new york state society of
NYSSCPA
certified public accountants

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May 16, 2008

Internal Revenue Service
CC:PA:LPD:PR (Notice 2008-32)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

By e-mail: Notice.Comments@irscounsel.treas.gov

Re: Proposed Regulation §1.67-4, Notice 2008-32, *Costs Paid or Incurred by Estates and Non-Grantor Trusts*

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. 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 for costs paid or incurred by estate and non-grantor trusts 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,

David A. Lifson
President

Attachment

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COMMENTS ON IRS PROPOSED REGULATION §1.67-4 AND NOTICE 2008-32 COSTS PAID OR INCURRED BY ESTATES AND NON-GRANTOR TRUSTS

May 16, 2008

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NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS

Trust and Estate Administration Committee

Comments on IRS Proposed Regulation §1.67-4 and IRS Notice 2008-32

Costs Paid or Incurred by Estates and Non-Grantor Trusts

Overview

The Internal Revenue Service has issued proposed regulation §1.67-4 (published in the Federal Register on July 27, 2007: REG-128224-06) addressing costs paid or incurred by estates and non-grantor trusts. The proposed regulation details when expenses are subject to the 2-percent floor. Notice 2008-32, I.R.B 2008-11, February 27, 2008, provides interim guidance on the same subject.

IRC §67 addresses the 2-percent floor on miscellaneous itemized deductions and IRC §67(e) defines the applicability for estates and trusts. Under §67(e)(1) "the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which **would** [emphasis added] not have been incurred if the property were not held in such trust or estate shall be treated as allowable in arriving at adjusted gross income." These expenses are not subject to the 2-percent floor.

Under the proposed regulation §1.67-4(a), "to the extent that a cost incurred by an estate or non-grantor trust is unique to such an entity, that cost is not subject to the 2-percent floor on miscellaneous itemized deductions. To the extent that a cost included in the definition of miscellaneous itemized deductions and incurred by an estate or non-grantor trust is not unique to such an entity, that cost is subject to the 2-percent floor." Proposed regulation §1.67-4(b) states "a cost is unique to an estate or a non-grantor trust if an individual **could** [emphasis added] not have incurred that cost in connection with property not held in an estate or trust." Under §1.67-4(c) the proposed regulation discusses bundled fees which involve the estate or non grantor trust paying a single fee that includes costs that are unique as well as costs that are not unique. The proposed regulation indicates that such bundled expenses will need to be allocated between expenses not subject to the 2-percent floor and those expenses subject to the 2-percent floor.

After the proposed regulation was issued, the Supreme Court of the United States issued its decision in Michael J. Knight, Trustee of William L. Rudkin Testamentary Trust v. Commissioner (128 S.Ct 782, (2008)). The Supreme Court interpreted IRC §67(e)(1) as providing an exception to the 2-percent for costs that would “be uncommon (or unusual or unlikely) for a hypothetical individual to incur.” The Court held that in the Knight case costs paid to the investment advisor by the trust were subject to the 2-percent floor for miscellaneous itemized deductions because these costs did not meet the criteria in this case of being uncommon or unusual, or unlikely for an individual to incur. The Court went on to say that in other situations, investment advisory fees might be fully deductible.

Notice 2008-32 was issued to provide interim guidance on the subject. The Notice states that the IRS and the Treasury Department will issue final regulations that are consistent with the Supreme Court’s holding in the Knight case.

Comments

The proposed regulation is inconsistent with IRC §67(e) and with the Knight case. The code section and the Supreme Court decision refer to costs that **would** [emphasis added] not have been incurred if the property were not held in such trust or estate. The proposed regulation expands the meaning of the word “would” to refer to costs which are “unique” to an estate or trust and further defines unique as costs that “could” not have been incurred if the entity were not an estate or trust. The words “would” and “could” are not synonymous. By changing the verbiage, the proposed regulation excludes expenses that would be appropriate to a non-grantor trust or estate in a given situation (although not to an individual because such expenses are incurred by individuals in other situations). The proposed regulation is more restrictive than the current Code and the Knight decision. In order to be consistent with the Code and with the recent Supreme Court decision, the word “**could**” ought not be used to replace the word **would.**

Notice 2008-32 requests comments on whether safe harbors would be helpful. In particular, the IRS and the Treasury Department request reasonable estimates of the percentage(s) of total costs of administering a non-grantor trust or estate that is/are attributable to costs subject to the 2-percent floor and whether safe harbors should reflect the value of the assets and/or the number of beneficiaries. We believe the Code Section and the Supreme Court case provide some guidance for taxpayers to determine whether or not the administrative expenses are subject to the 2-percent limitation. However, we realize that corporate trustees provide services that involve many departments and individuals. The allocation of those services between deductions that are subject to the 2-percent floor and those that are not may not be feasible either because of cost or technological constraints. Accordingly we think that safe harbors will be helpful to avoid the expensive and burdensome task of unbundling trustee fees in those circumstances where allocating is not practicable.

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