

September 12, 2008

Internal Revenue Service  
CC:PA:LPD:PR (REG-101258-08)  
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Washington, D.C. 20044

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By fax: 202-622-3484

**Re: Proposed Regulation Guidance Under §§642(c) and 643(a)(5),  
Income Ordering Rules**

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the above captioned release. The NYSSCPA thanks the Internal Revenue Service for the opportunity to comment on this release.

The NYSSCPA Trust and Estate Administration Committee deliberated the proposed regulations and prepared the attached comments. If you would like additional discussion with the committee, please contact Nathan H. Szerlip, chair of the Trust and Estate Administration Committee, at (212) 536-6908, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



Sharon Sabba Fierstein  
President

Attachment

**COMMENTS ON IRS PROPOSED REGULATIONS GUIDANCE UNDER  
§§642(c) AND 643(a)(5) WITH REGARD TO THE INCOME ORDERING RULES  
FOR AMOUNTS PAID BY A TRUST OR ESTATE TO A CHARITABLE  
BENEFICIARY**

**September 12, 2008**

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

**Trust and Estate Administration Committee**

**Comments on IRS Proposed Regulations Guidance Under §§642(c) and  
643(a)(5)**

***Income Ordering Rules for Amounts Paid by a Trust or Estate to a Charitable  
Beneficiary***

**Overview**

The Internal Revenue Service issued proposed regulations providing guidance under §§642(c) and 643(a)(5) (published in *The Federal Register* on June 18, 2008: REG-101258-08) with regard to the Federal tax consequences of an ordering provision in a trust, will or provision of local law that attempts to determine the tax character of the amounts paid to a charitable beneficiary of the trust or estate. These proposed regulations affect estates, charitable lead trusts and other trusts that pay or permanently set aside amounts for charitable purposes.

**Comments**

We respectfully disagree with the position taken in these proposed regulations. *The Federal Register* states, “These proposed regulations clarify the existing regulations under §§1.642(c)-3(b) and 1.643(a)-5(b).” The proposed regulations are making an interpretation that is not provided for in §§642(c) or 643(a)(5) of the Internal Revenue Code and the related regulations.

Further, we respectfully do not agree that “an analysis of the existing regulations with their interrelated cross-references” supports this position.

**Analysis and Basis for Comments**

As noted in *The Federal Register*, §1.642(c)-3(b)(2) provides that “in determining whether an amount of income paid to a charitable beneficiary includes particular items of income not included in gross income (for example, tax exempt income), provisions in the governing instrument will control if they specifically provide as to the source out of which amounts are to be paid to the charitable beneficiary.” *The Federal Register* further states, “As similarly provided in §1.642(c)-3(b), §1.643(a)-5(b) provides ‘if the governing instrument specifically provides as to the source out of which amounts are paid, permanently set aside, or to be used for such charitable purposes, the specific provisions control.’”

Both regulation sections address that, in the absence of any specific provision in the governing instrument, “an amount to which section 642(c) applies is deemed to consist of the same proportion of each class of the items of income of the estate or trust as the total of each class bears to the total of all classes.”

Regulation §1.662(b)-2 includes a provision that states, “However, before the allocation of other deductions among the items of distributable net income, the charitable contributions deduction allowed under section 642(c) is *(in the absence of specific allocation under the terms of the governing instrument or the requirement under local law of a different allocation)* [emphasis added] allocated among the classes of income entering into the computation of estate or trust income in accordance with the rules set forth in paragraph (b) of §1.643(a)-5.”

We note that the verbiage in this section is consistent with the existing sections that are the focus of the proposed regulations. We also note that §1.662(b)-2 provides two examples. To the extent that the second example is deemed to have a specific allocation under the terms of the governing instrument or the requirement under local law of a different allocation, this example is in direct conflict with the position being taken in the proposed regulations. The second regulation cited in the proposed regulations, §1.662(c)-4, provides only one illustration, and that example makes no mention of a specific allocation clause in the governing instrument or of an allocation requirement based on local law.

In both cases, the examples cited in the proposed regulations do not address the subject of these proposed regulations, and, further, as noted above, one of the cites echoes the existing Code sections.

The subject of the proposed regulations is not the general case; the proposed regulations are addressing the exception in which there is a specific allocation made in the governing instrument or by local law. Regulation §1.662(b)-1 repeats the same position as Regulation §1.652(b)-1; however, this specific regulation is titled, Character of amounts; when no charitable contributions are made.

Regulation §1.652(b)-2(a) states, “The amounts specified in §1.652(a)-1 which are required to be included in the gross income of a beneficiary are treated as consisting of the same proportion of each class of items entering into distributable net income of the trust ...as the total of each class bears to such distributable net income, unless the terms of the trust specifically allocate different classes of income to different beneficiaries, or unless local law requires such an allocation.” Regulation §1.652(b)-2 states, “The terms of the trust are considered specifically to allocate different classes of income to different beneficiaries only to the extent that the allocation is required in the trust instrument, and only to the extent that it has an economic effect independent of the income tax consequences of the allocation.”

We note that this “independent economic effect” rule for ordering is not included in §§642(c) or 643(a)(5) of the Internal Revenue Code; it is not included in the guidance of

Regulation §1.642; and it is not included in the guidance of any of the other regulations previously cited.

**Summary**

Based on the foregoing analysis, we respectfully disagree with the position taken in these proposed regulations, and do not agree that “an analysis of the existing regulations with their interrelated cross-references” supports this position.

We thank the Internal Revenue Service for the opportunity to submit our comments on the proposed regulations.