Part III - Administrative, Procedural, and Miscellaneous

Transfers by a Trustee from an Irrevocable Trust to another Irrevocable Trust (sometimes called "decanting"); Requests for Comments

Notice 2011-101

PURPOSE

This notice requests 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. In these transfers, the interests of one or more of the beneficiaries may be changed and, in some cases, the interest of a beneficiary may be terminated and/or another beneficiary who did not have an interest in Distributing Trust may receive an interest in Receiving Trust.

BACKGROUND

The Treasury Department and the Internal Revenue Service (IRS) are studying the tax implications of such transfers when there is a change in the beneficial interests in the trust and are considering approaches to addressing some or all of the relevant tax issues in published guidance. While these issues are under study, the IRS will not issue private letter rulings (PLRs) with respect to such transfers that result in a change in beneficial interests. *See* Sections 5.09, 5.16, and 5.17 of Rev. Proc. 2011-3, 2011-1 I.R.B. 111. The IRS generally will continue to issue PLRs with respect to such transfers that do not result in a change to any beneficial interests and do not result in a change in the applicable rule against perpetuities period.

REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments from the public regarding the income, gift, estate and GST tax issues and consequences arising from transfers by a trustee of all or a portion of the principal of a Distributing Trust to a Receiving Trust that change beneficial interests. The Treasury Department and IRS also invite comments as to the relevance and effect of the various facts and circumstances listed below and the identification of other factors that may affect the tax consequences. The facts and circumstances that the Treasury Department and the IRS have identified as potentially affecting one or more tax consequences include the following:

1. A beneficiary's right to or interest in trust principal or income is changed (including the right or interest of a charitable beneficiary);

2. Trust principal and/or income may be used to benefit new (additional) beneficiaries;

3. A beneficial interest (including any power to appoint income or corpus, whether general or limited, or other power) is added, deleted, or changed;

4. The transfer takes place from a trust treated as partially or wholly owned by a person under §§ 671 through 678 of the Internal Revenue Code (a “grantor trust”) to one which is not a grantor trust, or vice versa;

5. The situs or governing law of the Receiving Trust differs from that of the Distributing Trust, resulting in a termination date of the Receiving Trust that is subsequent to the termination date of the Distributing Trust;

6. A court order and/or approval of the state Attorney General is required for the transfer by the terms of the Distributing Trust and/or applicable law;

7. The beneficiaries are required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;

8. The beneficiaries are not required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;

9. Consent of the beneficiaries and/or a court order (or approval of the state Attorney General) is not required but is obtained;

10. The effect of state law or the silence of state law on any of the above scenarios;

11. A change in the identity of a donor or transferor for gift and/or GST tax purposes;

12. The Distributing Trust is exempt from GST tax under § 26.2601-1, has an inclusion ratio of zero under § 2632, or is exempt from GST under § 2663; and

13. None of the changes described above are made, but a future power to make any such changes is created.

The Treasury Department and the IRS encourage the public to suggest a definition for the type of transfer ("decanting") this guidance is intended to address. Additionally, the public is encouraged to comment on the tax consequences of such transfers in the context of domestic trusts, the domestication of foreign trusts, transfers to foreign trusts, and on any other relevant facts or combination of facts not included in the above list.

Written comments are encouraged to be submitted by April 25, 2012. All comments will be available for public inspection and copying and should include a reference to this Notice 2011-101. Comments may be submitted in one of three ways:

(1) By mail to CC:PA:LPD:PR (Notice 2011-101), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

(2) Electronically to Notice.Comments@irscounsel.treas.gov. Please include "Notice 2011-101" in the subject line of any electronic communications.

(3) By hand-delivery Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2011-101), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, DC 20224.

DRAFTING INFORMATION

The principal author of this notice is Juli Ro Kim of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Juli Ro Kim at (202) 622-3090 (not a toll-free call).