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Demystifying the IRS Guidance Process

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[pg. 33]

For more than 15 years, the Treasury Department and the IRS have released an annual "business plan" through which they indicate their priorities for guidance. Divided by subject area, the Guidance Priority Plan, as it is now known, lists projects that the IRS plans to work on in the coming year. The guidance year runs from July 1 to June 30. The plan is released, in recent years, in the fall (approximately three months into the year), jointly by the Assistant Secretary for Tax Policy at the Treasury Department, the Commissioner of the IRS, and the IRS Chief Counsel. As stated in their cover memo, "The plan represents projects we intend to work on actively during the plan year and does not place any deadline on completion of projects." [1]

How the list gets made

The plan is created based on input from several sources. Internally, both the IRS Chief Counsel's Office and the Treasury Department's Office of Tax Policy develop ideas for projects to be included on the plan. Many times the suggested topics for guidance projects stem from new legislation or address issues that the IRS's National Office sees arising repeatedly in the private letter ruling context. Since at least 2000, [2] the IRS has also solicited input from the public. This year, for example, Notice 2012-25 [3] requested public comment on recommendations for items that should be included on the 2012-13 Guidance Priority List. Suggestions were to be filed with the IRS no later than May 1.

Notice 2012-25 admits that, in recent years, guidance has been driven largely by legislation. The Notice cites seven acts with tax provisions enacted between 2009 and 2011, which have generated myriad projects for the Service.

In reviewing projects for inclusion on the plan, the Treasury Department and the Service consider: "(1) Whether the recommended guidance resolves significant issues relevant to many taxpayers; (2) Whether the recommended guidance promotes sound tax administration; (3) Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance; (4) Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed; (5) Whether the Service can administer the recommended guidance on a uniform basis; and (6) Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the Service." [4]

The Notice asks submitters to describe the recommended guidance and explain the need for it. Commentators are also invited to include an "analysis of how the issue should be resolved." Finally, commentators who suggest more than one project are asked to prioritize the suggestions.

In response to Notice 2012-25, the IRS received approximately 40 comments, including suggestions across all tax disciplines. Looking only at suggestions for projects under the heading "Gifts and Estates and Trusts," this year four organizations responded to the Notice by filing suggestions:

(1) The Real Property, Probate and Trust section of the ABA (ABA).

(2) The American College of Trust and Estate Counsel (ACTEC).

[pg. 34]

(3) The American Institute of Certified Public Accountants (AICPA).

(4) The New York State Bar Association (NYSBA).

While all of these suggestions came from large organizations, the IRS also welcomes comments from individuals.

Suggestions from lawyers and accountants

The AICPA suggested the most projects, a total of 23 items. Among the suggestions denominated as "high priority" domestic issues, the AICPA includes guidance on the new 3.8% tax as it pertains to estates and trusts, and guidance on the ability to gift split contributions to *Crummey* trusts. The AICPA also includes several items on which it has been requesting guidance for years, such as a simplified procedure to obtain an extension of time to elect out of the automatic allocation of generation-skipping transfer (GST) exemption to indirect skips, and guidance on how and when to allocate GST exemption to trusts that receive assets on the termination of a grantor retained annuity trust (GRAT). [5]

The NYSBA placed its highest priority in this area on two projects that the IRS already seemed to have in its sights. First, the NYSBA asked that the Section 67 proposed regulations (issued 9/7/2011) be finalized. Second, it requested guidance in light of Notice 2011-101 on the income, gift, estate, and GST tax consequences of decanting. Both of these projects were added to the business plan this year. [6]

Other projects on which the NYSBA would like guidance include whether a gift of a partnership interest is considered to be intangible property for purposes of the gift tax, in the case of a gift made by a nonresident alien, and whether "phantom income" is included in gross income for the purposes of determining whether a charitable deduction is allowed to a trust under Section 642(c).

Both the AICPA and the NYSBA included on their lists of suggestions projects that were already on the priority list. Those suggestions should be construed as an indication that these groups feel those projects are important and should be given higher priority on the plan.

The ACTEC suggestions focus on a smaller number of new projects. First, ACTEC requested guidance on the issue of "clawback" in the event that the unified credit decreases in 2013. Second, following up on the unexpected conclusion in CCA201208026, ACTEC requested guidance on the completion of gifts and includability in the gross estate in the context of self-settled asset protection trusts. Finally, ACTEC suggested that the IRS might provide some safe harbors with respect to the application of the reciprocal trust doctrine. [7]

Finally, the ABA Real Property, Trust and Estate section suggested two projects relating to charitable lead trusts. First, the ABA requested clarification of the manner in which the recapture of the charitable income tax deduction under Section 170(f)(2) is calculated when a charitable lead trust ceases to be treated as a grantor trust. Second, it requested that regulations under Section 2055 and 2522 be revised to provide further guidance regarding the types of fluctuating annuities that a charitable lead trust may provide. [8]

Selection of projects for plan

After input from the attorneys in the IRS National Office, Treasury officials, and the public, the final composition of the Guidance Priority Plan is negotiated. Although the total number of projects on the list exceeds 300, fewer than 20 estate and gift tax projects are typically included. All of the estate and gift projects must be completed by the dozen attorneys in Branch 4 of Passthroughs and Special Industries in the IRS National Office, and reviewed by a series of officials in both the National Office and in the Treasury Department's Office of Tax Policy. With these limited resources, projects must be chosen carefully. Once the priority projects for the year are identified, it is highly unlikely that projects not on the list would be authorized during the year. The only exceptions are where new legislation requires guidance, or where the IRS feels it must address an abusive transaction that comes to light during the year. Because the Guidance Priority Plan dictates the work priorities for a full year, it is critical that the public express its views when comments are invited each April.

Projects on the 2012-13 Plan

The ten items discussed below are on the Guidance Priority Plan for 2012-13.

[pg. 35]

(1) *Final regulations under Section 67 regarding miscellaneous itemized deductions of trusts and estates.* The IRS issued proposed regulations on this subject on 9/7/2011. [9] A public hearing had been scheduled for 12/19/2011, but no one requested to speak, so the IRS cancelled the hearing. As suggested by the NYSBA, finalizing these regulations has been added to the list for this year. The regulations are expected to be finalized in a form similar to the proposed regulations issued in 2011.

(2) *Guidance concerning adjustments to sample charitable remainder trust forms under Section 664.* This project has been on the Priority Guidance Plan since 2008. It is not known which of the charitable remainder trust forms will be revised in this guidance.

(3) *Guidance concerning private trust companies under Sections 671, 2036, 2038, 2041, 2042, 2511, and 2601.* This controversial project has been stymied since a proposed revenue ruling with safe harbors was issued in 2008. The IRS received comments on the proposed revenue ruling that caused it to rethink its approach. When the IRS has completed its study, the guidance issued likely will be another form of proposed guidance—with a second opportunity for public comment.

(4) *Regulations under Section 1014 regarding uniform basis of charitable remainder trusts.* This project, added to the Plan in 2010, is intended to address the allocation of basis when both the income beneficiary and the remainderman of the charitable remainder trust sell their interests in the trust in a transaction designed to avoid the prohibition against commutation of charitable remainder trust interests. The IRS identified this transaction as one of interest in Notice 2008-99. [10] This guidance is likely to take the form of proposed regulations.

(5) *Final regulations under Section 2032(a) regarding imposition of restrictions on estate assets during the six-month alternative valuation period.* Proposed regulations were initially issued on 4/24/2008, but the comments received on them raised serious issues. In response, the IRS withdrew the proposed regulations and rewrote them, issuing new proposed regulations on 11/18/2011. This new project would finalize those regulations.

(6) *Guidance under Section 2053 regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate.* This project is the last piece of the Section 2053 regulations. The guidance on personal guarantees will fill the reserved space in Reg. 20.2053-1(d)(6). Because the application of present value concepts is listed as part of the same project, it is likely to be a proposed regulation as well. The rest of the Section 2053 regulations were issued in final form in 2009.

(7) *Regulations under Section 2642 regarding the allocation of GST exemption to a pour-over trust at the end of an ETIP.* The AICPA described this issue in

detail in a 2007 letter to the Commissioner, [11] and continued advocating for the need for guidance in its annual submission of business plan suggestions thereafter. As described by the AICPA, the issue concerns the allocation of GST exemption to trusts—one generation skipping and one not—into which a GRAT pours over at the end of the annuity term. This question had been determined by the IRS to have been outside the scope of an earlier GST regulation project. It is not clear whether the new project is limited to the narrow issue suggested by the AICPA or whether it will include other related issues.

(8) *Final regulations under Section 2642(g) regarding extensions of time to make allocations of the generation-skipping transfer tax exemption.* Proposed regulations giving GST issues their own version of the Section 9100-3 regulations were issued on 4/17/2008. There do not appear to have been any controversial issues raised regarding the proposed regulations, so the delay in finalizing them is most likely the uncertainty surrounding legislation in the area. First, the legislation authorizing 9100 relief for delinquent GST exemption allocations was originally set to expire at the end of 2010. The IRS probably thought it an unwise allocation of resources to finalize these regulations if the underlying law was going to expire. Then, in late 2010, Section 2642(g) was extended for two more years, along with most of the other provisions of the 2001 tax act. It is likely that the IRS views the project as on hold unless and until Congress extends the application of the authorizing statute.

[pg. 36]

(9) *Regulations under Section 2704 regarding restrictions on the liquidation of an interest in certain corporations and partnerships.* Making its tenth annual appearance on the Plan, this project is presumably intended to exercise the regulatory authority granted in Section 2704(b)(4). It is not clear why this continues to be listed as a "priority" when it so clearly is not a priority to issue this guidance.

(10) *Guidance under Section 2801 regarding the tax imposed on U.S. citizens and residents who receive gifts or bequests from certain expatriates.* This project first appeared on the Plan in 2009. The IRS has announced that it will not enforce the reporting and tax obligations for covered gifts or bequests received until guidance has been issued. [12] Given the deferral on enforcement, one would think that issuance of guidance under Section 2801 would be a high priority.

Also of interest is one project that did not make it onto the Plan. In late 2011, the IRS issued Notice 2011-101 [13] requesting comments regarding "when (and under what circumstances) transfers by a trustee of all or a portion of the principal of an irrevocable trust (Distributing Trust) to another irrevocable trust (receiving Trust), sometimes called 'decanting,' that result in a change in the beneficial interests in the trust are not subject to income, gift, estate, and/or generation-skipping transfer (GST) taxes." The Notice generated a lot of interest and comments. However, it appears that the IRS is not prepared to make answering these questions a priority for 2012-2013. Perhaps we will see that project on the Plan for a future year, but in the meantime, the current "no rule" policy [14] on decanting is likely to remain in place.

Conclusion

From among the suggestions of the AICPA, ACTEC, AICPA, and NYSBA for projects in the estate and gift area, only one new project made it on to the Priority Guidance Plan. The one successful addition has been advocated for by the AICPA since 2004. If there is a moral to this story, it is that persistence pays off.

Next time you are researching an issue and think to yourself "I cannot believe there is no guidance on this question; surely other people must be looking for an answer," make a note of it, and consider submitting it for consideration for the Guidance Priority List before next May 1.

1

Guidance Priority Plan for 2012-13, available on the web at http://www.irs.gov/pub/irs-utl/2012-2013_pgp.pdf.

2

Notice 2000-10, 2000-1 CB 451.

3

2012-15 IRB 789.

4

Id.

5

The full text of the AICPA submission is available on line at http://www.aicpa.org/advocacy/tax/downloadabledocuments/notice_2012_25.doc.

6

The full text of the NYSBA submission is available on line at http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=65742&Template=/CM/ContentDisplay.cfm.

7

The full text of the ACTEC submission is available on line at http://www.actec.org/public/Governmental_Relations/Mezzullo_Comments_04_30_12_2.asp.

8

The full text of the ABA submission is available on line at http://meetings.abanet.org/webupload/commupload/RP529000/relatedresources/2012_05_01_2012_2013_guidance_priority_list_pursuant_to_notice_2012_25.pdf.

9

REG-128224-06, 9/7/2011.

10

2008-47 IRB 1194.

11

http://www.aicpa.org/advocacy/tax/trustestategift/pages/advocacyissues.aspx.

12

Notice 2009-85, 2009-45 IRB 598.

13

2011-52 IRB 932.

[14]

Rev. Proc. 2012-3, 2012-1 IRB 113, sections 5.01(10), (17), and (18).