



Sioux Fall Estate Planning Council

The Magic of Grantor Trust

Jonathan G. Blattmachr ©2024
All Rights Reserved

- **TRUSTS ARE SEPARATE AND INDEPENDENT TAXPAYERS**
- **THEY ARE TAXED AS INDIVIDUALS ARE TAXED EXCEPT WHEN A SPECIAL RULE APPLIES**
- **TO DIVIDE INCOME IS TO CONQUER INCOME TAX ON ACCOUNT OF “BRACKET RIDE”**
- **USE OF TRUSTS PROLIFERATES**
- **HELVERING V. CLIFFORD, 309 US 331 (1940)**
- **ADOPTION OF GRANTOR TRUST RULES BY REGULATIONS UNDER THE GROSS INCOME SECTION OF THE 1939 CODE**
- **PRIOR TO THE CONTRACTION OF INCOME TAX RATES AND THE SEPARATE NEARLY “FLAT TOP RATE” STRUCTURE FOR TRUSTS, TRUSTS SERVED THE PURPOSE OF DIVIDING AND THEREBY LOWERING INCOME TAX**

- HENCE, A TRUST WAS A GRANTOR TRUST WAS “DEFECTIVE”
- TODAY, GRANTOR TRUSTS ARE GENERALLY REGARDED AS BENEFICIAL PRIMARILY FOR TRANSFER TAX PURPOSES
- GRANTOR TRUST STATUS MAY BE ADVERSE SUCH AS WITH RESPECT TO A CRT
- A TRUST IS A GRANTOR TRUST REGARDLESS OF WHETHER IT IS ONE INTENTIONALLY OR NOT
- HENCE, THE PHRASE “INTENTIONALLY DEFECTIVE GRANTOR TRUST” IS A MISNOMER (AND PARTIALLY REDUNDANT)

- THE INCOME, DEDUCTIONS AND CREDITS AGAINST TAX OF THE TRUST ARE ATTRIBUTED TO THE TRUST'S GRANTOR (OR OTHER "TRUST OWNER") AS THOUGH THE TRUST DID NOT EXIST
- A TRUST MAY BE A GRANTOR TRUST WITH RESPECT TO MORE THAN ONE TAXPAYER
- A TRUST MAY BE A GRANTOR TRUST ONLY WITH RESPECT TO A FRACTIONAL PORTION OF THE TRUST
- A TRUST MAY BE A GRANTOR TRUST ONLY WITH RESPECT TO HORIZONTAL PARTIAL INTEREST (SUCH AS THE INCOME INTEREST OR THE REMAINDER INTEREST)

- PERMIT TRUST INCOME TO GROW TAX FREE BECAUSE THE GRANTOR (OR OTHER TRUST OWNER) MUST PAY THE INCOME TAX. REV. RUL. 2004-64
- PERMIT ASSETS TO BE SOLD FROM THE GRANTOR TO THE TRUST AND THE REVERSE WITHOUT INCOME TAX EFFECT. CF PLR 200949012 (AS TO SEC. 678)
- PERMIT LOW BASIS ASSETS IN THE TRUST TO BE PURCHASED WITH CASH WITHOUT GAIN RECOGNITION BY THE GRANTOR PRIOR TO DEATH
- STEP-UP IN BASIS UNDER SECTION 1014 WITHOUT ESTATE TAX INCLUSION? CF. CCA 200937028 WITH CCA 201245006. Rev. Rul. 2023-2
- INCOME MAY BE TAXED HIGHER BECAUSE ATTRIBUTED TO THE GRANTOR (E.G., STATE INCOME TAXES)
- ACHIEVE S CORP STATUS
- HAVE ENTITY THAT IS DISREGARDED FOR INCOME TAX BUT NOT FOR OTHER PURPOSES

- SECTION 671: INCOME, DEDUCTIONS AND CREDITS ARE ATTRIBUTED TO THE GRANTOR (OR OTHER TRUST OWNER) TO THE EXTENT IT IS A GRANTOR TRUST
- SECTION 672: DEFINITIONS AND SPECIAL RULES—E.G., TRUSTS CREATED BY NRA'S
- GENERAL EXCEPTION TO APPLICATION OF SECTIONS: CONSENT OF ADVERSE PARTY

- SECTION 673—RETAINED REVERSIONS
- GRANTOR RETAINS REVERSION IF AT CREATION IT IS VALUED AT MORE THAN 5% OF TRUST CORPUS. EXAMPLE
- IT MAKES IT A GRANTOR TRUST AS TO THE “INCOME” PORTION OF THE TRUST EVEN THOUGH GRANTOR’S INTEREST IS ONLY IN THE REVERSION OF PRINCIPAL (WHICH ALSO WILL BE A GRANTOR TRUST)
- REVERSION CAUSES ESTATE TAX INCLUSION UNDER SECTION 2033
- SECTION 2702 CAUSES ENTIRE AMOUNT TRANSFERRED TO BE TREATED AS A COMPLETED GIFT
- ALTERNATIVE TO AVOID ESTATE TAX INCLUSION: GIVE REMAINDER TO SPOUSE (SPOUSAL UNITY RULE OF SECTION 672(e))

- SECTION 674: POWERS TO CONTROL BENEFICIAL ENJOYMENT
- GENERAL RULE: ANYONE (EXCEPT WITH ADVERSE PARTY CONSENT) CAN CONTROL BENEFICIAL ENJOYMENT
- REAL SCOPE IS DETERMINED BY THE EXCEPTIONS
- 674(b)(1): SUPPORT OF A DEPENDENT. APPLICATION FOR GRANTOR'S SUPPORT OBLIGATION ONLY TO THE EXTENT SO APPLIED—SEE SECTION 677. ESTATE TAX ISSUE
- 674(b)(2): FUTURE EXERCISE WHERE THE 5% SECTION 673 RULE WOULD NOT APPLY. IF HELD BY GRANTOR, THERE IS AN ESTATE TAX ISSUE (SECTION 2036(a)(2))
- 674(b)(3): TESTAMENTARY POWER OF APPOINTMENT EXCEPT IF HELD BY GRANTOR (OR SPOUSE) WITH RESPECT TO ACCUMULATED INCOME (EXCEPT FOR CHARITY) IF ACCUMULATION DOES NOT REQUIRE CONSENT OF ADVERSE PARTY. INCOMPLETE GIFT AND ESTATE TAX INCLUSION ISSUES

- 674(b)(4): SPRINKLE AND SPRAY INCOME AND CORPUS AMONG CHARITIES. ESTATE TAX INCLUSION ISSUE
- 674(b)(5): REASONABLY DEFINITE STANDARD TO SPRINKLE AND SPRAY CORPUS OR IF BENEFICIARIES HAVE SEPARATE SHARES (WHICH ARE CHARGED). ESTATE TAX ISSUE
- 674(b)(6): (1) ACCUMULATED INCOME MUST BE PAID TO BENEFICIARY, HIS OR HER ESTATE OR PURSUANT TO SPA THAT EXCLUDES ONLY BENEFICIARY, ESTATE, CREDITORS AND ESTATE CREDITORS, (2) ACCUMULATED INCOME MUST BE PAID IN SPECIFIED SHARES, OR (3) ACCUMULATED INCOME MUST BE PAYABLE TO BENEFICIARY'S APPOINTEES OR ALTERNATES (OTHER THAN GRANTOR OR GRANTOR'S ESTATE) IF THE BENEFICIARIES DIES "PREMATURELY." EXCEPTION DOES NOT APPLY IF ANYONE CAN ADD TO CLASS OF BENEFICIARIES (OTHER THAN LATER BORN OR ADOPTED PERSONS). COMPLETED GIFT AND ESTATE TAX ISSUES. WHAT IF THE BENEFICIARY CAN APPOINT TO THE GRANTOR OR GRANTOR'S SPOUSE?

- 674(b)(7): ACCUMULATION OF INCOME WHILE BENE IS UNDER AGE 21 OR DISABLED. EXCEPTION DOES NOT APPLY IF ANYONE CAN ADD TO CLASS OF BENEFICIARIES (OTHER THAN LATER BORN OR ADOPTED PERSONS). COMPLETED GIFT AND ESTATE TAX ISSUES
- 674(c): DISCRETIONARY SPRINKLE/SPRAY POWERS HELD BY INDEPENDENT TRUSTEES (“NO MORE THAN” RULE WITHOUT GRANTOR OR SPOUSE). RELATED OR SUBORDINATE “SUBSERVIENT” TO THE WISHES OF THE GRANTOR—FACTUAL ISSUE. EXCEPTION DOES NOT APPLY IF ANYONE CAN ADD TO CLASS OF BENEFICIARIES (OTHER THAN LATER BORN/ADOPTEDS)
- 674(d): REASONABLY DEFINITE EXTERNAL DISCRETIONARY SPRINKLE/SPRAY INCOME (NOT CORPUS— BUT COULD BE “COMBINED” WITH SECTION 674(b)(5) CORPUS EXCEPTIONS). EXCEPTION DOES NOT APPLY IF ANYONE CAN ADD TO CLASS OF BENEFICIARIES (OTHER THAN LATER BORN OR ADOPTED PERSONS). CONSIDER USING SPOUSE. BUT SPOUSE MAY RESIGN OR DIE

- SAYS “ANY PERSON”
- IT IS THE EXISTENCE OF THE POWER NOT ITS EXERCISE WHICH TRIGGERS GRANTOR TRUST STATUS
- PROBABLY DOES NOT APPLY IF HELD BY AN ADVERSE PARTY. IS A DISCRETIONARY BENEFICIARY AN ADVERSE PARTY?
- MUST IT BE FREELY EXERCISABLE? IF GRANTED TO A FIDUCIARY, IS IT FREELY EXERCISABLE?
- WOULD A BENEFICIARY WHO HOLDS AND EXERCISES THE POWER HAVE A GENERAL POWER OF APPOINTMENT?
- IF GRANTOR HOLDS THE POWER, SECTIONS 2036(a)(2) AND 2038 LIKELY APPLY

- SEE MADORIN, 84 TC 667 (1985) (POWER TO ADD CHARITIES)
- LIST OF THOSE WHO COULD BE ADDED MAY BE SHORT
- POWERHOLDER (OR OTHER) COULD HAVE POWER TO REMOVE THOSE ADDED
- TO “TOGGLE OFF” GRANTOR TRUST STATUS, POWERHOLDER SHOULD BE ALLOWED TO RENOUNCE/GIVE UP THE POWER
- HAVE AN AUTOMATIC SUCCESSOR (E.G., OLDEST INDIVIDUAL TRUSTEE OR SOLE NON-INDIVIDUAL TRUSTEE) BUT IN A NON-FIDUCIARY CAPACITY
- SHOULD EXCLUDE GRANTOR FROM BEING ADDED UNLESS IN SELF-SETTLED TRUST JURISDICTION
- LIFETIME SPECIAL POWER SEEMS TO BE THE EQUIVALENT OF A POWER TO ADD.
PLR 96-43-013

- GRANT NON-ADVERSE PERSON WHO IS NOT A TRUSTEE PRESENTLY EXERCISABLE SPECIAL POWER OF APPOINTMENT OVER INCOME AND CORPUS, EVEN IF LIMITED BY A STANDARD
- GIVE A NON-ADVERSE PERSON A POWER TO ADD TO THE CLASS (NAMED OTHER RELATIVES AND/OR CHARITY MAY BE GOOD CHOICES—BUT MAY NOT APPLY WHILE “OTHER” RELATIVES ARE NOT IN EXISTENCE)
- NAME SPOUSE AS BENEFICIARY OF DISCRETIONARY TRUST NOT LIMITED BY STANDARDS—PROVIDE SAFEGUARD IF SPOUSE DIES
- RELATED AND SUBORDINATE TRUSTEES MAY NOT BE A WISE CHOICE BECAUSE OF FACTUAL ISSUE OF SUBSERVIENCE

- 675(1): POWER IN GRANTOR, SPOUSE OR ANY NON-ADVERSE PARTY TO DEAL WITH THE TRUST ASSETS FOR LESS THAN FULL AND ADEQUATE CONSIDERATION. POOR CHOICE AS IT GENERATES ESTATE TAX ISSUES FOR SUCH PARTY
- 675(2): POWER IN GRANTOR, SPOUSE OR ANY NON-ADVERSE PARTY TO LOAN TO GRANTOR (OR SPOUSE) AT LESS THAN ADEQUATE INTEREST OR SECURITY UNLESS GENERAL AUTHORITY TO A NON-ADVERSE TRUSTEE. SHOULD CAUSE GRANTOR TRUST STATUS IF EXPLICITLY GRANTED TO THE TRUSTEE (IF NOT AN ADVERSE PARTY) BUT SHOULD COVER ONLY LACK OF SECURITY (NOT LACK OF INTEREST) AND SPECIFY “WITHOUT ADEQUATE SECURITY WITHIN THE MEANING OF SECTION 675(2).” ALSO, REQUIRE THAT AT LEAST ONE NON-ADVERSE TRUSTEE BE ACTING AT ANY TIME. TWO WOULD BE SAFER

- 675(3): GRANTOR (OR SPOUSE) HAS BORROWED CORPUS OR INCOME AND HAS NOT ENTIRELY REPAID LOAN, INCLUDING INTEREST, BEFORE THE BEGINNING OF A TAX YEAR. MAU, 355 F. SUPP 909 (1973) AND REV. RUL. 86-82 SUGGEST SECTION APPLIES IF THE LOAN IS OUTSTANDING DURING ANY PART OF THE YEAR. BENNETT, 79 TC 470 (1982) (ONLY GRANTOR TRUST ON PART BORROWED). BENSON, 76 TC 1040 (1981) (BORROWING ALL INCOME CAUSES WHOLE TRUST TO BE GRANTOR TRUST). THIS CAN BE USED TO “TOGGLE” OFF AND ON. CAN CREATE GRANTOR TRUST STATUS BY BUYING TRUST ASSETS FOR A NOTE. REV. RUL. 85-13

- 675(4)(A)/(B): NON-FIDUCIARY POWER TO VOTE STOCK AND CONTROL INVESTMENTS TO EXTENT THE TRUST CONSISTS OF SECURITIES WHERE HOLDINGS OF GRANTOR AND TRUST ARE SIGNIFICANT WITH RESPECT TO VOTING CONTROL. POTENTIAL SECTION 2036(b) ISSUE BUT VETO OF SALE SHOULD NOT BE PROBLEMATIC EVEN IF HELD BY GRANTOR. SAFER IF HELD BY SPOUSE OR OTHER NON-ADVERSE PERSON (IN NON-FIDUCIARY CAPACITY) BUT OF LIMITED USE

- 675(4)(C): NON-FIDUCIARY POWER TO “REACQUIRE” PROPERTY OF EQUIVALENT VALUE. DOES NOT HAVE TO BE HELD BY NON-ADVERSE PARTY. WHETHER HELD IN FIDUCIARY CAPACITY OR NOT, IT IS A QUESTION OF FACT BUT PUT IN “IN A NON-FIDUCIARY CAPACITY WITHIN THE MEANING OF SECTION 675(4)(C).” IF REACQUIRE POWER HELD BY GRANTOR: NO ESTATE TAX INCLUSION UNDER REV. RUL. 2008-22 EXCEPT, PERHAPS, WITH RESPECT TO SECTION 2036(b) STOCK AND LIFE INSURANCE ON GRANTOR’S LIFE. HELD BY SOMEONE OTHER THAN GRANTOR: REV. PROC. 2007-45 (CLT FORMS); GRANTOR’S SPOUSE; HAVE AUTOMATIC SUCCESSOR IF SOMEONE OTHER THAN GRANTOR



- IF HELD BY GRANTOR, THERE WILL BE ESTATE TAX INCLUSION
- IF HELD BY TRUSTEE, THERE MAY BE ESTATE TAX INCLUSION UNDER “CREDITOR RIGHTS” THEORY. REV. RUL. 2004-64
- IF HELD BY NON-ADVERSE PERSON WHO IS NEITHER THE GRANTOR NOR THE TRUSTEE, THERE MIGHT POSSIBLY BE ESTATE TAX INCLUSION UNDER NON-SELF-SETTLED TRUST JURISDICTION
- COULD IT BE A “TRANSACTION OF INTEREST”? IRS NOTICE 2007-73

- IF INCOME MUST BE DISTRIBUTED TO THE GRANTOR (OR SPOUSE). (MEANING OF INCOME)
- IF INCOME MAY BE DISTRIBUTED TO GRANTOR OR SPOUSE
- IF INCOME MAY BE APPLIED TO THE PAYMENT OF PREMIUMS ON LIFE OF GRANTOR OR SPOUSE (UNLESS IRREVOCABLY PAYABLE TO CHARITY)
- IF GRANTOR IS ELIGIBLE TO RECEIVE INCOME, THERE MAY BE ESTATE TAX INCLUSION
- HENCE, TRUST FOR SPOUSE IS BETTER BUT GRANTOR TRUST STATUS WILL BE LOST WHEN SPOUSE DIES UNLESS IT REMAINS A GRANTOR TRUST FOR ANOTHER REASON

- COULD BE THE MOST FLEXIBLE OF ALL
- BUT WATCH FOR SECTION 684, REPORTING REQUIREMENTS AND ACCUMULATION DISTRIBUTION EFFECTS LATER
- BONUS: QPRT SALE BAILOUT

- WHY WOULD YOU WANT TO DO THAT?
- HOW CAN IT BE DONE?
- SPOUSE AS TRUSTEE OF DISCRETIONARY TRUST WHO MAY RESIGN (AND BE REAPPOINTED)
- NON-ADVERSE PARTY CAN ADD TO THE CLASS OR RENOUNCE THE POWER
- NON-ADVERSE PARTY OR GRANTOR HOLDS POWER OF SUBSTITUTION AND CAN RENOUNCE IT
- CAN TRUSTEES RENOUNCE POWERS SUCH AS ABILITY TO DISTRIBUTE TO THE GRANTOR, THE GRANTOR'S SPOUSE OR USE INCOME TO PAY PREMIUMS OF INSURANCE? USE OTHER NON-ADVERSE PARTY INSTEAD BUT CONSIDER ESTATE TAX CONSEQUENCES IF FOR GRANTOR
- NON-ADVERSE PARTY CAN DIRECT TRUST TO LOAN TO GRANTOR OR SPOUSE WITHOUT ADEQUATE SECURITY AND MAY RENOUNCE THE POWER

- CRANE GAIN: MADORIN; REV. RUL. 77-402; EXAMPLE 5 TO REG. § 1.1001-3. APPLICATION TO OTHER ASSETS (E.G., RIGHT TO IRD) CCA 2009-23-024 (“THE CONVERSION OF A NONGRANTOR TRUST TO A GRANTOR TRUST IS NOT A TRANSFER FOR INCOME TAX PURPOSES...THAT REQUIRES RECOGNITION OF GAIN TO THE OWNER”)
- OTHER TRANSFER TRIGGERING EVENT (E.G., RIGHT TO IRD)
- TRANSFER FOR VALUE IF TO A NON-GRANTOR TRUST
- LOSS OF S CORPORATION STATUS IF TO A NON-GRANTOR TRUST (ESBT ELECTION)

WAS THERE GAIN AT DEATH IF THE NOTE WAS STILL OUTSTANDING?



PIONEER
WEALTH PARTNERS

- Two Published Articles Said the Installment Sale Strategy Was Fatally Flawed Because If the Note Was Still Outstanding at the Grantor's Death Gain Would be Recognized per Rev. Rul. 77-402
- In Blattmachr, Gans and Jacobson (Journal of Taxation 2002), Seven Reasons Were Presented on Why There Would Be No such Gain (the Other Lawyers Now Agree) and Note that "nonrecognition on death is among the strongest principles inherent in the income tax." Estate of Backemeyer v. Commissioner, 147 T.C. 526, 544 (2016).
- The Article Also Dealt with What the Basis Would Then Be of the Assets in the (Formerly) Grantor Trust
- The IRS Had Taken Inconsistent Positions: CCA 200937028 and PLR 201245006 (Neither of Which May Be Cited or Used as Precedent). Senator Bernie Sanders Introduced a Bill that Would Expressly Deny the Section 1014 Step-up ("the 99.5 Percent Act" -- S. 994).
- Which of Section 1012 (Purchase), 1014 (Passing from or Acquired from a Decedent) or 1015 (Gifted) Applies?
- But now the IRS has spoken: Rev Rul 2023-2

- SECTION 1014(A) SAYS: “THE BASIS OF PROPERTY IN THE HANDS OF A PERSON ACQUIRING THE PROPERTY FROM A DECEDENT OR TO WHOM THE PROPERTY PASSED FROM A DECEDENT SHALL... BE— (1) THE FAIR MARKET VALUE OF THE PROPERTY AT THE DATE OF THE DECEDENT’S DEATH...”
- SECTION 1014(B) SAYS: FOR PURPOSES OF SUBSECTION (A), THE FOLLOWING PROPERTY SHALL BE CONSIDERED TO HAVE BEEN ACQUIRED FROM OR TO HAVE PASSED FROM THE DECEDENT:
 - (1) PROPERTY ACQUIRED BY BEQUEST, DEVISE, OR INHERITANCE, OR BY THE DECEDENT’S ESTATE FROM THE DECEDENT;
 - (2) PROPERTY TRANSFERRED BY THE DECEDENT DURING HIS LIFETIME IN TRUST TO PAY THE INCOME FOR LIFE TO OR ON THE ORDER OR DIRECTION OF THE DECEDENT, WITH THE RIGHT RESERVED TO THE DECEDENT AT ALL TIMES BEFORE HIS DEATH TO REVOKE THE TRUST;
 - (3) PROPERTY TRANSFERRED BY THE DECEDENT DURING HIS LIFETIME IN TRUST TO PAY THE INCOME FOR LIFE TO OR ON THE ORDER OR DIRECTION OF THE DECEDENT WITH THE RIGHT RESERVED TO THE DECEDENT AT ALL TIMES BEFORE HIS DEATH TO MAKE ANY CHANGE IN THE ENJOYMENT THEREOF THROUGH THE EXERCISE OF A POWER TO ALTER, AMEND, OR TERMINATE THE TRUST;***
 - (4) PROPERTY ACQUIRED FROM THE DECEDENT BY REASON OF DEATH, *** IF BY REASON THEREOF THE PROPERTY IS REQUIRED TO BE INCLUDED IN DETERMINING THE VALUE OF THE DECEDENT’S GROSS ESTATE UNDER CHAPTER 11 OF SUBTITLE B OR UNDER THE INTERNAL REVENUE CODE OF 1939. ***THIS PARAGRAPH SHALL NOT APPLY TO—
 - (A) ANNUITIES DESCRIBED IN SECTION 72; (
 - (B) PROPERTY TO WHICH PARAGRAPH WOULD APPLY IF THE PROPERTY HAD BEEN ACQUIRED BY BEQUEST; AND
 - (C) PROPERTY DESCRIBED IN ANY OTHER PARAGRAPH OF THIS SUBSECTION.

REVENUE RULING 2023-2

SUMMARY OF PRESENTATION: ASPECTS-1



- ISSUES: SUMMARY
 - -TRUST'S BASIS? DOES 1014 APPLY?
 - - REV. RUL. 2023-2 LAYS DOWN GENERAL RULE:
 - SECTION 1014 IS INAPPLICABLE BECAUSE NO ESTATE-TAX INCLUSION AND IT IS NOT A BEQUEST UNDER STATE LAW
 - -POSSIBLE EXCEPTION:
 - IF THERE IS DEBT BETWEEN GRANTOR AND TRUST AT DEATH, RULING IS INAPPLICABLE
 - WHAT DOES THIS IMPLY?

- WHAT IS THE TRUST'S BASIS IN CASE OF SALE TO GRANTOR TRUST IF 1014 IS INAPPLICABLE?
 - -RULING DOES NOT ADDRESS THIS.
 - -IF SECTION 1014 DOES NOT APPLY, THE POSSIBILITIES ARE
 - SECTION 1015(A), 1015(B) OR 1012
 - IS THERE GAIN AT DEATH?
 - RULING DOES NOT ANSWER THIS QUESTION
 - BUT SEE BACKEMEYER 147 T.C. 526, 544 (2016)
 - -“NONRECOGNITION ON DEATH IS AMONG THE STRONGEST PRINCIPLES INHERENT IN THE INCOME TAX”

REVENUE RULING 2023-2

SUMMARY OF PRESENTATION: ASPECTS-3



- CAN THE GRANTOR STILL REPURCHASE ASSETS FROM TRUST FOR CASH OR OTHER ASSETS ON A TAX-FREE BASIS UNDER REV RUL 85-13 AND THEREBY SECURE A STEP-UP?
- YES, REV. RUL. 85-13 REMAINS INTACT
- WHICH PROVIDES A PLANNING ROUTE TO AVOID THE RULING
- A CRITIQUE OF THE RULING
- EXAMPLE 5 AND REV. RUL. 85-13 ESTABLISH A DEEMED-OWNERSHIP PRINCIPLE
- CONSISTENT APPLICATION OF THE PRINCIPLE WOULD LEAD TO THE APPLICATION OF SECTION 1014 (WHICH IS AN INCOME TAX PROVISION)
- QUESTIONABLE TO IMPOSE A DEEMED-OWNERSHIP PRINCIPLE IN INTER VIVOS CONTEXT TO TRIGGER GAIN WHILE REFUSING TO APPLY IT IN THE SECTION 1014 CONTEXT, WHERE IT WOULD FAVOR THE TAXPAYER
- DEFERENCE
- IRS HAS BEEN INCONSISTENT
- IRS FAILED TO GRAPPLE WITH DEEMED-OWNERSHIP PRINCIPLE
- PENALTY IMPLICATIONS

- SECTION 671 PROVIDES, IN PART: “WHERE IT IS SPECIFIED IN THIS SUBPART THAT THE GRANTOR OR ANOTHER PERSON SHALL BE TREATED AS THE OWNER OF ... A TRUST, THERE SHALL THEN BE INCLUDED IN COMPUTING THE TAXABLE INCOME AND CREDITS OF THE GRANTOR OR THE OTHER PERSON THOSE ITEMS OF INCOME, DEDUCTIONS, AND CREDITS AGAINST TAX OF THE TRUST WHICH ARE ATTRIBUTABLE TO ... THE TRUST....”
- NOTE IT DOES NOT SAY THE TRUST AND ITS ASSETS ARE TREATED AS OWNED BY THE GRANTOR.
- BUT REV. RUL. 85-13 AND EXAMPLE 5 OF REG. 1.1001-1(C) SAY: THE GRANTOR IS “CONSIDERED THE OWNER OF ALL THE TRUST PROPERTY FOR FEDERAL INCOME TAX PURPOSES....”
- REV. RUL. 2023-2 SAYS THAT IT (THE RULING) DOES NOT APPLY TO A SALE BY THE GRANTOR TO THE TRUST OR TO A SITUATION WHERE THERE IS NEGATIVE BASIS DEBT ON THE PROPERTY

- REV. RUL. 2023-2 RELIES ON BAACIOCCO (1961) AND COLLINS (1970) THAT THE MEANING OF “BEQUEST” IN SECTION 1014(B)(1) MEANS A BEQUEST UNDER STATE LAW AND SINCE THE ASSETS IN THE GRANTOR TRUST WON’T BE PASSING “IN PROBATE” UNDER STATE LAW, SECTION 1014(B)(1) CANNOT APPLY
- BUT ON ACCOUNT OF THE FICTION THAT THE GRANTOR OWNS THE ASSETS IN A GRANTOR TRUST, THE ASSETS, PERHAPS, SHOULD BE TREATED AS PASSING THROUGH PROBATE
- REV. RUL. 2023-2 SHOULD NOT GET THE NORMAL DEFERENCE REVENUE RULING GET FROM COURTS. SO A TAXPAYER CAN TAKE THE STEP UP AT DEATH POSITION BUT DISCLOSURE SHOULD BE MADE TO AVOID PENALTY

- HAVE THE GRANTOR BORROW CASH AND BUY THE ASSETS BACK FROM THE TRUST BEFORE DEATH (OR SUBSTITUTE THE GRANTOR'S HIGH BASIS ASSETS FOR LOW BASIS ASSETS IN THE TRUST)
- THERE WILL BE NO INCOME TAX RECOGNITION. REV. RUL. 85-13
- AND THE TAXPAYER CAN PICK AND CHOOSE WHICH TO BUY BACK
- THAT'S BETTER THAN A STEP UP/STEP DOWN UNDER SECTION 1014