

April 19, 2012

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

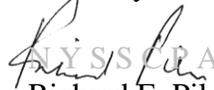
By e-mail to: Notice.Comments@irsounsel.treas.gov

Re: IRS Notice 2011-101, Transfers by a Trustee From an Irrevocable Trust to Another Irrevocable Trust (Sometimes called “Decanting”); Requests for Comments

The New York State Society of Certified Public Accountants, representing more than 28,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the above captioned notice. The NYSSCPA thanks the Internal Revenue Service for the opportunity to comment.

The NYSSCPA’s Trust and Estate Administration Committee deliberated the notice and prepared the attached comments. If you would like additional discussion with us, please contact Ita M. Rahilly, Chair of the Trust and Estate Administration Committee, at (845) 567-9228, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,


NYSSCPA
Richard E. Piluso
President

Attachment

**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

**COMMENTS ON
IRS NOTICE 2011-101, TRANSFERS BY A TRUSTEE FROM AN IRREVOCABLE
TRUST TO ANOTHER IRREVOCABLE TRUST (SOMETIMES CALLED
“DECANTING”); REQUESTS FOR COMMENTS**

April 19, 2012

Principal Drafters

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New York State Society of Certified Public Accountants

Comments on

IRS Notice 2011-101, Transfers by a Trustee from an Irrevocable Trust to another Irrevocable Trust (sometimes called “decanting”); Requests for Comments

The New York State Society of Certified Public Accountants respectfully submits its comments to IRS Notice 2011-101, Transfers by a Trustee from an Irrevocable Trust to another Irrevocable Trust (sometimes called “decanting”); Requests for Comments (the “Notice”). The Notice requests comments on the income, gift, estate and generation-skipping transfer (GST) tax consequences resulting from the transfer of all or a portion of the principal of one irrevocable trust (a “Distributing Trust”) to another irrevocable trust (a “Receiving Trust”) that results in a change in the beneficial interests in the trust. More specifically, the Notice requests comments concerning the relevance and effect of various facts and circumstances, and also asks practitioners to identify other factors that may have an effect upon the applicable tax consequences.

We believe that the analysis of the income, gift, estate and GST tax consequences of decanting lends itself to the promulgation of safe harbors by the Treasury Department (“Treasury”) and the Internal Revenue Service (the “IRS”). We begin this letter by enumerating the various factors and issues that are specifically addressed in the Notice. Next, we propose safe harbor guidelines for income, gift, estate and GST tax purposes. We conclude by addressing each of the Treasury’s and IRS’s enumerated items in the Notice and cross-reference as applicable to our proposed safe harbor guidelines.

FACTORS AND ISSUES ADDRESSED IN THE NOTICE

The first sixteen (16) factors and issues enumerated below (Items A through P) are specifically addressed in the Notice. We have also set forth a seventeenth (17th) item that warrants attention as well (Item Q).

Facts and Circumstances

- A. A beneficiary’s right to or interest in trust principal or income is changed (including the right or interest of a charitable beneficiary);
- B. Trust principal and/or income may be used to benefit new (additional) beneficiaries;
- C. A beneficial interest (including any power to appoint income or *corpus*, whether general or limited, or other power) is added, deleted, or changed;
- D. 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*;

- E. 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;
- F. 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;
- G. The beneficiaries are required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;
- H. The beneficiaries are not required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;
- I. Consent of the beneficiaries and/or a court order (or approval of the state Attorney General) is not required but is obtained;
- J. The effect of state law or the silence of state law on any of the above scenarios;
- K. A change in the identity of a donor or transferor for gift and/or GST tax purposes;
- L. The Distributing Trust is exempt from GST tax under § 26.2601-1, has as an inclusion ratio of zero under § 2632, or is exempt from GST tax under § 2663; and
- M. None of the changes described above are made, but a future power to make any such changes is created.

Other Issues

- N. How should “decanting” be defined?
- O. Should there be any additional tax consequences if the decanting is from a U.S. trust to a foreign trust?
- P. Should there be any additional tax consequences if the decanting is from a foreign trust to a U.S. trust?
- Q. Should a new employer identification number be required in the case of a decanting of all of the principal of the Distributing Trust where both the Distributing Trust and the Receiving Trust are U.S. trusts?

PROPOSED SAFE HARBOR ANALYSIS

General Parameters of the Safe Harbor

We believe that the analysis of the income, gift, estate and GST tax consequences of decanting lends itself to the issuance of safe harbors by the Treasury and the IRS to provide clear guidance in the case of a decanting of all of the property of the Distributing Trust (including accrued income) in circumstances in which decanting is done by a trustee that does not have any present or future beneficial interest in either the Distributing Trust or the Receiving Trust (an “Independent Trustee”).

A trust decanting that is beyond the scope of the safe harbor would not necessarily be subject to income, gift, estate or GST tax consequences; however, any such tax consequences would require analysis on a case-by-case basis. By issuing safe harbors, the Treasury and IRS would be

able to significantly narrow the extent of taxpayer uncertainty and thereby substantially reduce the number of private letter ruling requests that would seek guidance on this subject.

We propose that specific safe harbor guidelines be provided for income, gift, estate and GST tax purposes. The Independent Trustee would be able to avail itself of these safe harbor guidelines through its compliance with the provisions of an applicable state statute governing decanting that expressly incorporates these safe harbor guidelines. The Independent Trustee would also be able to avail itself of these safe harbor guidelines through its compliance with the provisions of a governing instrument that expressly incorporates these safe harbor guidelines (which may include the Independent Trustee's declaration of trust) provided that the provisions of such governing instrument are not prohibited by applicable local law.

We believe that these safe harbor principles can be addressed in the form of a revenue ruling, and would welcome the opportunity to submit a proposed revenue ruling to accomplish this.

Income Tax Safe Harbor Guidelines

An Independent Trustee's decanting of all of the property of a Distributing Trust to a Receiving Trust should not have any Federal income tax consequences if all of the following criteria are met.

1. The class of permissible beneficiaries under the Trust must not be any broader than the class of permissible beneficiaries under the Distributing Trust. Failure to comply with this guideline could cause the Distributing Trust to be considered a grantor trust in respect of a living grantor under IRC § 674 (Power to Control Beneficial Enjoyment) by reason of the power of a nonadverse party trustee to add beneficiaries, but it would not have any other income tax consequences to any person. For this purpose, a permissible appointee under a power of appointment conferred under the Distributing Trust should not be considered a beneficiary. In addition, the Receiving Trust should not itself be considered a separate beneficiary of the Distributing Trust so as to automatically trigger grantor trust status as to the Distributing Trust under Section 674.
2. Both the Distributing Trust and the Receiving Trust are U.S. trusts for Federal income tax purposes. In contrast, in circumstances in which the Distributing Trust is a U.S. trust for Federal income tax purposes while the Receiving Trust is a foreign trust for Federal income tax purposes, the Independent Trustee's decanting could potentially trigger income tax consequences under IRC § 684 (Transfer of Appreciated Assets to Foreign Estate or Trust).
3. Both the Distributing Trust and the Receiving Trust are either grantor trusts as to the same grantor for Federal income tax purposes, or are both nongrantor trusts. In either of these cases, the Receiving Trust should be considered the continuation of the Distributing Trust. Accordingly, among other things, no income tax consequences would result if the Distributing Trust holds negative basis property. In addition, the Receiving Trust should not be required to obtain a new Federal tax identification number.
4. The Receiving Trust must not potentially diminish any charitable interest under the Distributing Trust that is intended to qualify for a charitable deduction.
5. Beneficiary consent must not be required for the decanting. A beneficiary's failure to object shall not be considered tantamount to the giving of consent.

Gift Tax Safe Harbor Guidelines

An Independent Trustee's decanting of all of the property of a Distributing Trust to a Receiving Trust should not have any Federal gift tax consequences if all of the following criteria are met.

1. The Receiving Trust must not potentially diminish any fixed income interests under the Distributing Trust.
2. The Receiving Trust must not potentially diminish any charitable interest under the Distributing Trust that is intended to qualify for the gift tax charitable deduction.
3. The Receiving Trust must maintain any provisions of the Distributing Trust that were necessary to qualify for the gift tax annual exclusion under Section 2503(c) of the Internal Revenue Code.
4. The Receiving Trust must not confer any general powers of appointments upon any person within the meaning of Section 2514 of the Internal Revenue Code. If, however, a general power of appointment is conferred upon any person under the terms of the Receiving Trust, the gift tax consequences of this would be limited to consequences attendant to any subsequent release under Section 2514(e) of the general power of appointment so conferred.
5. To the extent that the Donor's transfers of property to the Distributing Trust did not constitute a completed gift for Federal gift tax purposes, the Receiving Trust must not contain any terms that would cause there to be a completed gift for Federal gift tax purposes upon the decanting of property to the Receiving Trust.
6. Beneficiary consent must not be required for the decanting. A beneficiary's failure to object shall not be considered tantamount to the giving of consent.

Estate Tax Safe Harbor Guidelines

An Independent Trustee's decanting of all of the property of a Distributing Trust to a Receiving Trust should not have any Federal estate tax consequences if all of the following criteria are met.

1. The Receiving Trust must not potentially diminish any fixed income interests under the Distributing Trust that would qualify for the estate tax marital deduction under Section 2056 of the Internal Revenue Code.
2. The Receiving Trust must not potentially diminish any charitable interest under the Distributing Trust that is intended to qualify for the estate tax charitable deduction.
3. The Receiving Trust must not confer any general powers of appointments upon any person within the meaning of Section 2041 of the Internal Revenue Code. If, however, a general power of appointment is conferred upon any person under the terms of the Receiving Trust, the estate tax consequences of this should be limited to estate tax inclusion pursuant to Section 2041 with respect to the general power of appointment so conferred.
4. The terms of the Receiving Trust must not confer upon the Donor any power or interest that would trigger estate tax consequences to the Donor under Sections 2033 through 2044 of the Internal Revenue Code.

5. Beneficiary consent must not be required for the decanting. A beneficiary's failure to object shall not be considered tantamount to the giving of consent.

Generation-Skipping Transfer (GST) Tax Safe Harbor Guidelines

An Independent Trustee's decanting of all of the property of a Distributing Trust to a Receiving Trust should not have any GST tax consequences if all of the following criteria are met.

1. A Distributing Trust that has been grandfathered from the GST tax due to the GST tax's effective date must not extend the maximum duration of the trust pursuant to the governing law of the Distributing Trust. This is a different standard than the safe harbor currently set forth in Treas. Reg. § 26.2601-1(b)(4)(i)(D)(1), which provides that the GST exempt status of a grandfathered trust shall not be placed at risk where the decanting (i) does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in Section 2651) than the person or persons who held the beneficial interest prior to the decanting and (ii) does not extend the time for vesting of any beneficial interest in the Receiving Trust beyond the period provided for in the Distributing Trust.¹ We do not perceive there to be any sound tax policy reason to call into question the GST exempt status of a trust that is grandfathered from the GST tax by reason of its effective date provided that the maximum duration of the trust pursuant to the applicable law of the Distributing Trust cannot be extended as a result of the decanting to the Receiving Trust.
2. Consistent with our proposed approach for GST grandfathered trusts, a trust to which GST exemption has been allocated to produce an inclusion ratio of zero under IRC § 2632 (or any trust which has an inclusion ratio of less than one as a result of the allocation of GST exemption) must not be extended to a termination date that is later than the maximum duration of the trust pursuant to the applicable law of the Distributing Trust. Provided that this guideline has been followed, the trust's exempt status as a result of the allocation of GST exemption to the trust should not be lost even though the Independent Trustee of the Receiving Trust may make distributions to a lower generation beneficiary or the date of vesting of a particular beneficial interest may be extended vis-à-vis the Distributing Trust.

¹ Treas. Reg. §26.2601-1(b)(4)(i)(D)(1) provides as follows:

“A modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraph (b)(4)(i)(A), (B), or (C) of this section) by judicial reformation, or non-judicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, if the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in section 2651) than the person or persons who held the beneficial interest prior to the modification, and the modification does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.”

3. Provided that there has not been any change in the transferor for gift or estate tax purposes subsequent to the initial transfer of property to the trust, a trust to which a transfer has been made by a nonresident of the U.S. who is not a U.S. citizen that is exempt from GST tax under IRC § 2663 should not be subject to GST tax under any circumstances.
4. Beneficiary consent must not be required for the decanting. A beneficiary's failure to object shall not be considered tantamount to the giving of consent.

ADDITIONAL SPECIFIC COMMENTS

We have set forth below on an itemized basis our additional specific comments to the issues raised in the Notice. Where appropriate, we have cross-referenced our proposed safe harbor guidelines set forth above.

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

Subject to the proposed safe harbor guidelines set forth above, there should not be any tax consequences resulting from a change in a beneficiary's right to or interest in trust principal or income (including the right or interest of a charitable beneficiary).

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

As discussed in the proposed income tax safe harbor guidelines set forth above, the power to add new beneficiaries through decanting would cause a Distributing Trust as to which the grantor is still living to be treated as a grantor trust under IRC § 674. Subject to the proposed safe harbor guidelines set forth above, it should not, however, have any other income, gift, estate or GST tax consequences.

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

Except in the case of a power to add beneficiaries described in Item B above, and subject to the proposed safe harbor guidelines set forth above, there should not be any tax consequences resulting from a change or deletion of a beneficiary's interest in a trust, including any power to appoint income or corpus.

D. 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

We believe that this may result in the recognition of gain to the extent that the property distributed from one trust to another trust is subject to a liability in excess of its income tax basis (*i.e.*, a "negative basis" asset). Under these circumstances, whether gain will be recognized under *Crane v. United States*² is uncertain. Under the *Crane* doctrine, the amount realized, which will be used to determine tax profit or loss, includes indebtedness discharged, including nonrecourse indebtedness. There is no developed law as to whether Code § 643(e) overrides the *Crane* doctrine. This section provides that a distributing trust's basis in distributed property carries over to the beneficiary and that the amount of the distribution is

² 331 U.S. 1 (1947).

limited to the beneficiary's basis in the distributed property. This argument is weakened by the requirement in Code § 643(e) that the basis of the property distributed by the fiduciary to the beneficiary is "adjusted for . . . any gain . . . recognized to the . . . trust by the distribution."³ Accordingly, gain recognition would appear to be warranted here to the extent that the property distributed from the Distributing Trust to the Receiving Trust is subject to a liability in excess of its income tax basis.

E. 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

We believe that a decanting that results in a termination date of the Receiving Trust that is subsequent to the termination date of the Distributing Trust may have GST tax consequences in the case of trusts that are grandfathered from the GST tax by reason of the effective date of the trust, or trusts that are exempt from GST tax by reason of the allocation of GST exemption. Except in the foregoing instances, subject to the proposed safe harbor guidelines set forth above, there should not be any tax consequences resulting from this.

F. 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

Subject to the proposed safe harbor guidelines set forth above, this should not produce any tax consequences.

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

As described in the proposed safe harbor guidelines set forth above, we believe that a decanting that requires beneficiary consent does not lend itself to a safe harbor analysis.

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

Subject to the proposed safe harbor guidelines set forth above, this should not produce any tax consequences.

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

Subject to the proposed safe harbor guidelines set forth above, this should not produce any tax consequences.

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

Subject to the proposed safe harbor guidelines set forth above, this should not produce any tax consequences.

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

In accordance with the proposed safe harbor guidelines set forth above, this may warrant examination on a case-by-case basis.

³ Code § 643(e)(1). Cf. Treas. Reg. § 1.661(a)-2(f).

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

Decanting should only produce GST tax consequences to the extent that it falls outside of the proposed GST tax safe harbor guidelines set forth above.

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

Subject to the proposed safe harbor guidelines set forth above, this should not produce any tax consequences.

N. How should “decanting” be defined?

We define decanting to mean the discretionary authority of a trustee to distribute some or all of the assets of one trust to another trust pursuant to authority in the governing instrument or applicable state law, or pursuant to a power of appointment, without the need for prior court approval or the prior consent of any beneficiary of the trust. Decanting does not include any required interim or final distribution from a trust pursuant to the terms of its governing instrument.

We assume, unless stated to the contrary, that decanting authority exercisable by a trustee is subject to fiduciary duties. We further assume, unless stated to the contrary, that the person with decanting authority is an “Independent Trustee” who has no present or future beneficial interest in either the original trust or the trust to which property is distributed as a result of the decanting.

O. Should there be any additional tax consequences if the decanting is from a U.S. trust to a foreign trust?

As discussed in Item 2 of the proposed income tax safe harbor guidelines set forth above, IRC § 684 should govern the income tax consequences in such circumstances.

P. Should there be any additional tax consequences if the decanting is from a foreign trust to a U.S. trust?

Subject to the proposed income tax safe harbor guidelines set forth above, the domestication of a foreign trust through decanting should not have any income tax consequences.

Q. Should a new employer identification number be required in the case of a decanting of all of the principal of the Distributing Trust where both the Distributing Trust and the Receiving Trust are U.S. trusts?

Where all of the principal of the Distributing Trust is decanted to a Receiving Trust and both the Distributing Trust and the Receiving Trust are U.S. trusts for Federal income tax purposes and there is no change in a trust’s grantor or non-grantor trust status as a result of the decanting, a decanting that is accomplished through a trustee’s declaration of trust should not warrant that the Receiving Trust obtain a new employer identification number. The Receiving Trust is effectively a continuation of the Distributing Trust, and therefore it should be able to use the Distributing Trust’s employer identification number. This result should not obtain, however, if the Distributing Trust is a grantor trust and the Receiving Trust is a nongrantor trust, or vice versa.