Legacy Leaders: Estate Planning for Business Owners

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Section 2036(a)

- "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (***except in case of a bona fide sale for an adequate and full consideration in money or money's worth***), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death:

1. The possession or enjoyment of, or the right to the income from, the property, or

2. The right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

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Bona Fide Sale for Adequate and Full Consideration

- Note the bona fide sale for adequate and full consideration exception under section 2036(a). This exception has been interpreted extensively in the context of Family Limited Partnership/Family Limited Liability Companies (collectively referred to as "FLPs")
- "The transfers, trusts, interests, rights or powers enumerated and described in sections 2035 through 2038 and section 2041 are not subject to the Federal estate tax if made, created, exercised, or relinquished in a transaction which constituted a bona fide sale for an adequate and full consideration in money or money's worth. To constitute a bona fide sale for an adequate and full consideration in money or money's worth, ***the transfer must have been made in good faith, and the price must have been an adequate and full equivalent reducible to a money value***. If the price was less than such a consideration, only the excess of the fair market value of the property (as of the applicable valuation date) over the price received by the decedent is included in ascertaining the value of his gross estate." 26 CFR § 20.2043-1(a).

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Summary of Current Law

- Two prevailing tests under modern case law:
  1. "Arm's Length Transaction Test"
  2. "Nontax Reason Test"
- Of these two tests, the Nontax Reason Test appears to be the dominate trend.

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United States v. Byrum (U.S. Supreme Court)

- In *Byrum*, the United States Supreme Court held that the transfer of stock in three closely held corporations to irrevocable trusts was not to be included in the decedent's estate under section 2036(a).
- The decedent had retained the voting control over the gifted stock, among other rights. The Court stated that: "Here, the right ascribed to Byrum was the power to use his majority position and influence over the corporate directors to "regulate the flow of dividends" to the trust. That "right" was neither ascertainable nor legally enforceable, and hence was not a right in any normal sense of that term."
- The corporate trustee alone, not Byrum, had the right to pay out or withhold income, and thereby to designate who among the beneficiaries enjoyed such income.
- There were many other unrelated stockholders. "A majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests."
- Byrum has been overruled with respect to its key holding by the enactment of section 2036(b), which by its express terms only applies to corporations. However, the logic of Byrum still applies outside the very narrow construct of section 2036(b).

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Estate of Strangi v. Commissioner (5th Circuit)

- In Strangi, Albert Strangi through his agent under a power of attorney, transferred assets to a FLP in exchange for a 99% limited partnership interest.
- Stranco, Inc. was the general partner of the FLP, of which Strangi owned 47% of the corporation and each of his four children owned equal shares of the balance. Strangi, along with four of his children were on the board of directors for Stranco.
- The FLP paid personal expenses of Strangi. Strangi also continued to live in one of the two residences that he transferred to the FLP, only paying rent after his death (by his estate).
- The Court first found that there was an implied agreement between Strangi and his children that the assets transferred to the FLP would be available for his use.

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Estate of Strangi cont'd

- The court next looked at whether there was a bona fide sale for full and adequate consideration.
- The court found there was adequate consideration and had to assess whether the sale was “bona fide”. In formulating the test, the court said: “We think that the proper approach . . . is that a sale is bona fide if, as an objective matter, it serves a "substantial business [or] other non-tax" purpose.
- Five proffered non-tax tests were rejected by the Tax Cour and upheld by the 5th Circuit.
- *Strangi* emphasizes the importance of having a “significant non-tax purpose” for creating the entity, which seems to be the predominant test among the various courts at the present time. It also highlights the importance of not continuing to use transferred assets (such as residences) without clear and prompt payment of rent.

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Estate of Powell v. Commissioner (Tax Court)

- The court found that assets transferred by Nancy H. Powell (through her son as her agent under a power of attorney) in exchange for a 99% limited partnership interest in a FLP was includable in her estate for estate tax purposes under section 2036(a).
- The decedent’s son was the general partner of the FLP. As general partner, her son had the sole discretion to determine the amount and timing of partnership distributions, but the partnership's dissolution would require the written consent of all partners.
- Decedent’s son transferred her 99% interest in the FLP to a charitable lead annuity trust, which the court found was an ineffective transfer as either void or revocable, because the power of attorney only permitted gifts up to the annual exclusion amount. Under section 2035, the assets would come back into the estate if section 2036 would have applied because the transfer occurred less than three years (actually only a week) prior to the decedent’s death

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Estate of Powell cont'd

- The court found that the decedent effectively retained two “strings” under section 2036(a).

i. First, she could, in conjunction with others, as a partner of the FLP vote on dissolving the FLP and in effect return the assets back to herself.

ii. Second, the decedent, through her son as power of attorney, effectively controlled distributions from the FLP both as to timing and amount. Since her agent owed her fiduciary duties and she was the sole limited partner, the duties were deemed to be illusory.

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Estate of Powell cont'd

- In addition to its ruling on section 2036, the court *sua sponte* opined on a calculation of how to include the value of the assets in the taxable estate under section 2043(a).
- The takeaway is that if there were appreciation in the assets between the date of contribution and the date of death, the appreciation of the assets could be taxed twice under the court's 2043(a) formula.
- Extreme caution is warranted with this type of planning!

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Planning Considerations – Existing Entities

- If the entity was organized for a "significant nontax reason", such as an active business, then no further action likely needs to be taken. The "full and adequate consideration exception" to section 2036(a) likely applies here based on current case law.
- Further, if the entity engages in an active business, it is likely that the Arm's Length Transaction Test would also be satisfied.
- Generally, planning with entities that engage in an active business does not implicate section 2036(a).
- Questions arise when there is not an active business component, or perhaps that status is questionable.

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Planning Considerations – New Entities

- If the entity was organized for a reason other than an active business, an analysis needs to be performed as to the risk associated with making the transfer. There are a few of different planning options in this case:

1. Rely on the Nontax Reason Test to demonstrate that the entity is not created primarily with intent to obtain tax benefits. This is very fact specific and carries risk due to the subjective nature of the "nontax reasons".
2. A more conservative approach to simply relying on the Nontax Reason Test is, in addition to having a significant nontax reason, is to give voting control over dissolution and distribution decisions to an independent third party.
   - This can take the form of a "Special Manager" or "Special General Partner" whose sole role is to decide, unilaterally, all decisions with respect to liquidation and dissolution decisions and whose consent would be required to amend the partnership agreement or operating agreement with respect to the same. This Special Manager/General Partner should have affirmative and legitimate fiduciary duties to the other partners/members. ***Note—this has never been tested in any published court cases and there is no authority for relying on such a structure.***
   - Beware of implied agreements!
3. Give all of the interests (including any manager or general partnership interests) away. If there are no retained interests and the grantor does not retain control or use of the assets, then section 2036(a)(2) would not apply. This is a very conservative option, which also likely negates the benefits of obtaining discounts.

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Tax Controversy Involving Section 2036 - Overview

- Unlike other tax returns, which are generally subject to an audit "lottery," ALL estate tax returns will be individually reviewed (*i.e.*, classified) to determine revenue potential and identify the key issues for an examination
  - "Begin with the end in sight" through proper planning and implementation of that planning
  - One issue that is regularly examined is whether an interest in a FLP that was purportedly transferred by a decedent is nevertheless includible in the decedent's gross estate under section 2036
  - Certain sub-issues emerge with regularity
    - Implied agreements to retain possession
    - Rights to designate enjoyment of property or income from property
    - Bona fide sale for adequate and full consideration
- Estate and gift tax auditors ("auditors"), who are usually attorneys, are specially trained in estate and gift tax matters
  - Various strategies apply to an estate or gift tax audit that do not necessarily apply to other audits. These strategies are not discussed here, as the focus is on section 2036

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Tax Controversy Involving Section 2036 – Standard Information Requests

- Estate and gift tax attorneys typically request documents, and may conduct interviews, to determine whether a purportedly transferred interest in a FLP is includible in the decedent's gross estate under section 2036
- Standard requests implicating section 2036:
  - Whether partners received FLP interests that were proportionate to the value of the property transferred;
  - Whether an implied agreement existed between the decedent and the transferee concerning the possession or enjoyment of, or the right to income from, the property;
  - Whether there was a failure to transfer legal title to property such that the decedent retained the possession or enjoyment of, or the right to income from, the property;
  - Whether the purportedly transferred interest was reported for gift tax purposes; and
  - Where spouses transfer community property and each retains a life estate in the property, whether the transferred property is includible under section 2036 due to a retained interest (*i.e.*, whether section 2036 requires inclusion of one-half of the value of transferred community property in the gross estate of each spouse).

  See Internal Revenue Manual, pts. 4.25.5.2.12(7) (July 28, 2020), 4.25.5.2.13 (July 28, 2020), 4.25.5.2.7(8) (July 28, 2020).

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Tax Controversy Involving Section 2036 – Implied Agreements to Retain Possession

- Background
  - Recall that section 2036 requires inclusion in the decedent's gross estate if there was an express or implied agreement at the time of a transfer that the decedent would retain one or more of the purportedly transferred rights
  - In *Estate of Strangi v. Commissioner*, 85 T.C.M. (CCH) 1331, 1338 (2003) (quoting Estate of Strangi v. Commissioner, 115 T.C. 478, 486 (2000)), aff'd, 417 F.3d 468 (5th Cir. 2005), the Tax Court explained:

    > To avoid characterization as a retained interest, the decedent must have 'absolutely, unequivocally, irrevocably, and without possible reservations' parted with all of her title, possession, and enjoyment of the transferred assets.

- Prevalence in Litigation
  - Much of the litigation concerning section 2036 has concerned implied agreements under section 2036(a)(1) and the bona fide sale exception

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Tax Controversy Involving Section 2036 – Implied Agreements to Retain Possession (cont'd)

- Factors
  - In deciding whether a decedent impliedly retained the right to possess or enjoy purportedly transferred assets, courts typically consult the following factors:
    - Direct evidence of an implied agreement;
    - The decedent's failure to observe formalities in order to access the purportedly transferred assets to satisfy the decedent's personal needs;
    - The use of the transferred assets to pay the decedent's personal expenses;
    - The decedent's relationship to the assets before and after the transfer;
    - Commingling of funds;
    - Consistency in tax reporting as between the estate tax returns, gift tax returns, income tax returns, capital accounts, and FLP's books and records;
    - A history of disproportionate distributions;
    - Testamentary characteristics of the arrangement;
    - The extent to which the decedent transferred nearly all of his or her assets;
    - The unilateral formation of the FLP;
    - The type of assets transferred; and
    - The decedent's personal situation.

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Tax Controversy Involving Section 2036 – Implied Agreements to Retain Possession (cont'd)

- Takeaways
  - When drafting estate plans, be mindful of the above-referenced factors
  - Consistency between a well-crafted plan and the implementation of that plan is key to success

Tax Controversy Involving Section 2036 – Right to Designate

- Background
  - Recall that section 2036 requires inclusion in the decedent's gross estate if there was "the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the purportedly transferred property or the income therefrom."
  - In *United States v. Bynum*, 408 U.S. 125, 136 (1925), the United States Supreme Court explained that inclusion in a decedent's gross estate under section 2036(a)(2) is limited to situations in which the decedent had "an ascertainable and legally enforceable power."
    - In other words, when a right to determine distributions is ascertainable and legally enforceable, it violates section 2036(a)(2) and inclusion in the decedent's gross estate is appropriate. By contrast, when a power is attenuated or not legally enforceable, the right should not require inclusion in the decedent's gross estate under section 2036(a)(2)
- Prevalence in Litigation
  - The right to designate enjoyment of property or income from property under section 2036(a)(2) is litigated less frequently than implied agreements under section 2036(a)(1), but the IRS does raise the issue, most typically when a taxpayer retains power over an asset as a trustee, general partner, or managing member

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Tax Controversy Involving Section 2036 – Right to Designate (cont'd)

- Takeaways
  - In order to avoid application of section 2036(a)(2), it is generally advisable to not allow a client to assume a management position giving her the right to designate enjoyment of property or income from property
  - If the client insists on managing the entity, then:
    - The client should not have the power to vote stock, which would require inclusion in the decedent's gross estate under section 2036(b) ; and
    - The power must be limited in the governing document (*e.g.*, the FLP operating agreement) by a legally enforceable, ascertainable standard in the governing document for all important decisions during the lifecycle of a business (*e.g.*, distributions, liquidation, dissolution, amendments)

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Tax Controversy Involving Section 2036 – Bona Fide Sale for Adequate and Full Consideration

- Background
  - Recall that section 2036 does not apply in the case of a bona fide sale for an adequate and full consideration in money or money's worth. In other words, any transfer made in a bona fide sale for an adequate and full consideration in money or money's worth is excepted from inclusion in the decedent's gross estate under section 2036. This so-called "bona fide sale exception" consists of two distinct elements:
    - Whether there was a bona fide sale; and
    - Whether the sale was made for adequate and full consideration in money or money's worth.
- Prevalence in Litigation

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Tax Controversy Involving Section 2036 – Bona Fide Sale for Adequate and Full Consideration (cont'd)

- Element 1: Bona Fide Sale
  - Nontax reason test dominant
  - As articulated by the Tax Court in *Estate of Bongard v. Commissioner*, 124 T.C. 95, 118 (2005), that test provides:

    > In the content 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 . . . . The objective evidence must indicate that the nontax reason was a significant factor that motivated the partnership's creation . . . . A significant purpose must be an actual motivation, not a theoretical justification. By contrast, the bona fide sale exception is not applicable where the facts fail to establish that the transaction was motivated by a legitimate and significant nontax purpose.

  - Factors consulted in connection with determining an implied agreement also consulted
  - Memorializing nontax reasons
    - Asset protection
    - The need for an active and centralized management of underlying assets
    - Restructuring for a discrete purpose (*e.g.*, to provide liquidation for an anticipated public offering)

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Tax Controversy Involving Section 2036 – Bona Fide Sale for Adequate and Full Consideration (cont'd)

- Element 2: Adequate and Full Consideration
  - In order for a price to constitute "adequate consideration in money or money's worth," the price

    must have been an adequate and full equivalent reducible to a money value. If the price was less than such consideration, only the excess of the fair market value of the property (as of the applicable valuation date) over the price received by the decedent is included in ascertaining the value of his gross estate.

    Treas. Regs. § 20.2043-1(a)
  - Proving "adequate consideration"
    - Values should be corroborated with reliable evidence of the property's value on the date of sale (e.g., with a valuation report);
    - The interests received by the participants in the FLP should be proportionate to the value of the property each participant contributed to the entity;
    - The respective assets contributed to the FLP should be properly credited to the respective capital accounts of the transferors;
    - Distributions from the FLP should be required a negative adjustment in the distributee's capital account; and
    - There should be a legitimate and significant nontax reason for engaging in the transaction.

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Tax Controversy Involving Section 2036 – Impact of *Loper Bright*

- <u>The Historical Landscape</u>
  - Treasury Regulations under section 2036 adopt an expansive interpretation of already broad wording contained in the statute
  - Most courts have historically simply examined the facts of a case to determine whether inclusion under section 2036 was required under the statute's broad language
  - Some courts have also relied upon specific regulatory provisions to support inclusion under section 2036
    - *See, e.g.*, *Estate of Bongard v. Commissioner*, 124 T.C. 95, 146 n.7 (2005).
- <u>A Change in the Landscape?</u>
  - In *Loper Bright Enters. v. Raimondo*, 603 U.S. __ (2024), the Supreme Court said that deferring to an agency's interpretation of a statute when resolving statutory ambiguities is misguided and inconsistent with the Administrative Procedure Act (the "APA"). Rather, the Court reasoned that the APA requires courts to exercise independent judgment in deciding whether an agency has acted within its statutory authority. The Court ultimately concluded that, when a court resolves statutory ambiguities, courts may not simply defer to an agency's interpretation of the law.

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Tax Controversy Involving Section 2036 – Impact of *Loper Bright* (cont'd)

- Key Takeaways as it Relates to Section 2036
  - The standard to be used by courts in resolving statutory ambiguity has changed – it is now to look at the totality of the matter, including the statute and its legislative history, to determine whether the agency's interpretation of a statute is "reasonable"
  - Given the broad language in section 2036, regulatory challenges in this area may be difficult
  - If the IRS's position in a controversy relies upon a regulatory provision or caselaw referencing a regulatory provision, that regulation must be scrutinized for conformity with the plain language of the statute, the law's legislative history, and compliance with the APA
    - Taxpayers should be motivated to challenge questionable administrative interpretations of the Code

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Evolution of Tax Law and Chief Counsel Advice 202352018

- On November 28, 2023, the IRS issued Chief Counsel Advice 202352018, which was released on December 29, 2023, opining that trust beneficiaries who consent to add to the terms of a grantor trust a discretionary power held by an independent trustee to reimburse the grantor for income tax paid by the grantor on the income of the trust have thereby made a gift.

- Note change from general understanding, as previously indicated by Revenue Ruling 2004–64, 2004–2 C. B.

- Note value of gift, IRS saying that the beneficiaries "each have made a gift of a portion of their respective interest in income and/or principal" of the trust.

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Evolution of Tax Law and Chief Counsel Advice 202352018 Cont'd

- Note broad statement: " The result would be the same if the modification was pursuant to a state statute that provides beneficiaries with a right to notice and a right to object to the modification and a beneficiary fails to exercise their right to object.

- The CCA represents a litigation posture of the IRS; is not an official ruling by the IRS , the broad application of these statements is concerning- failure to retain counsel and object in a standard proceeding may result in an unintended gift.

- The Relationship Between CCA 202352018 and Rev. Rul. 2004– this reversal of the position previously taken by the IRS in Revenue Ruling 2004-64 may require a taxpayer creating an intentionally defective grantor trust ("IDGT") to commit to an obligation to pay income taxes for the life of the trust.

- The CCA evidences evolving approach on the part of the IRS, as well as the Tax Court, as previously discussed, to broaden the circumstances in which assets, despite having been transferred by the grantor and having thereby been treated as a completed gift, may nevertheless be included in the estate of the grantor for estate tax purposes or may result in a taxable gift by the recipients, although the actions taken would not have led to inclusion or a taxable gift under prior law.

Chief Counsel Advice 202352018

- In the CCA, an irrevocable trust authorized an independent trustee- not "related or subordinate" to the grantor under section 672(c), to distribute principal or income of the trust to the grantor's child in the "trustee's absolute discretion" and on the death of the child the remainder was payable to the child's then living issue, per stripes.
- The trust was a grantor trust under section 671, but the assets of the trust would not be included in the estate of the grantor, i. e. an "IDGT" or "intentionally defective grantor trust." This trust instrument did not require or permit the trustee to reimburse the grantor for income tax paid by the grantor on the income of the trust and there was no power to reimburse the under relevant state law.

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Chief Counsel Advice 202352018 cont'd

- The trustee petitioned the court for permission to modify the trust to add a provision permitting the trustee to reimburse the grantor for income taxes paid by the grantor on the income of the trust in the discretion of the trustee. A state statute permitted this modification if the interested beneficiaries, in this case, the grantor's child and adult grandchildren, consented to the modification, which they did. The court approved the petition and ordered the proposed modification.

- The Office of the Chief Counsel concluded that the modification resulted in a gift by each of the beneficiaries "of a portion of their respective interest in income and/or principal" of the trust.

- Rev. Rul. 2004–64 established parameters regarding reimbursement of the grantor for income tax paid on the income of a grantor trust, relied upon by practitioners for almost 2 decades, that a grantor is not considered to have made a gift to the beneficiaries by paying income tax on the income of a trust which is a grantor trust under section 671 because the liability for the income tax is imposed on the grantor. This follows long-standing rules, such as those set forth in Rev. Rul. 1985–13 holding a grantor is liable for income tax on the income of a trust if certain powers are retained by the grantor over the trust.

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Chief Counsel Advice 202352018 cont'd

- Rev. Rul. 2004–64 also held that the discretionary right to reimburse the grantor for income taxes paid by the grantor on the income of the trust "would not alone cause inclusion of the trust in [the grantor's] gross estate … However, such discretion combined with other facts, including…an understanding… between [the grantor] and the trustee regarding the trustee's exercise at this discretion; a power retained by [the grantor] to remove the trustee and name [the grantor] as successor trustee; or applicable local law subjecting the trust assets to the claims of [the grantor's] creditors), may cause inclusion of [the trust's] assets in the grantor' gross estate for federal estate tax purposes.

- Moreover, Rev. Rul. 2004-64 clarified that if the terms of the trust require the grantor to be reimbursed for income tax payments then the grantor has retained to have the property of the trust expended in discharge of the legal obligations of the grantor and that would cause inclusion of the value of the trust assets in the grantor's gross estate under section 2036(a)(1).

- Thus, note that the holding by the IRS in Rev. Rul. 2004-64 relates to section 2036, which is now indirectly challenged by the recent CCA, consistent with the evolving Tax Court case law in this area, more broadly applying the application of section 2036 to the facts of a trust.

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Chief Counsel Advice 202352018 cont'd

- Finally, Rev. Rul. 2004-64 went on to say that reimbursement of the grantor for payment of income tax on the trust income under a discretionary standard "is not a gift by the trust beneficiaries" leaving open if that would also be true even if there was a prearranged understanding that a reimbursement would be available to the grantor.

- CCA 202352018 attempts to distinguish Rev. Rul. 2004–64 on the basis that the discretionary authority in the revenue ruling to reimburse the grantor was set forth "under the terms of the original governing instrument, "as opposed to being created pursuant to a modification consented to by the beneficiaries", as in the CCA.

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Chief Counsel Advice 202352018 cont'd

- Repudiation of Letter Ruling 201647001. The CCA acknowledges that it represents a change of position from an earlier letter ruling, 201647001, released on November 18, 2016, which concluded that the modification of a trust to add a discretionary power in the trustee to reimburse the grantor for income tax "did not result in a change of beneficial interests in the Trust." The CCA merely states that "these conclusions no longer reflect the position of this office." The 2016 ruling provided context that "unforeseen and unanticipated circumstances [had made] payment by the grantor of the income taxes on the Trust income… unduly burdensome.

- The 2016 Ruling combined with Rev. Rul. 2004-64 has for decades led practitioners to understand that a discretionary power to reimburse the grantor for income taxes when these taxes become unduly burdensome is acceptable as long as it is not required to be made and does not reflect a prearranged understanding – these reimbursements have been made on an ad hoc basis, at different times and in different amounts.

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CCA 202233014

- CCA 202233014 repudiating previous PLR.

- Another recent IRS reversal of position was made by CCA 202233014, released on August 19, 2022, which stated that neither a charitable deduction nor a marital deduction would be allowed for a charitable remainder unitrust interest, where the trustee may “sprinkle” the interest between the spouse and charity. The CCA admitted in a footnote that this was contrary to the holding in four previous PLR’s, allowing either a marital or charitable deduction in such a case. Here again, the CCA stated that “the position in these earlier rulings no longer reflects the position of this office”

- Although it has long been established that a charitable deduction may be denied where the amount ultimately passing to charity cannot be determined at the moment of the gift or bequest, this reversal of position, combined with more strict interpretation of these tax rules, is consistent with the general evolution of the tax law in this area, giving notice to taxpayers that the application of the statutes is increasingly being applied more broadly.

- Notably, a CCA often consists primarily of a litigation position by the IRS in a specific emerging litigation, which would account for the unusually aggressive stance taken in the CCA.

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Procedures for Revocation of a Letter Ruling pursuant to Rev. Proc, 2024–1

- Note that a CCA repudiating a previous position taken in a letter ruling does not constitute the revocation of a ruling. See Rev. Proc. 2024 – 1, 2024 – 1 I. R. B. 1, 64, providing that in order to revoke a letter ruling there must be legislation enacted, ratification of a tax treaty, a decision of United States Supreme Court, temporary or final regulations issued, or the issuance of a revenue ruling, revenue procedure, notice or other statement published in the IRB. Accordingly, the CCA does not constitute revocation of the previous letter ruling.

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Litigation Context of CCA

- In light of the probable litigation context of the CCA, it is notable that is addressed to two IRS Associate Area Counsels – Janice B. Geier and Sheila R Pattinson, both of whom have been included in the IRS counsel of record in several notable Tax Court cases, including the *Estate of Strangi v. Commissioner*, 115 T.C. 478 (2000), affirmed in part and reversed and remanded in part, 293 F. 3rd 279 (5th Cir. 2000)., *Nelson v. Commissioner*, T.C. Memo 2020–81, affirmed, 17 F. 4th 556 (5th Cir. 2021), and *Jones v. Commissioner*, T.C. Memo. 2019-101, involving inclusion of property in a decedent's estate that was transferred to a limited partnership, a defined value clause and "tax- affecting "in the valuation of interest in a timber businesses, respectively. Thus, the CCA appears to be part of a broader narrative in the evolving tax law trend in this area.

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CCA Conclusion

- The CCA gives rise to a number of concerns involving beneficiaries making gifts by failing to take aggressive action, ignoring the effect of fiduciary duties that have often precluded taxable gifts occurring in the context of actions taken by a trustee in exercising discretion, and the tax related complexities of relinquishing grantor trust status.
- The CCA provides strong evidence of the need for added care by beneficiaries and taxpayers when establishing an IDGT, not only in terms of the reimbursement power, but also in the nature of the control retained by the grantor over the assets transferred to the trust.

QUESTIONS

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