

June 02, 2022

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2022-21)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20224

Re: section 1041 basis adjustment to assets held in IDGTs

To whom it may concern:

In Rev. Proc. 2015-37, released 06/08/15, IRS announced it would no longer provide advance determinations whether Code section 1014 affords an adjustment to basis in assets held in a "grantor" trust where those assets are not includible in the gross estate of the deemed owner.¹

The question was assigned to section 5 of the agency's "no rule" list, areas "under study," in which rulings will not be issued pending the issuance of formal guidance. And a few weeks later, a corresponding project on "basis of grantor trust assets at death" under section 1014 was added to the priority guidance plan for fiscal 2015-16.

That project was carried in subsequent priority guidance plans for six years, but it was dropped from the plan for fiscal 2020-21, without explanation and without a formal guidance project having ever been launched.

The Greystocke Project urges the Treasury and IRS to reinstate this guidance project and to begin a process of developing formal guidance on the question, possibly under Code section 1015(b), and possibly in conjunction with a project to revoke or modify Rev. Rul. 85-13, 1985-1 C.B. 184.²

¹ It does not appear that any advance determinations directly addressing the issue as framed had been issued prior to the release of the revenue procedure, so this might be seen as a preemptive maneuver.

Some commenters have decried PLRs 201245006 and 201544002 as having conceded the point. The latter ruling was issued about two weeks after the effective date of revenue procedure, but expressly noted that the request had been made earlier.

While each of these letter rulings perhaps inartfully suggests that basis in assets held in a "grantor" trust would be adjusted at the deemed owner's death, in each case the reserved interests would in fact have triggered estate tax inclusion had the settlor not been a nonresident noncitizen.

² See, e.g., Austin Bramwell and Stephanie Vara, *Basis of grantor trust assets at death: what Treasury should do*, 160 Tax Notes 793 (Aug. 06, 2018). But also see, Jeffrey Pennell, *Basis of grantor trust assets before the grantor's death*, (Jan. 20, 2019), available at <https://ssrn.com/abstract=3319242>.

At least since the publication in September 2002 of an article in the Journal of Taxation arguing that the statute, regulations, and legislative history "do not affirmatively preclude" the result,³ some number of tax advisors have been assisting very high net worth clients in implementing installment sales to so-called "intentionally defective" "grantor" trusts, not only to freeze asset values but also with a view toward reporting a basis adjustment in trust assets at the settlor's death, despite the fact that these assets will not be includible in the settlor's gross estate.

Although a November 2008 intra-agency e-mail message released as CCA 200937028 did express that the Chief Counsel's office "strongly disagree[d]" with a taxpayer's argument that the reservation of a section 675 "swap" power in an IDGT should alone afford a basis adjustment at the settlor's death, it does not appear that the particular case resulted in litigation, certainly not in a published court opinion.

More to the point, in the intervening dozen years Counsel's expressed view has not found its way into formal guidance. The consequence is that taxpayers adopting this reporting position are not required to disclose the fact,⁴ and IRS therefore has had no effective means of identifying noncompliance or quantifying revenue losses.

This situation should not be allowed to persist.

Sincerely,



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The Greystocke Project is a 501(c)(4) organization whose purpose is to advocate for state and federal tax and nontax legislative and regulatory measures to limit the intergenerational transferability of accumulated wealth.

3 Jonathan G. Blattmachr, Mitchell M. Gans, and Hugh H. Jacobson, *Income tax effects of termination of grantor trust status by reason of the grantor's death*, 97 Journal of Taxation 149 (Sept. 2002).

4 This point is articulated in greater detail in a letter dated January 17, 2022 from Prof. Daniel Hemel, then of the University of Chicago School of Law, to Rep. Bill Pascrell, chair of the Oversight subcommittee of the House Ways and Means committee, reprinted at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4024396