



April 14, 2023

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RE: OMB Number 1545-1578 – Election to Treat Trust as Part of an Estate and Request for Comments on Final Regulations TD 9032

Dear Mr. Garcia and Ms. Liquerman:

On behalf of the American Institute of CPAs (AICPA), we are writing in response to the request for comment in [OMB Number 1545-1578 – Election to Treat Trust as Part of an Estate and request for comment on final regulations TD 9032](#) (dated 2/17/23). We are providing to the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) our suggestions for improvements to the current section 645 final regulations ([TD 9032](#), published December 24, 2002).¹ Our recommendations will simplify filing for taxpayers and practitioners and will reduce the administrative burden on the IRS as well.

Background

TD 9032 describes the procedures and requirements for making an election to have certain revocable trusts treated and taxed as part of an estate (the “Section 645 election”). The Taxpayer Relief Act of 1997 added section 645 to the Internal Revenue Code to permit the election.

Recommendations

Treasury and the IRS should:

1. Provide clarification regarding the “applicable date” under Treas. Reg. §1.645-1(f)(2)(ii)(A) given the current estate tax closing letter process.
2. Simplify reporting for [Form 8855](#), Election to Treat a Qualified Revocable Trust as Part of an Estate, to require that it be filed as part of the initial estate income tax return rather than being filed separately.

¹ Unless otherwise indicated, references to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), and references to a “Treas. Reg. §” are to the Treasury regulations promulgated under the Code.

3. Provide clarification regarding the applicability of the set-aside deduction under section 642(c) to a formerly revocable trust after termination of the election period.

Analysis

Clarification of the “Applicable Date” of Final Determination

Treas. Reg. § 1.645-1(f)(1) provides that the Section 645 election period terminates on the earlier of the day on which both the electing trust and related estate, if any, have distributed all of their assets, or the day before the applicable date. In the case where a [Form 706](#), United States Estate (and Generation-Skipping Transfer) Tax Return, is required to be filed, the applicable date is the later of the day that is 2 years after the date of the decedent’s death, or the day that is 6 months after the date of final determination of liability for estate tax. Specifically, under Treas. Reg. § 1.645-1(f)(2)(ii), the date of final determination is the earliest of the following –

- (A) The date that is six months after the issuance by the IRS of an estate tax closing letter, unless a claim for refund with respect to the estate tax is filed within twelve months after the issuance of the letter;
- (B) The date of a final disposition of a claim for refund that resolves the liability for the estate tax, unless the suit is instituted within six months after a final disposition of the claim;
- (C) The date of execution of a settlement agreement with the IRS that determines the liability for the estate tax;
- (D) The date of issuance of a decision, judgment, decree, or other order by a court of competent jurisdiction resolving the liability for the estate tax unless a notice of appeal or a petition for certiorari is filed within 90 days after the issuance of a decision, judgment, decree, or other order of a court; or
- (E) The date of expiration of the period of limitations for assessment of the estate tax provided in section 6501.

Rather than automatically issuing estate tax closing letters, the IRS now issues an estate tax closing letter only if the executor requests such a letter and pays the requisite \$67 fee.² This has created uncertainty as to the date of final determination in Treas. Reg. § 1.645-1(f)(2)(ii)(A), as outlined above.

The date of final determination is of utmost importance, especially for a formerly revocable trust holding S corporation stock since the requisite elections must be timely made to ensure the trust remains an eligible S corporation shareholder after the termination of the Section 645 election. Specifically, taxpayers need guidance as to what happens if the taxpayer does not request an estate tax closing letter. In that case, is the first prong of the test for the final determination date disregarded such that the earliest of the remaining four dates continues to apply? To prevent taxpayers from being forced to request and pay for an estate tax closing letter, the AICPA recommends that if a closing letter is not requested that the provision in Treas. Reg. § 1.645-

² See T.D. 9957.

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1(f)(2)(ii)(A) be disregarded such that the earliest of the other four provisions continue to apply in determining the time for final determination.

Similarly, taxpayers need guidance as to the impact of Transaction Code 421 (“closed examination of tax return”) on transcripts with respect to the time for final determination. In some cases, a taxpayer may request a transcript in lieu of an estate tax closing letter. If the transcript indicates that the estate has been closed, is placement of Transaction Code 421 on the account equivalent to issuance of an estate tax closing letter for purposes of the time for final determination? If Transaction Code 421 is not present, the tax return remains under review, and the instructions on the IRS website instruct the user to allow additional time before checking again. If placement of the Transaction Code 421 on the account is equivalent to issuance of an estate tax closing letter, this places a burden on the taxpayer to have to routinely request transcripts to check for the code. Accordingly, the AICPA requests clarification on the interaction between Transaction Code 421 on a transcript and the time for final determination under Treas. Reg. § 1.645-1(f)(2)(ii).

Further, Treas. Reg. § 20.2053-1(d)(5)(i), promulgated by [T.D. 9468](#) (2009), permits a decedent’s estate to make a protective claim for refund at any time before the expiration of the refund period defined in section 6511(a), which is the later of (i) three years after the date the return was filed; or (ii) two years after the tax was paid. These protective claims may now be made with the filing of the Form 706 through the preparation of one or more Schedules PC. The procedures preserve rights of the taxpayer with respect to, among other considerations, the deductibility of contested claims which under the 2009 changes to the section 2053 regulations cannot be deducted until the controversy is finally resolved. These regulations, published after section 645, preclude the final determination of the estate tax liability, as required by section 645(a), until those controversies are resolved. No coordination of this regulation exists with Treas. Reg. § 1.645-1(f)(2)(ii) to determine how a protective claim would impact the date for final determination. We note that Treas. Reg. § 1.645-1(f)(2)(ii)(E), which references section 6501, is automatically extended under section 6213 if a proper Tax Court petition is timely filed until the Tax Court decision is final as defined by section 7481. However, Treas. Reg. § 1.645-1(f)(2)(ii)(B) makes no similar reference to section 6511 or to the section 2053 regulation cited above. The AICPA requests clarification on this matter.

Simplify Reporting for Form 8855

Form 8855, *Election to Treat a Qualified Revocable Trust as Part of an Estate*, is required to be filed in order to make the election under section 645. Under current procedures, Form 8855 must be filed with one of the two service centers listed in the form instructions. Form 8855 currently cannot be electronically filed. Also, Form 8855 is not currently included as a form allowed for a digital signature, and it should be. The instructions for [Form 1041](#), *U.S. Income Tax Return for Estates and Trusts*, then require that if the estate has made a Section 645 election, the executor must check item G on Form 1041 and attach a statement to provide the following information for each electing trust: (a) the name of the electing trust, (b) the TIN of the electing trust, and (c) the name and address of the trustee of the electing trust. This required information essentially duplicates information already provided on Form 8855. To simplify reporting, the AICPA

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recommends that the requirement to file the Form 8855 separately with the service center be removed and that taxpayers instead file Form 8855 (with a digital signature allowed) as part of the Form 1041 for the initial year of the estate. Since Form 1041 can be electronically filed, these procedures will also reduce the amount of paper being sent to the Internal Revenue Service for processing. Given that Form 8855 is to be signed by the executor or trustee(s) under penalty of perjury, the form could be signed and uploaded as an electronic filing attachment.

If the IRS does not adopt the above recommendation to e-file and e-sign the Form 8855 as part of the Form 1041 e-filing, the IRS should at least clarify if there is a specific order for processing of the forms. For example, if Form 8855 is mailed in but Form 1041 is electronically filed, how is the electronically filed Form 1041 being processed if Form 8855 has not been processed?

Provide Guidance Regarding the Section 642(c) Deduction

Section 642(c) permits a revocable trust for which a Section 645 election has been made to deduct amounts permanently set-aside for charity. In cases where the election period has terminated but assets remain in the formerly revocable trust such that the trust continues, confusion exists as to whether the set-aside deduction may continue to apply. The AICPA requests clarification on this matter.

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The AICPA is the world's largest member association representing the CPA profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of our recommendations and welcome the opportunity to discuss our comments. If you have any questions, please contact Irene Estrada, Chair, AICPA Trust, Estate, and Gift Tax Technical Resource Panel, at (703) 628-5243 or Irene.C.Estrada@pwc.com; Eileen Sherr, AICPA Director – Tax Policy & Advocacy, at (202) 434-9256 or Eileen.Sherr@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,



Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

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cc: Ms. Catherine Hughes, Estate and Gift Tax Attorney-Advisor, Office of Tax Legislative Counsel, Office of Tax Policy, Department of the Treasury
Ms. Holly Porter, Associate Chief Counsel, Passthrough & Special Industries, Internal Revenue Service
Ms. Karlene Lesho, Senior Technician Reviewer, Office of Associate Chief Counsel, Passthroughs & Special Industries (Estate & Gift), Internal Revenue Service
Ms. Leslie H. Finlow, Senior Technician Reviewer, Office of Associate Chief Counsel, Passthroughs & Special Industries (Estate & Gift), Internal Revenue Service
Mr. Daniel Gespass, Attorney, Office of Associate Chief Counsel, Passthroughs & Special Industries, Branch 4 (Estate & Gift), Internal Revenue Service