

## Odds and Ends

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### the Congress

- status of tax "reform"
- other legislative proposals

### the IRS

- rev. ruls., rev. procs., notices
- PLRs, CCAs

### the courts

- conservation easements, substantiation

### a case study

- early termination of two-life gift annuity

### tax "reform"

the Camp proposal, ca. December, 2014

- deduction floors
- lower percentage limits
- deduction for appreciated property limited to basis

### tax "reform," cont'd

the House GOP "blueprint," ca. June, 2016

- fewer brackets, lower top marginal rate
- much larger standard deduction
- eliminate itemized deductions other than for mortgage interest, charitable contributions[\*]
- repeal estate and GST taxes, w/ basis carryover

[\*] consider options to make these more "effective and efficient"

### tax "reform," cont'd

the White House one-pager, April 26

- fewer brackets, lower top marginal rate
- "double" standard deduction
- "eliminate targeted tax breaks that mainly benefit wealthiest"
- "protect" mortgage interest and charitable deductions[\*]
- repeal AMT
- repeal estate tax

[\*] cf. campaign statement re caps at 100k/200k

### tax "reform," cont'd

the "gang of six" statement, July 27

- rate reduction
- capital expensing
- "permanence" a priority
- repatriation of foreign earnings
- not transitioning to consumption tax
- border adjustment off the table

tax "reform," cont'd

the Senate Democrats statement, August 2

- no tax increase on middle class, no cuts for top one pct.
- "regular order," not reconciliation
- revenue neutral, so as not to endanger social welfare programs

McConnell says no dice

tax "reform," cont'd

budget reconciliation

- 1974 legislation
  - simple majority in Senate
  - amendments cannot increase cost
- "Byrd rule"
  - no "extraneous" provisions
  - no increase in deficit outside budget window (ten years)

other legislative proposals

H.R. 3280

Appropriations Committee, reported July 18

- budget for IRS for FY 2018 down another \$149 million to \$11.1 billion
- no spending on
  - implementing or enforcing Notice 2017-10 re syndicated easements
  - finalizing, implementing, or enforcing proposed regs under sec. 2704
  - enforcing "Johnson amendment" against churches

other legislative proposals, cont'd

re "Johnson amendment"

- S. 264, H.R. 781
  - no violation if statement made in "ordinary course" of carrying out exempt purpose and incremental expense "de minimis"
- H.R. 172 outright repeal

other legislative proposals, cont'd

re "Johnson amendment," cont'd

- note Executive Order 13798, issued May 4
  - IRS not to take "adverse action" against individual or religious org. for speaking about "moral or political issues from a religious perspective," where similar speech has, "consistent with law, not ordinarily been treated as participation or intervention"
    - singles out "conscience-based objections" to preventive care regs under Obamacare

other legislative proposals, cont'd

- H.R. 30, H.R. 198 [identical]
  - outright repeal of subtitle B, i.e., estate, gift, GST taxes, chapter 14
- H.R. 451
  - repeal estate tax only, preserve step-up[\*]
- H.R. 631, S. 205 [Thune, et al.]
  - repeal estate and GST taxes only
  - reinstate 2511(c)

other legislative proposals, cont'd

S. 1343, H.R. 2916

- DAFs eligible to receive charitable IRA "rollovers"
- "simplify" excise tax on net investment income of foundations to flat one pct.
- exception to excise tax on excess business holdings ["Newman's Own" amendment]

other legislative proposals, cont'd

S. 1343, H.R. 2916, cont'd

- "Newman's Own" amendment
  - all interests held by foundation, acquired from decedent
  - profits distributed w/in 120 days of close of tax year
  - independent operation (i.e., no family members)

[also H.R. 3035, Reichert, introduced in at least three previous sessions]

other legislative proposals, cont'd

S. 1343, H.R. 2916, cont'd

- "sense of the Senate" re tax incentives for charitable giving
- "value and scope" of [existing] deduction "not diminished" in "comprehensive reform"

other legislative proposals, cont'd

S. 1343, H.R. 2916, cont'd

- cf. Madoff/Colinvaux letter, July 17
- require DAFs to pay out w/in ten years
  - private foundation distributions to DAFs not counted toward minimum payout
  - simplify excise tax on net investment income while preserving incentive for larger payouts

other legislative proposals, cont'd

S. 3471 (114th Congress)

- complete distribution of defined contribution plan w/in five years after account holder's death
- except where designated bene is surviving spouse, minor child, not more than ten years younger
- would apply only to excess over \$450k

bipartisan support, SFC unanimous

other legislative proposals, cont'd

S. 3471 (114th Congress), cont'd

- would eliminate "stretch" IRA
- JCT estimates \$3.2 bil. over ten years \$536.6 mil./yr. in outlying
- strong incentive for using CRT or PIF to replicate "stretch"
- statistics suggest \$450k threshold implies AGI over \$1 million

#### Rev. Proc. 2016-42

- "qualified contingency" per 644(f)(1) terminating CRAT early can satisfy "probability of exhaustion" test
- Rev. Rul. 70-452, pre-69 law not "so remote as to be negligible"
- Rev. Rul. 77-334, no reformation per 2055(e)(3)
- specimen language creating safe harbor
- CRATs created on or after August 8

#### Notice 2017-10

- "syndicated" conservation easement identified as listed transaction
- passthrough entity
- investors solicited on premise deduction might be 2.5x
- or "substantially similar" transaction
- IRS will challenge on overvaluation, disproportionate allocations, disguised sale, economic substance, etc.

#### Notice 2017-10, cont'd

- initial filing deadline May 1 [recipient org. not treated as participant]
- extended by Notice 2017-29 to October 2 [participants only - also clarifies recipient org. is not "material advisor"]
- pushback in appropriations bill, noted above

#### Notice 2017-10, cont'd

- Koskinen ltr. to Wyden dtd. July 13
  - filings from 200 participants, 5,500 advisors
  - 104 participant filings processed
  - 40 reported both amount invested, deduction claimed [cf. Form 8886]
  - average deduction 9x investment
  - outliers "would have skewed higher"

#### PLRs 201648007/008/009

- division of CRT incident to divorce
  - funded by H from separate property
  - concurrent or successive? unclear
  - unequal division
  - each reserving power to redesignate remainderman of separate trust

#### PLRs 201648007/008/009, cont'd

- division of CRT incident to divorce
  - not a recognition event, per 1041(a)
  - not a gift, per 2516
  - W treated as funding "trust B," thus includible in her estate, per 2036

PLRs 201648007/008/009, cont'd

- division of CRT incident to divorce
  - Rev. Rul. 56-437, converting joint tenancy to tenancy in common not sale or exchange
  - Rev. Rul. 69-486, non-pro rata distribution of trust assets w/out express authority treated as pro rata, followed by sale
- cf. Rev. Rul. 2008-41, situation 2 [no expenditure responsibility]

CCA 201651013

- "friendly" judicial reformation of trust to give beneficiary limited power to appoint to charities inter vivos
- distributions pursuant to exercise not deductible under 642(c)
- nor as carrying out DNI under 661(a)

CCA 201651013, cont'd

- "friendly" judicial reformation, etc., cont'd
  - Rev. Rul. 59-15, payments from decedent's estate to charity under will contest settlement deductible under 642(c)
  - revoking Rev. Rul. 55-122 in light of *Emanuelson*, 159 F.Supp. 34 (D.Conn. 1958)
  - Reg. 1.663(a)-2, distribution to charity deductible, if at all, only per 642(c)

CCA 201651013, cont'd

- "friendly" judicial reformation, etc., cont'd
  - memo acknowledges ambiguity in 663(a)(2), which says amounts "otherwise deductible" under 642(c) not included in DNI, however
  - 642(c) tracing rule should not be subsumed by conduit rule of 661
  - reg. 1.663(a)-2 promulgated in 1956
  - in 1960 Congress expressly declined to change rule
  - "bifurcation" betw. 2055(a)(2) and 642(c)

PLRs 201713002/003

- CRT not subject to private foundation rules if no deduction claimed
  - literal reading of 4947(a)(2), "amounts for which deduction was allowed"
  - note reg. 53.4947-1(a) presumption
  - reg. 1.664-1(a)(1)(iii)(A) requires only that deduction be "allowable"

PLRs 201713002/003, cont'd

- CRT not subject, etc.
  - potentially relevant excise tax provisions incl.
    - 4941, self-dealing
    - 4943, excess business holdings[\*]
    - 4944, jeopardizing investments[\*]

[\*] but only as to income interests for which deduction was allowed

PLRs 201713002/003, cont'd

- CRT not subject, etc.
- note: 664(d) does not require claim or allowance of deduction to qualify, i.e.,
  - trust is exempt from income tax, not treated as "grantor" trust
  - income and realized gains taxed only as distributed
  - cf. net income trust

PLRs 201723005/006

- nonvoting interest in LLC shields private foundation from self-dealing
  - promissory note from irrevocable trust
  - transferred to LLC held in revocable trust
- both trusts would be "disqualified persons" as to foundation
- because foundation holds only nonvoting interests, it does not "control" LLC, therefore no "indirect" self-dealing

PLRs 201730012/017/018

- converting non-grantor CLAT to grantor CLAT
  - amend to give third party substitution power per 675(4)
  - per Rev. Rul. 77-402, conversion from grantor to nongrantor is recognition event
  - Rev. Rul. 85-13 stopped short of reaching similar conclusion on reverse
  - Rev. Proc. 2007-45 specimen form suggests exercise by settlor might be self-dealing

RP Golf v. Comm'r

8th Cir., June 26

- no deduction for conservation easement unless mortgages are subordinated
- aligns w/
  - *Mitchell*, 775 F.3d 1243 (10th Cir. 2015)
  - *Minnick*, 796 F.3d 1156 (9th Cir. 2015)
- rejects argument likelihood of foreclosure "so remote as to be negligible," per reg. 1.170A-14(g) (3)

RERI Holdings v. Comm'r

Tax Court, July 3

- no deduction where basis not disclosed on Form 8283
- 40 pct. gross valuation misstatement penalty on claimed deduction of \$32.94 mil.

[despite disallowance on compliance ground]

- Notice 2007-72 identified contribution of "successor member interest" as "transaction of interest"

Rutkoski v. Comm'r

Tax Court, August 7

- enhanced deduction for easement not available where taxpayers not "qualified farmers" per 170(b)(1)(E)(v)
- requires more than half of gross income be from "trade or business of farming," defined by cross-reference to 2032A(e)(5)
- proceeds of bargain sale, sale of underlying land not w/in defn.
- also, income to passthrough entity was from rents, not farming

Bosque Canyon Ranch, LP v. Comm'r

5th Cir., August 11

- vacating Tax Court decision disallowing deduction for "floating" easement
- arguable conflict w/ *Belk v. Comm'r*, 774 F.3d 221 (4th Cir. 2014), *aff'g* 140 T.C. 1 (2013)
- "exterior" boundaries of servient estate
- note also "disguised sale" issue, cf. Notice 2017-10, discussed above

case study

terminating two-life gift annuity

- funded by H w/ separate property
- reserved power to revoke contingent survivor annuity to W

question: how to value gift to issuing charity

- i.e., is value of W's contingent annuity included in deductible gift? and
- what is the value of the contingent annuity?

case study

related questions:

- what if H were to exercise power to revoke?
- what if H were to release his power, and W joined in assignment?

case study

- per reg. 1.1011-2(a)(4),

- gain recognized ratably over expected return multiple if contract not assignable, except to issuing charity
- survivor's life expectancy not taken into account for this purpose
- no inclusion if transferor dies or relinquishes before all gain reported

case study

note [water under the bridge]:

- if joint and survivor, funded w/ joint property, gain would have been spread over longer return multiple
- but a larger portion of each annuity payment would have been allocated to ordinary income

Reg. 1.1011-2(a)(4), example 8

case study

- what if H were to exercise power to revoke?

- arguably, this would increase present value of residuum
- which might be a deductible gift?
  - there is no formal or informal guidance on this question

case study

- what if H were to release his power,  
and W joined in assignment?
    - completed gift, per reg. 25.2511-2(c)
    - not eligible for marital deduction,  
per 2523(b)
- [cf. 2523(g) re successive interest in CRT]
- note: gift at funding was calculated w/  
reference to both lives

case study

in the actual case:

- annuity contract specified "not assignable,"  
but did not expressly state exception for  
issuing charity
- H assigned all his "right and interest" in the  
contract
- W co-signed letter, "acknowledg[ing] and  
accepting" H's action
- both documents drafted by issuing charity,  
[or by commercial provider]

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