June 18, 2020

CC:PA:LPD:PR
(REG-113295-18), Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: REG-113295-18

To whom it may concern:

The proposed revision to reg. section 1.642(h)-2 corrects a longstanding error and should apply retroactively not only to tax years beginning after 2017 but to any open years.

Section 642(h) says simply that excess deductions on termination are to be "allowed as a deduction" to the distributees, "in accordance with regulations prescribed by the Secretary." There is no express authority here for the position taken in the existing reg at paragraph (a) that these are to be treated as itemized deductions, much less as preference items.

The existing reg has simply been wrong on this point since at least November 1960 when a comprehensive rewrite of what had been 26 CFR (1939), part 39 (Regulations 118) was finalized in TD 6500.

The confusion was of course exacerbated by TD 9664, finalizing reg. section 1.67-4(a) in the wake of *Knight/Rudkin*, 552 U.S. 181, 128 S. Ct. 782 (2008). That project was focused on a different issue, but the final reg mistakenly frames section 67(e) as an exception to the rule that miscellaneous itemized deductions are/were subject to a floor of two pct. of adjusted gross.

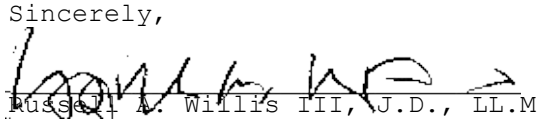
This might be seen as an artifact of the awkward placement of subsection (e) within section 67 in the first instance, rather than somewhere in subchapter J, perhaps in section 642(h) itself.

What section 67(e) actually says is that expenses of administration that "would not have been incurred" if the property were not held in a trust or estate are not miscellaneous itemized deductions, period. Not an "exception." Only those expenses that might "commonly or customarily" have been incurred by an individual holding the same property -- here quoting reg. section 1.67-4(b) -- are subject to the two pct. floor. Or were. Otherwise we are talking about an above-the-line income adjustment.

Section 67(e) does use the word "except," but what it says is that an estate or trust calculates its "adjusted gross income" -- which of course is not a phrase that is used anywhere in subchapter J itself, and is not otherwise the subject of section 67 -- "in the same manner as" an individual, "except" that in effect expenses of administration are treated as an "above-the-line" deduction. An exception to an exception to an exception.

It has taken the suspension of the allowance of miscellaneous itemized deductions through 2025 to force the issue, but that is not a reason to key the effective date of this correction to the effective date of section 67(g).

Sincerely,



Russell A. Willis III, J.D., LL.M.
Director, The Greystocke Project
1042 East Lester Street
Tucson, AZ 85719-3543

314.566.3386
rawillis3@plannedgiftdesign.com

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.