiary of an estate or trust is a private foundation, charitable lead trust or charitable remainder trust where the self-dealing rules apply, consider the applicability of the rules and exceptions (like the probate administration exception or the redemption exception).
We do not know if the state attorney general charged the trustee for breach of fiduciary duties to the Foundation by selling the majority interest in DPI at a discount, which benefited the trustee and his two brothers.

B. **U.S. v. Ringling.**\(^4\) - The U.S. District Court granted the government’s summary judgement motion holding beneficiaries of decedent’s estate liable for unpaid federal estate tax, penalties and interest based on transferee liability.

1. **Summary**

   The U.S. District Court granted the government’s summary judgement motion holding beneficiaries of decedent’s estate liable for unpaid federal estate tax, penalties and interest based on transferee liability.

2. **Facts**

   The decedent died on Dec. 24, 1999, survived by three daughters and a grandson. The decedent’s estate was bequeathed in equal parts to his three daughters. Shortly before his death, the decedent forgave a debt owed by his grandson, conveyed a property to his grandson (retaining a life interest), gifted his grandson bushels of corn and paid proceeds from the redemption of a CD to his grandson. The decedent also owned assets jointly with his daughters. The three daughters also served as the co-Personal Representatives of his estate by letters of representation issued in 2000. They prepared a state inheritance tax return, which, however, improperly relied on the assessed value of the properties instead of appraised values. Thereafter, in 2003, the probate court appointed a special administrator to investigate the estate, like whether a federal estate tax return was required. In 2008, the estate filed a form 706 with a gross estate of $834,336 and a net estate tax due of $28,939. With penalties and interest, the total due on July 14, 2008 was $65,874.80. The IRS sent many notices of deficiency to the estate. The beneficiaries made some payments with respect to the deficiency but, as of May 2018, the estate had a remaining balance due of $63,479. Only one beneficiary (Ringling) filed a response to the government’s motion for summary judgment.

3. **Analysis**

   Transferee liability applies under Section 6324(a)(2) where (i) a federal estate tax is not paid when due and (ii) the transferee, surviving tenant, or beneficiary received property included in the gross estate under Sections 2034 to 2042. The government must prove the existence of these two factors for a transferee to be personally liable.

   Here, the court found that the undisputed facts show that the estate tax was not paid when due and dismissed the beneficiary’s argument that an inconsistency in the amount due in the IRS’s memo/motion and underlying documents precluded summary judgment.

\(^4\) 123 AFTR2d-XXXX (DC SD 2/21/19).
Next, the court found that each defendant was liable based on the property each defendant received from the estate, to the extent of the property’s value measured at the time of the decedent’s death.

Lastly, the court rejected all of Ringling’s affirmative defenses, including the doctrines of accord and satisfaction, waiver, estoppel, and reasonable care because Ringling failed to identify any specific facts in the record to support her defense. Regarding the statute of limitations, personal liability under Section 6324(a)(2) can be asserted by the U.S. ten years from the date the assessment is made against the estate in accordance with Section 6502(a). Here, the assessment was made on July 14, 2008 and the U.S filed its case within the ten-year statute of limitations on January 23, 2017, therefore, the Court rejected this affirmative defense.

4. **Bottom Line**

The case illustrates that the IRS will pursue transferee liability even where the estate tax liability is small (here, $65,874 with penalties and interest). The case also reflects that it may be quite some time before the IRS will assert a claim for transferee liability (here, the IRS made the claim in the 9th year of the 10-year statute of limitations period and 19 years after the decedent’s date of death).

This case also highlights that transferee liability is not limited to those receiving gifts or bequests under a Will or Will substitute – it applies to all property included in the gross estate, including (i) certain transfers within three years of death included in the gross estate under Section 2035, (ii) property jointly held with the decedent under Section 2040, (iii) property included in the estate because the decedent retained an interest under Section 2036 and (iv) life insurance proceeds included under Section 2042.

Based on this case, a practitioner may consider recommending that beneficiaries not spend their inheritances until the three-year estate tax assessment period has expired after the filing of the Form 706 (without any assessment).

C. **North Carolina Dept. of Revenue v. Kimberley Rice Kaestner 1992 Family Trust**

The U.S. Supreme Court granted the petition by the North Carolina Department of Revenue asking for a determination of whether the existence of an in-state resident beneficiary of a non-grantor trust can trigger a state income tax under the federal due process clause.

1. **Summary**

The U.S. Supreme Court granted certiorari to review the North Carolina Department of Revenue’s request for a determination of whether the existence of an in-state resident beneficiary of a non-grantor trust can trigger a state income tax under the federal due process clause.

2. **Bottom Line**

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5 (Jan. 11, 2019).
In *Kaestner*, the North Carolina Supreme Court declared unconstitutional a state statute imposing income taxation on a trust solely based on the residence of the beneficiaries of the trust in the state. The trust was created by a New York settlor. During the years in question, no distributions were made to the North Carolina resident beneficiaries (though a loan was made to a resident child). The Trustee was a Connecticut resident, the custodian of the trust assets was located in Boston and the financial books and records, legal records, tax returns and trust accountings were prepared and kept in New York. The Court concluded that the trust failed to have minimum contacts with North Carolina sufficient to allow the state to tax the trust under the Due Process Clause.

Given the very few trust contacts with the state in *Kaestner*, the U.S. Supreme Court could decide this case in a narrow manner so as not to provide much clarity on the broader issue of when a state has sufficient minimum contacts under the Due Process Clause to tax a trust. Currently, four states tax a trust’s income based on the residence of the trust beneficiaries (North Carolina, Tennessee, Georgia and California).

The oral argument will take place on April 16, 2019. Amicus curiae briefs have been submitted by ACTEC (in support of neither party), Constitutional Law Scholars (in support of neither party), and other states and organizations.

D. **Montrois v. U.S.**\(^6\) - D.C. Circuit affirms Internal Revenue Service’s ability to charge for PTIN assignment and renewal.

1. **Summary**

   The D.C. Circuit court vacated the District Court’s judgement preventing the IRS from charging tax practitioners for a PTIN and remanded for further determination as to whether the amount charged was reasonable. The D.C. Circuit reasoned that the IRS is providing a service to an identifiable group of beneficiaries and that service (PTIN assignment) is justified because it keeps practitioners’ social security numbers private.

2. **Bottom Line**

   The IRS may resume charging a fee for assigning PTINs and PTIN renewals.

IV. **PLRs**

A. **PLR 201845014**\(^7\) - IRS ruled on the tax implications of sprinkling charitable remainder trusts.

1. **Summary**

\(^{6}\) No. 17-5204 (DC Cir. March 1, 2019)

\(^{7}\) Nov. 9, 2018.
The IRS ruled that the contemplated charitable remainder unitrusts (CRUTs) qualified as CRUTs under Sec. 664(d)(2) where, among other things, the CRUTs provided that a portion of the unitrust interest (an amount determined to be more than de minimis under Sec. 664(d)(2)) would be paid to the donor annually and the balance of the unitrust interest could be paid in the independent trustee’s discretion either to the donor or to one or more charities in a class of charities (the class of charities was selected by the donor).

2. Facts

Donor intended to form two CRUTs. Both CRUTs would require that (a) the trustee distribute to donor x% of the unitrust amount each year and such additional portion of the unitrust amount as the independent trustee determines so that the donor receives more than a de minimis amount under Sec. 664(d)(2); and (b) the trustee distribute the balance to such one or more of the donor and one or more charitable organizations included in the charitable class as the independent trustee selects in his full discretion. The charitable class means such one or more charitable organizations that the donor, as an individual and not in a fiduciary capacity, designates, which was revocable until the payment date. At the end of the unitrust term (on the donor’s death for CRUT 1 and on the death of the survivor of the donor and the donor’s spouse for CRUT 2, though subject to the donor’s right to revoke the spouse’s lifetime interest by Will), the remainder passes to one or more charitable organizations as the donor may appoint by Will or, if not so appointed, to a specified charity. An independent trustee is required to act at all times.

3. Rulings

The IRS concluded that the independent trustee’s power to allocate a portion of the unitrust amount between charitable and noncharitable beneficiaries did not prevent the CRUTs from qualifying under Sec. 664(d)(2). The power of the independent trustee to apportion the unitrust amount between the grantor and the charitable beneficiaries fit the exception under Sec. 674(c) so that the trust would not be treated as a grantor trust under Sec. 674(a). Also, since the unitrust amount must be allocated to the noncharitable beneficiary each year in an amount that is not de minimis, such payments satisfied the requirement under Section 664(d)(2)(A), which provides that, with respect to a CRUT, “a fixed percentage (which is not less than 5 percent nor more than 50 percent) of the net fair market value of its assets, valued annually, is to be paid, not less often than annually, to one or more persons (at least one of which is not an organization described in section 170(c) . . .”

The IRS also concluded that (1) the donor and donor’s spouse did not retain an impermissible power to remove and replace an independent trustee, which was limited to someone who is not related or subordinate to the donor or the donor’s spouse, (2) the donor’s power to designate the class of charitable beneficiaries was permissible and the grantor trust rules did not apply under Sec. 674(b)(4), (3) the donor’s power to revoke the surviving spouse’s unitrust interest by Will was permissible and the grantor trust rules did not apply under Sec. 674(b)(3), (4) the donor’s power to designate the charitable class and to revoke any previously-made designation of a charity before distribution to one or more charities prevented completion of the gift of the net unitrust amount until the unitrust amount is distributed to one or more charities each year (at which time it will qualify for the gift tax charitable deduction) and the donor’s power to revoke by Will the survivor’s interest will cause the gift of the survivor’s unitrust interest to remain incomplete.
until the donor’s death, and (5) if the donor’s spouse survives the donor and if the donor does not revoke the survivor’s unitrust interest on the donor’s death, the entire value of the assets of CRUT 2 included in the donor’s estate will be deductible because of the combined charitable and marital estate tax deductions available under Sec. 2055(a) and 2056(a).

4. **Bottom Line**

This PLR provides a useful outline for a charitable remainder unitrust with built-in flexibility for the donor that works. Specifically, to avoid creating a taxable gift that does not qualify for the gift tax charitable deduction under Sec. 2522, the donor retained the right to revoke prior designations of charities until the payment date. Therefore, the gift is incomplete until the payment date, at which time it is ascertainable and qualifies for the gift tax charitable deduction. Also, note that, since a CRUT cannot be a grantor trust, any lead amount going to charity would not be deductible so the sprinkling feature would not change the value of the lead and remainder interests for income tax purposes.

B. **PLR 201852008** — IRS grants taxpayer an extension to make the election to opt out of the automatic allocation of GST exemption for 15 years of prior transfers due to the failure of a qualified tax professional to make the appropriate election.

1. **Summary.**

A donor’s spouse requested an extension of time to opt out of the automatic GST exemption allocation rules under §2632(c) after discovering that the tax adviser failed to make the proper election. The IRS granted a 120-day extension to make the election on a supplemental gift tax return for fifteen years of gifts.

2. **Facts.**

A donor established a trust in 2000 that had generation-skipping transfer tax potential. The donor made gifts for seventeen years to the trust and retained a tax adviser to advise and prepare his gift tax return. His spouse also agreed to split gifts for each year and the same tax adviser prepared her returns. However, the tax adviser failed to advise the donor and his spouse about the automatic allocation rules under §2632(c) and failed to opt out of the automatic allocation. Thus, the donor’s and his spouse’s GST exemption were automatically allocated to the transfers in Year 2 through Year 17. The issue before the IRS was whether the spouse was entitled to Treas. Reg. § 301.9100 relief due to the tax adviser’s failure to notify the spouse of the automatic allocation rules and to make the appropriate election to avoid using the spouse’s generation skipping transfer tax exemption.

3. **Analysis.**

The IRS evaluated the requirements under IRC §9100 to grant relief, namely that (1) the time to make an automatic allocation election is not prescribed by statute, (2) the taxpayer acted reasonably and in good faith, and (3) granting the extension will not prejudice the Government’s

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8 December 28, 2018
interests. The IRS found that the first element was met because Notice 2001-50 expressly provides that taxpayers can seek an extension of time to make the election under Treas. Reg. §301.9100-3. Additionally, the IRS found the spouse met the second element because a taxpayer is deemed to have met the element if the taxpayer relies on a “qualified tax professional” and the spouse hired a tax adviser to prepare and advise her on the gift tax return. Thus, the spouse was granted additional time to make the election out of the automatic allocation of GST exemption.

4. **Bottom Line.**

The IRS will grant additional time to opt out of automatic allocation of GST exemption if the taxpayer relied on a qualified tax professional to make the appropriate elections even if the election to opt out relates to transfers occurring more than three years ago.

C. **PLR 201901005** — Surviving spouse treated as intended beneficiary of her husband’s IRA and permitted to rollover the IRA to an account established and maintained for her benefit.

1. **Summary.**

A surviving spouse was permitted to rollover an IRA to an account for her benefit after the beneficiary designated by the decedent and other surviving descendants executed qualified disclaimers under IRC §2518.

2. **Facts.**

A trust was named as the sole beneficiary of a decedent’s IRA. The taxpayer’s husband had not named a contingent beneficiary and was over 70 ½ years old at his death. He was survived by his spouse, his son, and two grandchildren. Within 9 months of decedent’s death, the trustee, his child, and his two grandchildren executed qualified disclaimers under IRC §2518. As a result, the IRA passed to the decedent’s estate and is governed by decedent’s will under applicable state law. Applicable state law provides that the surviving spouse is the sole beneficiary of the IRA as a result of the disclaimers.

The surviving spouse requested the following rulings:

a. The surviving spouse would be treated as acquired the IRA directly from the decedent and not from the decedent’s estate or testamentary trust.

b. The surviving spouse is entitled to roll over the IRA to one or more IRAs established and maintained in her own name as provided in IRC §408(d)(3)(A)(i) if the rollover occurs no later than the 60th day after the proceeds are distributed.

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9 January 4, 2019
c. The surviving spouse may exclude from her current year federal gross income the amount distributed from the IRA and rolled over to the new IRA in the spouse’s name.

3. **Analysis.**

a. Ruling 1: The surviving spouse is treated as acquiring the IRA directly from the decedent and not from the decedent’s estate or trust.

As a result of the disclaimers, the surviving spouse was entitled to receive decedent’s estate. Therefore, the surviving spouse is entitled to receive the IRA. As such, the IRS concluded that the IRA is maintained for the surviving spouse’s benefit under IRC §408(d)(3)(A).

b. Ruling 2: The surviving spouse may rollover the IRA.

Additionally, given that the IRA was deemed to be maintained for the surviving spouse’s benefit under IRC §408(d)(3), the IRS concluded she may rollover the IRA distribution to an IRA established and maintained in her name. The rollover must conclude within 60 days of a distribution of the IRA proceeds.

c. Ruling 3: The amounts distributed from the IRA and rolled over to an IRA in the spouse’s name will not result in additional income included in her federal gross income for the calendar year in which the rollover occurs.

Consistent with §408(d)(3), any amounts distributed from an IRA and rollover to an IRA established for the surviving spouse may be excluded from federal gross income in the year in which the rollover occurs.

4. **Bottom Line.**

As a result of a series of qualified disclaimers, a surviving spouse may be treated as the initial beneficiary of an IRA her husband established. This PLR may prove instructive for practitioners presented with troublesome beneficiary designations that may not be changed upon the death of their client.

D. **PLR 201902023**

IRS permits stretch treatment of an IRA when the decedent named a marital trust under his revocable trust as the designated IRA beneficiary.

1. **Summary.**

The IRS considered whether an IRA could receive favorable income tax treatment when the decedent named a marital trust under his revocable trust as the designated beneficiary of his IRA and not his surviving spouse outright. The IRS determined that as long as the required conduit
language was included in the marital trust, the surviving spouse would be treated as the designated beneficiary and the IRA would receive “stretch” treatment.

2. **Facts.**

   Before his death, decedent established a revocable trust that provided that any IRA distributions should be held in a separate sub-trust. Decedent died after attaining 70 ½ and had already received required minimum distributions. Decedent designated his revocable trust as the sole beneficiary of the IRA. The trust terms provide that the sub-trust should be maintained for the sole benefit of his younger surviving spouse and that all required distributions and any additional retirement proceed distributions shall be made directly to the surviving spouse. Upon the surviving spouse’s death, the remaining IRA proceeds will be divided among the decedent’s surviving descendants.

   The surviving spouse requested the following rulings:

   a. The requirements of Treas. Reg. §1.401(a)(9)-4 Q&A-5 are satisfied that the surviving spouse may be treated as the designated beneficiary of the IRA when determining the applicable distribution period under IRC §401(a)(9); and

   b. The applicable distribution period for decedent’s IRA be calculated using the surviving spouse’s life expectancy.

3. **Analysis.**

   Under IRC §401(a)(9), a trust will not be qualified unless the plan provides that an employee’s IRA be distributed to them no later than the required beginning date (the later of attaining age 70 ½ or retiring) and if the employee dies before receiving all distributions, the remainder should be distributed pursuant to §401(a)(9)(A)(ii) as of the date of death. In order for a beneficiary to qualify as a designated beneficiary, the individual must be named by the employee as of the employee’s date of death. Treas. Reg. §1.409(a)(9)-4, Q&A -4. If the employee names a non-individual (i.e. a trust), the trust’s beneficiaries are treated as the designated beneficiaries for purposes of §409(a)(9) if the trust is valid under state law, is or becomes irrevocable upon the employee’s death, the beneficiaries are ascertainable, and the plan administrator received the required designation. Treas. Reg. §1.409(a)(9)-4, Q&A – 5.

   The IRS concluded that the spouse could be considered the “designated beneficiary” because the decedent’s revocable trust was valid under applicable state law, the trust became irrevocable upon his death, the spouse was ascertainable, and the plan administrator had the appropriate documents.

   Under Treas. Reg. §401(a)(9)-5, when the designated beneficiary is the employee’s surviving spouse, the applicable distribution period is the longer of the surviving spouse’s life expectancy or the deceased employee’s life expectancy. Under Treas. Reg. §1.401(a)(9)-5, Q&A-7, if multiple beneficiaries are designated, the shortest life expectancy is used to determine the applicable distribution period.
The IRS concluded that the spouse’s life expectancy would be used as she was younger than the decedent and the designated beneficiary.

4. **Bottom Line.**

This ruling confirms that an IRA made payable to a conduit trust established under a client’s revocable trust instrument may receive preferential treatment when the spouse is the sole beneficiary of the conduit sub-trust. This confirms that an IRA made payable to a revocable trust on death can receive the favorable income tax treatment of a surviving spouse but permit other remainder beneficiaries to benefit upon the surviving spouse’s death.