Sales to Intentionally Defective Irrevocable Trusts
Recent Cases Explore Tax Planning Strategy of Sale to an IDIT

With sale to intentionally defective irrevocable trust arrangements coming under IRS scrutiny, proper structuring is key to successful tax results.

MICHAEL D. MULLIGAN is Co-Chair of the Estate Planning Department in the St. Louis, Missouri, office of Lewis Rice LLC. He is an originator of the estate planning strategy of sale to defective trust for an installment note, which is now widely used by estate planners nationally. Mike is currently a member of the Editorial Boards of Estate Planning and The Journal of Taxation and is a fellow of the American College of Trust and Estate Counsel. This special report is adapted from a presentation made at the 41st Annual Notre Dame Tax and Estate Planning Institute in 2015. Copyright ©2016, Michael D. Mulligan.

The sale to an intentionally defective irrevocable trust (IDIT) in exchange for the IDIT’s promissory note has become an established estate planning technique.1 If the seller’s life expectancy is shortened by illness, an annuity based on the seller’s life or a self-cancelling installment note (SCIN) may be substituted for the promissory note. Unlike a standard promissory note, payments under the annuity or SCIN terminate at the seller’s death, leaving only payments that the seller received during his or her lifetime to be included in the seller’s estate.

This special report discusses the standard sale transaction, as well as the two variations. The report examines authorities which indicate that a properly structured sale to an IDIT should be a successful transfer tax planning strategy.

Four recent cases have generated a great deal of interest among estate planning commentators. One case is a final decision by the Tax Court, Estate of Trombetta.2 The others are the companion cases of Estate of Marian Woelbing and Estate of Donald Woelbing,3 and the case of Estate of Davidson.4 CCA 201330033 was issued in connection with the Davidson case. These cases and their impact on the sale to an IDIT strategy are also discussed below.

Structure of standard sale to IDIT transaction

The term “IDIT” describes a particular type of trust. The existence of an IDIT apart from its grantor is recognized for estate, gift and generation-skipping tax purposes, but not for income tax purposes. Any uncompensated transfer to an IDIT is a gift. The assets of an IDIT are not included in the estate of its grantor at death. An IDIT is created by inserting provisions in the governing instrument that violate the grantor trust income tax rules under Sections 671 through 677, but do not cause estate tax inclusion. It is fairly easy to achieve this result.5

The position of the IRS is that an IDIT does not exist for federal income tax purposes.6 All income of an IDIT, including capital gain, is taxed directly to its grantor. The grantor’s sale of appreciated property to an IDIT causes no recognition of gain. Interest on a promissory note paid by an IDIT to its grantor is not taxed to the grantor or deductible by the IDIT. For income tax purposes, such interest is ignored. An IDIT has the option to use the Social Security number of its grantor as its tax identification number.7

Applicable federal rate. The standard sale to an IDIT technique involves a grantor establishing an IDIT and selling assets to the IDIT in exchange for the IDIT’s promissory note. The IRS has asserted in litigation that Section 7872 applies to a promissory note given in a sale transaction and that if, pursuant to Section 7872(f), a promissory note bears interest at the applicable federal rate under Section 1274, it has a gift tax value equal to its face amount. This position has been accepted by the Tax Court.8 The sale to an IDIT is a mechanism by which equity can be converted into debt without income tax consequences.9

Under Section 7872(f)(2)(A), the applicable federal rate for a term loan is the rate in effect under Section 1274(d) as of the date upon which the loan is made. Section 1274(d)(2) establishes a special rule for determining the applicable federal rate for a sale or exchange. Under Section 1274(d)(2), the applicable federal rate is the lowest of the interest rates for the month in which there is a binding contract for the sale or exchange and the two immediately preceding months. Because a lower interest rate on an IDIT’s promissory note reduces the value of the seller’s estate, it is tempting to make use of the Section 1274(d)(2) exception when the applicable federal rate for one of the two months preceding the month of sale is lower than the rate for the month of sale.
Section 1274(d) is an income tax statute. As noted in the discussion with note 6, supra, the IRS takes the position that transactions between a grantor trust and its grantor are not recognized for income tax purposes. The IRS conceivably could apply this position to assert that a sale to an IDIT is not a sale or exchange for purposes of Section 1274(d)(2). In most cases, the variation in the interest rates over the three-month period described in Section 1274(d)(2) is unlikely to be substantial. It would seem advisable not to risk challenge by the IRS and use the applicable federal rate for the month of sale and not either of the two preceding months.¹⁰

**Use of a formula.** In the sale of difficult-to-value assets to an IDIT, the sales documents might describe the quantity of an asset being sold through the use of a formula expressing that quantity as a dollar amount rather than as a number or percentage of units, e.g., as $X worth of ABC, Inc. stock rather than XX number of shares of ABC, Inc. stock. Recent cases indicate that the courts might recognize the effectiveness of such a formula to eliminate any gift if the IRS successfully argues that the assets being sold to the trust have a greater per-unit value than contemplated in the sale transaction.¹¹ In such event, the formula operates to reduce the number or percentage of units transferred so that the dollar amount transferred remains constant. If the formula is effective, the reduction in units transferred avoids a gift.

**Beneficial results produced by sale.** Similar to a grantor retained annuity trust (GRAT), the sale to an IDIT technique produces an estate tax savings if the assets sold to the IDIT generate a total return (net income plus appreciation) that exceeds the interest on the IDIT’s promissory note. In such case, the excess return is trapped inside the IDIT and excluded from the seller’s estate. Except for interest on the note, the sale is a “freeze” technique. Net return in excess of interest on the note is easier to produce with an IDIT than with a trust that is a separate taxpayer. With an IDIT, the grantor pays all taxes due on income and capital gain generated by the assets of the IDIT. The IDIT’s return on assets is not reduced by income tax liability.

The sale technique is particularly powerful when interests in a partnership, limited liability company or S corporation are sold to the IDIT. No income tax is imposed on such an entity. Rather, tax is imposed on its owners. The seller of an interest in such an entity to an IDIT continues to be taxed on the portion of the entity’s income attributable to that interest. If the entity makes a distribution to its owners for the payment of income taxes, that distribution is received by the IDIT, even though tax is due from the seller. The IDIT can move funds to the seller by making payments on the promissory note, which has the effect of reducing, not just freezing, the seller’s estate.

Although the grantor’s payment of taxes on an IDIT’s income could be viewed as an indirect gift increasing the value of an IDIT, the IRS ruled in Rev. Rul. 2004-64¹² that such payment is not a transfer subject to gift tax. Rev. Rul. 2004-64 permits a grantor to pay taxes on income that is not in the grantor’s estate without having that payment treated as a gift.

The sale to an IDIT technique also produces favorable generation-skipping tax results. If the IDIT to which a sale is made has an inclusion ratio of zero for generation-skipping tax purposes and if the value of assets sold to the IDIT does not exceed the face amount of the promissory note the seller receives in the sale, then the sale does not change the IDIT’s inclusion ratio. Any assets excluded from the seller’s estate for federal estate tax purposes are also insulated from generation-skipping tax. The significant point is that this insulation occurs without any allocation of additional GST exemption.

**Sale for a private annuity**

The use of the standard sale to an IDIT for a promissory note technique is not generally recommended in the case of an individual whose life expectancy is shortened by virtue of illness. For such an individual, a variation of the standard sale to an IDIT in exchange for a promissory note might be considered. That variation is a sale to an IDIT in exchange for an annuity that terminates at the seller’s death. The sale transaction is a variation of a long-established estate planning technique, a sale in exchange for a private annuity.¹³

**50% probability of survivorship.** Reg. 25.7520-3(b)(3) establishes a planning-friendly rule in determining the life expectancy of an individual who is suffering from an illness that can be anticipated to shorten life expectancy. Under Reg. 25.7520-3(b)(3), the mortality component prescribed under Section 7520 may not be used to determine the present value of an annuity, income interest, remainder interest or reversionary interest if an individual who is a measuring life dies or is terminally ill at the time the gift is completed.
For purposes of this rule, an individual who is known to have an incurable illness or other deteriorating physical condition is considered terminally ill if there is at least a 50% probability that the individual will die within one year. Reg. 25.7520-3(b)(3) further provides that if the individual survives for 18 months or longer after the date the gift is completed, the individual is presumed to have not been terminally ill at the date the gift was completed unless the contrary is established by clear and convincing evidence. If the IRS mortality tables are not to be used in valuing an interest under Section 7520 because an individual is considered to be terminally ill, Reg. 25.7520-3(b)(4) provides that the value of the interest is to be determined taking into account the individual’s actual life expectancy.14

The test established by Reg. 25.7520-3(b)(3) affords significant planning opportunities when an individual is afflicted with an illness that shortens life expectancy, but there is less than a 50% probability that the individual’s death will occur within one year. If the 50% test of Reg. 25.7520-3(b)(3) is met, the IRS mortality tables under Section 7520 are binding even if the individual’s actual life expectancy is, concededly, substantially shorter than predicted by those tables. It is conclusively presumed that an individual will survive for his or her life expectancy under the tables even though that may actually be highly unlikely. Even when an early death is virtually certain, satisfying the 50% test of Reg. 25.7520-3(b)(3) is frequently possible.

**Kite.** Estate of Kite15 involves a sale of assets in exchange for an annuity. The sale transaction did not involve a trust, but illustrates how sales based on an individual’s life can be structured under the 50% test of Reg. 25.7520-3(b)(3) to produce substantial estate tax savings.

In Kite, the decedent, through her revocable trust, sold her entire interest in a general partnership to her three children in exchange for three separate private annuities. Under the terms of sale, the payment of the annuity obligations was not to commence for 10 years. The decedent died approximately three years after entering into the transaction without having received a single payment.

Prior to entering into the annuity transaction, the decedent’s children met with the family’s attorney who described the proposed transaction to them. They were advised that if their mother died within the ten-year period, their obligation to make any annuity payments would terminate. If their mother survived the ten-year deferral period, then they would be liable for the annuity payments. The children were advised that, based on their own net worth without considering the assets they purchased from their mother, they could be insolvent after the first three years of annuity payments.

The IRS argued that it was improper to use the IRS actuarial tables in valuing the 10-year deferred annuities because the decedent’s deteriorating health at the time the transaction was entered into made her death within 10 years foreseeable. At trial, testimony was given that the decedent’s health was failing, but no evidence was produced that the decedent was terminally ill. At the time of the transaction, the decedent received a letter from her treating physician indicating that she had at least a 50% probability of surviving 18 months or longer. The IRS did not challenge this opinion at trial.

The court rejected the IRS’s argument that the decedent’s death was foreseeable from her actual health and the medical costs she was incurring at the time she entered into the annuity transactions. The court held that increased medical costs do not prove a terminable interest under Section 7520. The court also rejected the IRS’s argument that the annuity transaction was illusory. The court found that the decedent and her children had intended to be bound by their obligations under the annuity agreements. The court noted that the decedent had access to other assets to maintain her lifestyle after the sales and also pointed out that the decedent could have increased medical costs do not prove a terminable interest under Section 7520. The court also rejected the IRS’s argument that the annuity transaction was illusory. The court found that the decedent and her children had intended to be bound by their obligations under the annuity agreements. The court noted that the decedent had access to other assets to maintain her lifestyle after the sales and also pointed out that the decedent could have made a substantial profit on the transaction had she survived to receive annuity payments.

**The exhaustion test.** The premium that shores up the value of annuity payments conditioned on survivorship has a significant impact on the sale for a lifetime annuity. Reg. 25.7520-3(b)(2)(i) provides that a standard Section 7520 factor may not be used to determine the present value of an annuity for a specified term of years or the life of one or more individuals unless the effect of the trust, will or other governing instrument is to ensure that the annuity will be paid for the entire defined period. This, in essence, is the exhaustion test. The annuity is not considered payable for the entire defined period if, considering the applicable Section 7520 interest rate on the valuation date of the transfer, the annuity is expected to exhaust the fund before the last possible annuity payment is made in full. When an individual’s life is used to measure the term of the annuity payments, the determination of whether the annuity is expected to exhaust the fund is to be made under the assumption that the individual could survive until the age of 110 years.
If the provisions for the annuity do not satisfy the exhaustion test, Reg. 25.7520-3(b)(2)(i) requires a special factor to be calculated for use in valuing the annuity. The special factor is calculated in the manner outlined in Reg. 25.7520-3(b)(2)(v), Example 5.

Some commentators have asserted that Reg. 25.7520-3(b)(2)(i) is invalid because of the assumption in the Regulation that the individual whose life is used to establish the term of the annuity will live until age 110. According to these commentators, this is an unreasonable assumption.

The calculations prescribed by Reg. 7520-3(b)(2)(v), Example 5 are based on assumptions that are standard in the use of IRS tables under Section 7520. It is assumed that the assets in the trust produce a net return equal to the applicable Section 7520 interest rate and that the assets of the trust do not appreciate or depreciate in value. Based on those assumptions, a projection is made as to when the trust will run out of funds. Under the exhaustion test, the time for making annuity payments cannot be assumed to extend beyond the time that the computations project the trust to be exhausted.

From this viewpoint, the exhaustion test as promulgated by Reg. 25.7520-3(b)(2)(i) and Reg. 25.7520-3(b)(2)(v), Example 5 appears quite reasonable. Section 7520(a) provides that the value of any annuity shall be determined under tables prescribed by the Secretary. Section 7520(b) provides that Section 7520 applies for purposes of any provisions specified in the Regulations. Because Congress has delegated authority to fill in gaps in Section 7520, the Regulations under that statute are legislative regulations which are given controlling weight unless arbitrary, capricious or manifestly contrary to the statute. Courts are unlikely to find Reg. 25.7520-3(b)(2)(i) and Reg. 25.7520-3(b)(2)(v), Example 5 to be invalid.

Self-cancelling installment note (SCIN)

The SCIN is another device that might be used when the seller's life expectancy is shortened by illness. A SCIN generally takes the form of an ordinary installment note which provides for periodic payments at specified intervals (e.g., annually, semi-annually, quarterly or even monthly). Unlike an ordinary installment note, which remains due if the seller dies, a SCIN provides that the obligation to make further payments ceases at the seller's death. Any outstanding obligation canceled at the seller's death is not included in the seller's gross estate. The balance due on the SCIN at the seller's death escapes federal estate tax.

Many of the considerations that arise with the use of an annuity for life payable by an IDIT also arise with the use of a SCIN. As discussed below, the issuance of CCA 201330033 and the arguments made by the IRS in the case of Estate of Davidson raise the question as to whether the annuity for life should be preferred over the SCIN.

Avoiding Sections 2036(a)(1) and 2702

If the sale is to be successful, the seller cannot retain any interest in the assets being sold that is subject to tax under Section 2036(a)(1) or 2702.

The statutes. Section 2036(a)(1) includes in a transferor's gross estate any transfer (other than a bona fide sale for an adequate and full consideration in money or money's worth) under which the transferor has retained, for life or for any period not ascertainable without reference to the transferor's death or for any period that does not in fact end before the transferor's death, the possession or enjoyment of, or right to income from, the transferrer property. Section 2702 governs the value for federal gift tax purposes of a transfer to a trust to (or for the benefit of) a member of the transferor's family. Under Section 2702, the value of any interest in the trust retained by the transferor is zero unless the retained interest is a qualified annuity, unitrust interest or a noncontingent remainder interest in which all other interests are qualified annuity or unitrust interests. Grantor retained annuity trusts (GRATs) and qualified personal residence trusts (QPRTs) are planning techniques designed to qualify under Section 2702.

If a sale to an IDIT in exchange for a promissory note produces estate tax inclusion under Section 2036(a)(1), it also likely produces gift tax consequences under Section 2702. Those consequences are likely to be severe, because the applicability of Section 2702 is likely to cause the promissory note to be assigned a value of zero, resulting in the value of assets transferred to the IDIT in the sale being exposed to gift tax with no reduction due to the promissory note.
**Fidelity-Philadelphia Trust Co.** It is easy to comprehend how a sale to an IDIT in exchange for payments from the IDIT over time might be treated as a Section 2036(a)(1) transfer. Payments by the IDIT, including, specifically, any interest on deferred payments, are payable from income generated by the property sold to the IDIT. In Fidelity-Philadelphia Trust Co. v. Smith, the U.S. Supreme Court enunciated the circumstances under which a sale in exchange for deferred payments is not to be treated as a transfer includable under Section 2036(a)(1). Under the tests enunciated by the Supreme Court, the size of payments on the promissory note must not be related to the income generated by the transferred property. Further, the debt created by the promissory note must be a personal obligation of the transferee and must not be chargeable solely to the transferred property.

In a standard sale to an IDIT transaction in exchange for the IDIT’s promissory note, the interest rate on the promissory note is determined in accordance with Sections 7872(e) and (f)(2), i.e., the applicable federal rate in effect under Section 1274(d) on the date the sale is effected. Use of the applicable federal rate satisfies the first test under the Fidelity-Philadelphia Trust Co. case, i.e., that payments under the promissory note must not be related to the income generated by the property sold to the IDIT.

In seeking to meet the second and third tests established by Fidelity-Philadelphia Trust Co. that the obligation on the promissory note must be a personal obligation of the transferee and not be chargeable solely to the property sold to the IDIT, practitioners generally use a cushion of at least 10% of the value of the property sold to the IDIT. This cushion comes from sources other than the sale, e.g., by the seller’s gift to the IDIT or beneficiary guarantees of the IDIT’s promissory note. The 10% figure is based on conversations Byrle Abbin had with IRS personnel in the process of obtaining Ltr. Rul. 9535026.

**Ltr. Ruls. 9535026 and 9251004.** The taxpayers in Ltr. Rul. 9535026 proposed to sell stock in a closely held corporation to separate trusts held for their benefit in exchange for promissory notes which would provide for payment of interest for a period of 20 years, with all principal under the note becoming due and payable on the expiration of the 20-year period. Interest on the note was sufficient so that the notes would not be considered below-market loans under Section 7872.

Citing Frazee, Ltr. Rul. 9535026 held that because the notes would bear interest at the rate prescribed by Section 7872, they would have a gift tax value equal to their face value. The ruling also held that if the fair market value of stock sold to a separate trust was equal to the face amount of the note received in exchange for such stock, the sale would not be a transfer subject to gift tax. This determination was conditioned on two assumptions:

1. No facts are presented which would indicate that the notes would not be paid according to their terms.
2. The separate trusts’ ability to pay the notes is not otherwise in doubt.

Ltr. Rul. 9535026 also held that Section 2702 would not apply to the sale.

Ltr. Rul. 9251004 is an earlier ruling in which the IRS held that a sale of closely held stock to an irrevocable trust in exchange for the trust’s promissory note was a transfer with a retained right to income from the transferred property causing the stock to be included in the decedent’s estate under Section 2036(a)(1). Ltr. Rul. 9251004 makes no reference to the U.S. Supreme Court’s decision in Fidelity-Philadelphia Trust Co. v. Smith.

**Trombetta**

As noted near the beginning of this report, four recent cases have affected the sale to an IDIT technique. Trombetta is the only one of those four cases in which the Tax Court issued an opinion. The Tax Court’s decision was unfavorable to the petitioner.

**Facts and results.** In Trombetta, the decedent transferred two highly leveraged rental properties to a trust she had established, the terms of which provided her with an annuity. The annuity was to continue for 180 months, which the decedent retained the power to reduce. The decedent remained personally liable on the debt after the rental properties were transferred into the trust.

Under the terms of the annuity trust, the decedent was to receive $75,000 for the first 12-month period of the annuity term with a 4% increase at the beginning of each successive 12-month period. If the income of the annuity trust exceeded the amounts due the decedent as annuity payments, the trustees could distribute the excess income to the decedent or accumulate it in the annuity trust. The trust instrument provided that the decedent intended her retained annuity in the trust to be a qualified interest under Section 2702(b)(1).

The decedent and three of her children were named as trustees of the annuity trust. The decedent retained 50% of the trustees’ voting rights, and the co-trustees split the remaining voting rights. The decedent’s three children who were acting as co-trustees each personally guaranteed payment of the annuity amounts due the decedent.
The annuity trust was prohibited from making any distributions to the decedent after the term of the annuity payments had expired. The annuity trust itself would terminate on the later to occur of the decedent’s death or the expiration of the annuity term. Upon termination, the annuity trust was to be distributed to the decedent’s children or grandchildren.

The decedent reported her transfer of the rental properties on a gift tax return, reducing the value of the gift by the value of her retained annuity interest. In subsequent years, the trust made payments of varying amounts to the decedent. During the term of the annuity payments, the decedent reduced that term from 180 to 156 months. The decedent died several months after the expiration of the shortened annuity term. At the decedent’s death, there was a balance due her resulting from the underpayment of annuity amounts. After the decedent’s death, the unpaid balance due the decedent was paid to the decedent’s estate, together with interest. The decedent’s children who were co-trustees never made any payments to the decedent under their guarantees.

The Tax Court held that because of the decedent’s retained interests in the rental properties, they were included in her gross estate under Section 2036(a)(1). The court held that Section 2036(a)(1) applied by virtue of Section 2035(a) because the decedent’s shortening of the annuity term was a transfer occurring within three years of her death.

The court rejected the estate’s argument that the decedent received adequate and full consideration for her transfer under the parenthetical exception in Section 2036 for bona fide sales. The court noted that the value of the annuity payments that the decedent reserved was less than the value of the rental properties that she transferred to the trust.

The court also noted that no bona fide sale, in terms of an arm’s-length transaction, had occurred. There was no meaningful negotiation or bargaining with the decedent’s co-trustees or beneficiaries of the trust. According to the court, the decedent, as sole beneficiary of the trust and the sole transferor, formed the transaction, funded the annuity trust and essentially stood on both sides of the transaction. The court found that there were no legitimate and significant nontax reasons for establishing the trust. It noted that the decedent transferred the properties into the annuity trust on the advice of her estate planning counselors and that her actions with respect to the trust were consistent with an estate plan rather than a legitimate business.

The estate argued that the decedent wished to reduce her responsibilities in the management of the rental properties. The court noted, however, that the trust agreement did not preclude the decedent from participating as a trustee in managing the properties and that the decedent had, in fact, continued in managing the properties after the trust was established. The court concluded that the decedent retained de facto control over the transferred properties and that, consequently, the decedent retained a Section 2036(a)(1) interest in the properties.

The court also noted that the trust instrument provided that income in excess of the annuity payments could be distributed to the decedent at the discretion of the trustees and that the decedent held 50% of the trustees’ vote. In addition, because the properties were conveyed to the annuity trust subject to the mortgages upon which the decedent remained liable, the court found that the decedent received an economic benefit when the trust made payments on the mortgages. According to the court, the decedent impliedly maintained the same enjoyment of the rental properties and their income stream as she had before she had transferred them into the trust.

The court rejected the estate’s argument that, under the Supreme Court’s decision in Fidelity-Philadelphia, the decedent retained an interest in the annuity and not in the rental properties. While noting that the decedent formally structured the transaction as an annuity obligation and did not calculate the annuity payments based on the trust’s income, her conduct showed that her transfer was more akin to a transfer with a retained interest than a sale for an annuity. Payments were made to her solely out of trust income. The court noted that the co-trustees were never called on to pay under their guarantees when income was insufficient to fund the annuity payments in full. The court held that the tests established by the Fidelity-Philadelphia case were not satisfied. According to the court, the amounts distributed to the decedent were based on the trust’s income and were derived solely from the property the decedent transferred to the trust.

**Commentators’ response to Trombetta.** The court’s technical analysis in Trombetta can be criticized. For example, it used implied powers which it found were retained by the decedent as a basis for its conclusions. Implied retained interests are a sufficient basis for inclusion under Section 2036(a)(1), but only ascertainable and enforceable powers cause inclusion under Section 2036(a)(2). The principal source of difficulty for the estate in Trombetta was the provision in the trust instrument authorizing the trustees to distribute excess income to the decedent. An implied understanding between the decedent and her children acting as trustees was sufficient to cause inclusion under Section 2036(a)(1). At a minimum, the court’s litany of other justifications in its decision is unnecessary.
There has been a good deal of commentary on the Trombetta decision. Commentators have recommended steps to consider in structuring sale to IDIT transactions. In addition to taking steps designed to satisfy the tests of Fidelity-Philadelphia Trust Co., the suggestions include the following:

1. The IDIT should have an independent trustee, not the seller or the seller’s spouse. The seller should also not possess any direct or indirect decision-making authority with respect to the IDIT.
2. To the extent possible, have the purchasing IDIT funded with assets, the transfer of which is “old and cold.” If there is no “old and cold” trust, gifts of “seed capital” should be effected earlier in time than the sale, perhaps in a different tax year, to avoid aggregation with the sale.
3. If an interest in a closely held business is being sold to the IDIT, the seller should dispose of any voting interest in the business and should resign as an officer, director or manager of the business.
4. Have arm’s-length negotiations to arrive at the purchase price and other terms of sale, with the trustee of the IDIT and its beneficiaries being represented by separate counsel.

Comments on recommendations. Many of the recommendations are a response to the observations made in the Trombetta opinion. One objective of the commentators’ recommendations is to eliminate, except for the IDIT’s promissory note, any interaction between the seller and the assets that the seller has conveyed to the IDIT. The concern is that any interaction might cause the IRS to ignore the sale and assert that the assets conveyed to the IDIT are to be included in the seller’s gross estate. Uncertainty exists on the extent to which interaction must cease because, unlike with the GRAT, the IRS has issued no regulations or other rules governing how a sale to an IDIT transaction is to be structured.

Many clients will find at least some of the recommendations unpalatable. For example, most business owners will balk at the suggestion that they should surrender control of a business when they are selling interests in the business to an IDIT. Many clients will be discouraged by the prospect of having independent counsel represent the IDIT and its beneficiaries and that the sales price for the assets sold to the IDIT is to be arrived at through arm’s-length negotiations. Many sellers also prefer to be trustee of the IDIT. A question arises as to whether the failure to follow some or all of the recommendations will cause a sale to an IDIT transaction to fail.

Seller as trustee. So long as a trust does not contain stock described in Section 2036(b)(2) or insurance on the grantor’s life that could be included in the grantor’s estate under Section 2042, a grantor of a trust can serve as trustee of that trust without causing the assets of the trust to be included in the grantor’s estate. Administrative powers, such as the power to invest and the power to allocate receipts and disbursements between income and principal, do not cause estate tax inclusion under Section 2036(a)(2) or Section 2038(a)(1), so long as the powers are not overbroad and are subject to judicially enforceable limitations.

A power retained by the grantor of a trust to distribute income or principal to beneficiaries does not cause inclusion if the power is limited by a definite external standard. Cases have held Sections 2036(a)(2) and 2038(a)(1) inapplicable when grantors have retained the right to distribute assets to provide for “illness,” “infirmity,” “disability,” “sickness,” “accident” or other “emergency” affecting a trust beneficiary and also to provide for a beneficiary’s “health,” “support,” “maintenance,” “welfare,” “happiness” and “comfort.”

Although the IRS contends otherwise, it appears that the definite external standard that will accomplish exclusion under Sections 2036(a)(2) and 2038(a)(1) is less restrictive than the ascertainable standard described in Section 2041(b)(1)(A). The safest rule to follow, however, is to use only the ascertainable standard set forth in Section 2041(b)(1)(A) to avoid an argument with the IRS.

Even if a grantor has retained no beneficial interest in the IDIT, the ability given creditors under state law to reach the trust to satisfy the grantor’s legal obligation to support a beneficiary of the trust may cause the trust to be included in the grantor’s estate. If the grantor as trustee has discretion to satisfy legal support obligations out of the trust, the trust is included in the grantor’s estate. If the grantor is to act as a trustee, the governing instrument should expressly preclude the grantor from making use of trust assets to satisfy the grantor’s legal support obligations.

Despite the authorities cited in notes 29 and 30, many practitioners hesitate to name the grantor as a trustee of an irrevocable trust that is designed to be excluded from the grantor’s gross estate. For example, in the Bisignano article cited in note 28, supra, the author, who is a well-known and highly regarded estate planning attorney, asserted that the more he researched the law on the point, the more convinced he became that there was little to fear in using self-trusteed trusts and that “self-trusteed trusts can indeed be successfully drafted so long as the draftsman is careful.” In spite of this conclusion, the author goes on to state that “third-party trustees should be the norm and self-trusteed trust the exception.” It is not clear why this should be the case. Mr. Bisignano gives no reasons in his article for this statement.
Given the general reluctance to name the grantor as trustee, as evidenced by the Bisignano article, it is not surprising that commentators have suggested that the seller should not act as trustee of the IDIT in a sale transaction. The Trombetta court’s statement that the decedent was on both sides of the transaction in that case increases their reluctance. Courts in other cases have described taxpayers as being on both sides of a transaction in reaching decisions adverse to the taxpayer. While Trombetta refers to the grantor of a trust being on both sides of the transaction, that fact was just one of a number of justifications that the court used in reaching its result. A trustee has fiduciary responsibilities. The existence of those responsibilities should preclude adverse results in a sale transaction in which the seller is the trustee of the IDIT so long as the transaction is otherwise structured properly.

A good illustration of this point is the case of Goodman. The decision in Goodman followed the Fifth Circuit’s affirmance of the Tax Court’s decision in Rushing. In Rushing, the seller sold corporate stock to a trust for the benefit of his children after the corporation had adopted a plan of liquidation. The stock was sold in exchange for the trust’s installment obligation. The IRS challenged the transaction, asserting that the taxpayer was not entitled to installment treatment and should be taxed immediately on the sale. The Fifth Circuit rejected the IRS argument and held that the taxpayer was entitled to installment treatment, emphasizing that the trust had a corporate trustee independent of the taxpayer.

In Goodman, the taxpayers sold apartments to trusts of which they were trustees for installment notes the day before the trusts sold the apartments to an unrelated party. The Tax Court rejected the IRS’s arguments that installment sale treatment should be denied. While distinguishing other cases involving taxpayers participating in transactions with themselves as trustees, the court stated that the fact that taxpayers were trustees was not the basis for the holdings in those cases. The court’s opinion contains the following:

> Considering our holdings in a number of other cases, we conclude that the fact that a seller of property is the trustee of the trusts to which the property is sold, standing alone, does not cause the same to lack substance or bona fides or the seller to constructively receive the income from the sale received by the trusts. The crucial factor is whether the trustee was acting solely as trustee and in the best interests of the trusts in making the purchase and sale of the property.

In our view, under the facts here present, [the taxpayers] did not have control over the proceeds of the sale or control over making the sale to Cathedral except in their capacity as trustees, which was a capacity distinct and apart from their capacity as individual sellers of the property.

**Seed capital.** The suggestions regarding the transfer of seed capital to the IDIT arise from concern that seed capital which is transferred to an IDIT as a part of a sale transaction may not constitute other assets under the test of Fidelity-Philadelphia Trust Co. Commentators having this concern point out that the transfer in Trombetta was a part gift/part sale occurring simultaneously and the court held Fidelity-Philadelphia Trust Co. inapplicable. Ltr. Rul. 9251004, discussed above, is also cited for the proposition that assets transferred to an IDIT as the gift portion of a part gift/part sale are not other assets under Fidelity-Philadelphia Trust Co.

A problem with this analysis is that the Trombetta opinion discusses Fidelity-Philadelphia Trust Co. in connection with the children’s guarantees, not their mother’s gift to the annuity trust. The court basically found the children’s guarantees to be illusory because they were never called upon by their mother. The Trombetta opinion does not discuss Fidelity-Philadelphia Trust Co. in connection with the decedent’s gift to the annuity trust. Similarly, it is difficult to see how Ltr. Rul. 9251004 can be viewed as authority for the proposition that assets gifted to an IDIT in a part gift/part sale transaction cannot serve as other assets under Fidelity-Philadelphia Trust Co. when the ruling itself makes no reference to that case.

Neither Trombetta nor Ltr. Rul. 9251004 should be viewed as authority for the proposition that assets gifted to an IDIT as a part of a sale cannot serve as other assets under Fidelity-Philadelphia Trust Co. This is especially true if the assets being sold and those being gifted are delineated in the tax documents.

Commentators who express concern about a gift occurring simultaneously with a sale qualifying as other assets prefer the use of an “old and cold” trust (i.e., a trust with assets that were clearly transferred into the trust independent of the sale). If there is no such trust, the commentators suggest delaying the sale for some time after the gift is made to the trust. If possible, it is suggested that the sale occur in a year different than the gift. As a practical matter, it is difficult to see how the passage of one year cures any problem if it is clear by the relatively small amount gifted to the new trust as compared to the sale that the gift and sale actually are a part of the same plan. If the gift and sale are truly related, it is not apparent why the passage of time has the effect of separating them from one another.
A guarantee by trust beneficiaries of at least 10% of the note is a method of avoiding the other assets issue. It has been suggested that a guarantee by trust beneficiaries might be a gift to the IDIT. The law is presently unclear as to when a gift upon a guarantee occurs. There is authority that a gift occurs when (and if) a payment is made on a guarantee, rather than when the guarantee is made. On the other hand, there is authority for the proposition that a gift occurs when the guarantee becomes binding and enforceable rather than when (and if) payment is made.

If the guarantor is treated as making an addition to the IDIT in giving the guarantee and if the IDIT confers beneficial interests on the guarantor, the portion of the IDIT attributable to such addition could be included in the guarantor’s estate under Section 2036(a)(1). In addition, the guarantor would be a transferor to the IDIT for purposes of Chapter 13. If a portion of the IDIT is includable in the guarantor’s estate under Section 2036(a)(1), then while he or she remains a beneficiary, the ETIP rules of Section 2642(f) would preclude allocation of the guarantor’s GST exemption to protect the IDIT from generation-skipping tax. If the guarantor is the seller’s spouse, the seller would not be able to allocate GST exemption to the IDIT because inclusion of a part of the IDIT in the spouse’s estate is ETIP for the seller.

Potential problems with respect to possible inclusion in the guarantor’s estate and ETIP can be solved by drafting. The trust instrument could provide that in no event is any distribution to be made to an individual out of any asset or portion of the IDIT treated for estate, gift or generation-skipping tax purposes as having been added to the IDIT by the individual. With such a provision, any transfer to the IDIT resulting from the guarantee would be a completed gift, but would not remain in the guarantor’s estate and would permit allocation of the guarantor’s GST exemption to the transfer (and the seller’s GST exemption if the guarantor is the seller’s spouse).

If the guarantor is considered to have made a gift to the IDIT by making the guarantee, it is also possible that the guarantor could be treated as a grantor for purposes of the grantor trust income tax rules under Sections 671, et seq. If the guarantor is treated as the grantor of part of the IDIT for income tax purposes, the IDIT would not be a wholly grantor trust and the sale of appreciated property by the grantor to the IDIT would have income tax consequences.

Although the possibility exists that a guarantor can be treated as having made an addition to the IDIT for purposes of the grantor trust rules, this should not be the case. The purpose of the grantor trust rules is to avoid the shifting of income from assets. In the case of the guarantee, there is no transfer of assets from the guarantor into the IDIT on which the guarantor was taxed prior to the transfer. The guarantee has no potential to shift income away from the guarantor. The guarantor should not be treated as the owner of any portion of the IDIT for income tax purposes. This should be an instance in which the treatment of a transfer is different for gift tax purposes than for income tax purposes.

Risk of the guarantor being treated as making an addition to the IDIT can be reduced by paying the guarantor a fee for the guarantee. The amount of guarantee fee needed to eliminate a gift is uncertain. Some practitioners use an annual guarantee fee of .5% or 1% of the amount guaranteed, payable annually, so long as the guarantee continues in effect. It should be possible to eliminate the guarantee and the necessity of paying a fee without unfavorable gift tax consequences if the value of the assets of the IDIT increases sufficiently to create the equivalent of a 10% cushion for the IDIT’s promissory note.

Another strategy to deal with a potential gift by a guarantor is for the guarantor to file a gift tax return. That return would disclose the guarantee and take the position that the guarantee is not a gift for federal gift tax purposes. If the statute of limitations runs on that return, it should preclude the IRS from asserting otherwise. A timely filed gift tax return can also be used to establish conclusively the value of property for purposes of allocating GST exemption.
Sales to Intentionally Defective Irrevocable Trusts

**Surrender all interests in business.** The suggestion that a seller of an interest in a closely held business should give up other interests in the business would seem unnecessary under the U.S. Supreme Court’s decision in Byrum.41 In Byrum, the decedent transferred stock in closely held corporations to an irrevocable trust for the benefit of his children, retaining the right to vote the transferred stock. The right to vote the transferred stock, together with other stock owned by the decedent, gave the decedent a majority vote in each corporation. The Supreme Court held that the decedent’s retention of the right to vote was not a retention of the enjoyment of the transferred stock within the meaning of Section 2036(a)(1). The court also held that the decedent’s retention of the right to vote the stock was not an ascertainable and legally enforceable power to control the corporations necessary to bring about inclusion under Section 2036(a)(2).42 The court held that the decedent’s ability to continue to control the payment of dividends from the corporations, by virtue of his power to vote, was not sufficient control to cause the transferred stock to be included in the decedent’s estate under Section 2036(a)(2).

Byrum seems to have settled the indirect control concerns expressed by the commentators who suggest that a seller of interests in a business to an IDIT should break off all contact with the business. Under Byrum, the powers to run a business are not those that generate inclusion under Section 2036(a)(2).

**Arm’s-length transaction.** Commentators’ suggestions about arm’s-length negotiations and separate counsel are intended to structure a sale to an IDIT transaction as an arm’s-length transaction. Courts review intrafamily transactions with special scrutiny. This does not mean, however, that a sale to an IDIT will be recognized only if it is an arm’s-length transaction.

In Turner43 (appellate decision of Estate of Thompson), the Third Circuit held that the assets which a decedent had transferred into a limited partnership were includable in the decedent’s estate under Section 2036(a)(1). In addressing the parenthetical exception to the application of that statute for a “bona fide sale for an adequate and full consideration,” the court’s opinion contains an extensive discussion of intrafamily and arm’s-length transactions:

> The Commissioner argues that there was no “bona fide sale” in this case because decedent “stood on both sides of the transaction” as transferor and a limited partner to the family partnerships. The Commissioner’s position is supported by several cases which have concluded that a “bona fide sale” requires an arm’s length bargain. See, e.g., Bank of New York v. United States, 526 F.2d 1012, 1016 (3d Cir. 1975) ("[T] he value of the claim settled by the estate may not be deducted if the agreement on which the claim was based was not bargained at arm’s length."); Harper, 83 T.C.M. at 1653 (denying the §2036 exception, in part, where there was no "arm’s length bargaining because decedent “stood on both sides of the transaction”"); Strangi, 85 T.C.M. at 1343 (finding no bona fide sale where “decedent essentially stood on both sides of the transaction”). As a practical matter, an “arm’s length” transaction provides good evidence of a “bona fide sale,” especially with intrafamily transactions …

That said, however, neither the Internal Revenue Code nor the governing Treasury Regulations define “bona fide sale” to include an “arm’s length transaction.” Treasury Regulation 20.2036-1(a) defines “bona fide sale for adequate and full consideration” as a transfer made “in good faith” and for a price that is “adequate and full equivalent reducible to a money value.” 26 C.F.R. §20.2036-1(a) (referring to 26 C.F.R. §20.2043-1(a)). Based in part on an interpretation of this regulation, the Court of Appeals for the Fifth Circuit concluded a “bona fide sale” only requires “a sale in which the decedent/transferor actually parted with her interest in the assets transferred and the partnership/transferee actually parted with the partnership interest issued in exchange.” See Kimbell, 371 F.3d at 265. The court reasoned:

> [J]ust because a transaction takes place between family members does not impose an additional requirement not set forth in the statute to establish that it is bona fide. A transaction that is a bona fide sale between strangers must also be bona fide between members of the same family. In addition, the absence of negotiations between family members over price or terms in not a compelling factor in the determination … particularly when the exchange value is set by objective factors.

Id. at 263 (discussing Wheeler, 116 F.3d 749 (internal citations omitted).

We similarly believe a “bona fide sale” does not necessarily require an “arm’s length transaction” between the transferor and an unrelated third-party. Of course, evidence of an “arm’s length transaction” or “bargained-for exchange” is highly probative to the §2036 inquiry. But we see no statutory basis for adopting an interpretation of “bona fide sale” that would automatically defeat the §2036 exception for all intra-family transfers. Wheeler, 116 F.3d at 655 ("Unless and until the Congress declares that intrafamily transfers are to be treated differently ... we must rely on the objective criteria set forth in the statute and Treasury Regulations to determine whether a sale comes within the ambit of the exception to section 2036(a).”).
We are mindful of the mischief that may arise in the family estate planning context. As the Supreme Court observed, “the family relationship often makes it possible for one to shift tax incidence by surface changes of ownership without disturbing in the least his dominion and control over the subject of the gift or the purposes for which the income from the property is used.” Comm’r v. Culbertson, 337 U.S. 733, 649, 69 S.Ct. 1210, 93 L.Ed. 1659 (1949). But such mischief can be adequately monitored by heightened scrutiny of intra-family transfers and does not require a uniform prohibition on transfers to family limited partnerships. See id. (“[T]he existence of the family relationship does not create a status which itself determines tax questions, but is simply a warning that things may not be what they seem.”); Kimbell, 371 F.3d at 265 (“When the transaction is between family members, it is subject to heightened scrutiny.”)

The Woelbing Cases

In the Woelbing cases, the IRS asserted the applicability of Section 2702 to a sale of non-voting stock of a closely held corporation by Mr. Woelbing to an IDIT in exchange for the IDIT’s promissory note. The Woelblings were husband and wife. They both consented under Section 2513 to treat any gift on the sale as having been made one-half by each of them. The IRS also asserted that the assets sold to the IDIT by Mr. Woelbing should be included in his federal gross estate under Section 2036 and 2038. In the Woelbing cases, the IRS claimed that the stock sold to the IDIT had a value of $116.8 million on the date of sale, rather than the $59 million established as the purchase price in the sale transaction documents.

The Woelbing cases involve facts that are similar to those in Karmazin. Karmazin was a case filed in the Tax Court involving an asserted gift tax deficiency arising out of sales to IDITs. In Karmazin, the taxpayer sold limited partnership interests to two IDITs in exchange for the IDITs’ promissory notes. The notes bore interest at the applicable federal rate. The taxpayer made gifts of limited partnership interests affording a 10% cushion. The sales documents provided for the sale of limited partnership interests having a value equal to a fixed dollar amount, which amount equaled the face amount of the promissory notes given by the IDITs in the sale transactions. A discount of 42% was claimed on the gift tax return reporting the sale.

The case was settled on terms very favorable to the taxpayer. In the settlement, it was agreed that Section 2702 did not apply. The sales were recognized and it was agreed that the promissory notes had gift values equal to their face amounts. The discount produced by the limited partnership was agreed to be 37%, rather than the 42% claimed. Thus, the deficiency originally asserted by the gift tax examiner was reduced by 95%. These settlement terms were so favorable to the taxpayer that one commentary concluded that the IRS “was not serious” about its Section 2702 contentions.

The Woelbing cases have been settled. From the stipulated decisions entered in both cases in March 2016, it is clear that the IRS abandoned its Sections 2036, 2038 and 2702 arguments in those cases. Practitioners who did not cease recommending the sale to IDIT technique to their clients while the Woelbing cases were pending should feel some vindication.

Use of a SCIN — the Davidson case

A SCIN is structurally similar to an annuity based on an individual’s life. A question arises as to whether the 50% test of Reg. 25.7520-3(b)(2) applies to a SCIN as it does to an annuity based on a life. The answer to this question is uncertain.

Section 7520(b) provides that Section 7520 is not to apply for purposes of Part I of Subchapter D of Chapter 1 or any other provision specified in regulations. Reg. 25.7520-3(a)(7) provides that Section 7520 does not apply for purposes of Section 7872.

The extent to which Reg. 25.7520-3(a)(7) precludes application of Section 7520 to Section 7872 is not clear. The intent of Reg. 25.7520-3(a)(7) might be only to emphasize that the interest rate under Section 7520 is not to apply to Section 7872 transactions and that Reg. 25.7520-3(a)(7) does not preclude use of the actuarial tables under Section 7520 to sales in which the interest rate is determined under Section 7872. However, the language of Reg. 25.7520-3(a)(7) is not so limited. Reg. 25.7520-3(a)(7) can be construed as making the actuarial tables under Section 7520 and the 50% test of Reg. 25.7520-3(b)(2)(i) inapplicable to a sale to an IDIT transaction in which the interest on the promissory note bears interest at the rate specified under Section 7872.

An advantage to the 50% test under Section 25.7520-3(b)(2)(i) is that if the seller satisfies the 50% test, the IRS is bound to use the actuarial tables under Section 7520 in determining the seller’s life expectancy, even if it is conceded that the seller’s actual life expectancy is substantially shorter than predicted by the tables. To avoid possible application of Reg. 25.7520-3(a)(7), it would seem that the interest rate prescribed by Section 7520 should be used with a SCIN in a case in which the 50% test of Reg. 25.7520-3(b)(2)(i) is important. The SCINs in Davidson, discussed below, bore interest at the Section 7520 rate.
The IRS’s official position appears to be that even if an interest rate under Section 7520 is used, Section 7520 does not apply to a SCIN for the reason that a SCIN is a promissory note and not an annuity, interest for life or a term of years or a remainder or a reversion. See CCA 201330033, which was issued in connection with the Davidson case.

The Tax Court pleadings in the Davidson case reveal that William Davidson was the President, Chairman and Chief Executive Officer of Guardian Industries Corp. and a former owner of the Detroit Pistons. In December 2008 and January 2009, at the age of 86, he entered into multiple gift and sale transactions, including two large sales for SCINs. Shortly after the transactions, he was diagnosed with a terminal illness and died on 3/13/2009, before receiving any payment on the SCINs. In the notice of deficiency, the IRS asserted gift, estate and generation-skipping tax deficiencies in excess of $2.8 billion.

An important issue in the case is whether the SCINs were valid consideration for the sales. According to the IRS mortality tables under Section 7520, the decedent’s life expectancy was 5.8 years at the time of the transaction. The decedent’s physician wrote a letter on 10/20/2008 indicating that the decedent maintained an active exercise schedule and was working. The physician expressed the view that the decedent was in good health commensurate with his age group and participated in a healthy lifestyle, exercise regimens and activities that required keen mental rigor. The physician wrote a similar letter on 12/16/2008. Four medical consultants, two of whom were selected by the estate and two of whom were selected by the IRS, expressed the view that in January 2009 the decedent had greater than a 50% probability of living at least one year.

The IRS’s position in the Davidson case is expressed in CCA 201330033, as follows:

We do not believe that the §7520 tables apply to value the notes in this situation. By its terms, §7520 applies only to value an annuity, any interest for life or term of years or any remainder. In the case at hand, the items that must be valued are the notes that decedent received in exchange for the stock that he sold to the grantor trusts. These notes should be valued based on a method that takes into account the willing-buyer willing-seller standard in §25.2512-8. In this regard, the decedent’s life expectancy, taking into consideration decedent’s medical history on the date of the gift, should be taken into account. I.R.S. Gen. Couns. Mem. 39503 (May 7, 1986)

The case has been settled. On 7/6/2015, the Tax Court entered a stipulated decision with the IRS agreeing to a total $152 million increase in the estate’s combined gift, estate and generation-skipping tax liability. Given the settlement of Davidson, it remains uncertain whether the rules of Section 7520 can be applied to a SCIN. This uncertainty is frequently of critical importance.

If the tables apply, an estate need demonstrate only that a decedent had greater than a 50% probability of living more than one year in order to be able to take advantage of the conclusive presumption of life expectancy established by Reg. 25.7520-3(b)(3). If the tables do not apply, this conclusive presumption is not available and the decedent’s actual life expectancy is used. If a decedent is ill at the time of the sale, use of the decedent’s actual life expectancy could significantly reduce the value of the SCIN and result in a substantial gift.

Because the payments for an annuity can be structured in a way that is very similar to a promissory note or SCIN, there would seem to be no reason from a nontax viewpoint to favor one over the other. Given the IRS’s position that a SCIN does not qualify for the 50% test under Reg. 25.7520-3(b)(3), it would seem that practitioners contemplating sale transactions terminating at death should choose an annuity over a SCIN, at least until the law on this issue is clarified.

Conclusion

This report has sought to demonstrate that the sale to an IDIT is a valid strategy that will be recognized as a sale, as opposed to a transfer with a Section 2036(a)(1) or 2702(a) retained interest if the rules established by Fidelity-Philadelphia Trust Co. are observed. It has also sought to demonstrate that the sale can be successful without being burdened by the restrictions referred to in the report. The sale to an IDIT arrangement is a user-friendly, effective planning strategy that can be remarkably successful.
Endnotes

1 Mulligan, “Fifteen Years of Sales to IDITs-Where Are We Now?” 35 ACTEC J. 227 (Winter 2009).
2 TC Memo 2013-234.
3 Docket Nos. 30260-13 and 30267-13, respectively.
7 Regs. 671-4(b)(2)(i)(A) and 301.6109-1(a)(2)(i)(B).
8 Frazee, 98 TC 554 (1992); Estate of True, TC Memo 2001-167, aff’d on other grounds 390 F.3d 1210 94 AFTR2d 2004-7039 (CA-10, 2004). See also Ltr. Ruls. 9408018 and 9535026.
9 For an article advocating abolition of the grantor trust rules to foreclose this kind of planning see Rics, “Dig It, But Congress Shouldn’t Let Me: Closing the IDIT Loophole,” 36 ACTEC L. J. 641 (2010).
13 A private annuity has been described as the most talked about but least frequently used strategy in estate planning. Cooper, “A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance,” 77 Columbia L. Rev. 2 (March 1977).
14 See also Regs. 1.7520-3(b)(3) and 20.7520-3(b)(3) and the Examples at Regs. 1.7520-3(b)(4), 20.7520-3(b)(4) and 25.7520-3(b)(4).
15 TC Memo 2013-43.
18 For an excellent discussion of this issue and the exhaustion test generally, see McGrath, “Private Annuity Sales and the Exhaustion Test,” 31 T.M. Est., Gifts and Tr. J. 167 (July/August 2006).
21 Id.; see also Rev. Rul. 77-193, 1977-1 CB 273.
24 See also Ltr. Rul. 9436006.
25 Gans and Blattmaier, “Private Annuities and Installment Sales: Trombetta and Section 2036,“ 120 J. Tax’n 227 (May 2014).
26 Byrum, 408 U.S. 125 30 AFTR2d 71-5811 (1972). Section 2036(a)(2) includes transfers with respect to which the transferor has retained the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the transferred property or the income therefrom. Although Byrum was legislatively overruled by the enactment of Section 2036(b), the decision remains “good law” to the extent not expressly modified by that statute. Rev. Rul. 81-15, 1981-1 CB 457; Daniels, TCM 1994-591.
28 Bisignano, “When the Only One You Trust is Yourself-Drafting and Planning With Self-Trusteed Irrevocable Nongrantor Trusts,” State Bar of Texas-Advanced Drafting: Estate Planning and Probate Course (October 2006).
32 See, e.g., Bixby, 58 TC 757 (1972).
33 74 TC 684 (1980).
34 441 F.2d 593 27 AFTR2d 71-1139 (CA-5, 1971), aff’d 52 TC 888 (1969).
35 Note that the decision in Rushing and its progeny led to the enactment of Section 452(e) that disallows installment treatment in sales to a related party if the buyer disposes of the purchased property within two years.
37 Covey, supra note 36.
38 Section 2642(f)(4).
39 Sections 2001(f), 2504(c) and 6501(c)(9).
40 Section 2642(b)(1).
41 408 U.S. 125 30 AFTR2d 72-5811 (1972).
42 See the discussion on the continuing validity of Byrum in note 26, supra.
44 Tax Ct. Docket No. 2127-03.
47 See also Regs. 1.7520-3(a)(7) and 20.7520-3(a)(7).
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