ACTEC
THE AMERICAN COLLEGE OF
TRUST AND ESTATE COUNSEL

McPherson Building
901 15th Street, NW, Suite 525
Washington, DC 20005
(202) 684-8460 • Fax (202) 684-8459
actec.org

Please Address Reply to:

Executive Director
DEBORAH O. MCKINNON

May 26, 2021

Internal Revenue Service CC:PA:LPD:PR (Notice 2021-28) Room 5203
Post Office Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted electronically at www.regulations.gov

Re: Recommendations for 2021-2022 Priority Guidance Plan (Notice 2021-28)

Dear Ladies and Gentlemen,

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit recommendations pursuant to Notice 2021-28, 2021-18 I.R.B. 1130, published April 14, 2021, which invites recommendations for items that should be included on the 2021-2022 Priority Guidance Plan.

ACTEC is a professional organization of approximately 2,400 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of estate and generation-skipping transfer taxes and business succession planning. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

As set forth in the attached comments, ACTEC' recommends two items:

1. A Proposal to Amend Treasury Regulation Section 25.6081-1 to Add an Extension for "Good Cause" for Filing Gift Tax Returns Similar to the Existing Rule for Estate Tax Returns.

2. A Proposal for a Revenue Ruling or Other Guidance to Address Powell and Similar Cases in Order to Avoid Double Inclusion in the Estate under Section 2036.

If you would like to discuss these recommendations, please contact the primary drafters identified in each attachment; or Beth Kaufman, Chair of the Tax Policy Study Committee, at 202.862.5062 or bkaufman@capdale.com; or Deborah O. McKinnon, ACTEC Executive Director, at 202.684.8460 or domckinnon@actec.org.

Respectfully submitted,

Ann B. Burns, President

Attachments:
1. A Proposal to Amend Treasury Regulation Section 25.6081-1 to Add an Extension for "Good Cause" for Filing Gift Tax Returns Similar to the Existing Rule for Estate Tax Returns.
2. A Proposal for a Revenue Ruling or Other Guidance to Address Powell and Similar Cases in Order to Avoid Double Inclusion in the Estate under Section 2036.

A Proposal to Amend Treasury Regulation Section 25.6081-1 to Add an Extension for "Good Cause" for Filing Gift Tax ReturnsSimilar to the Existing Rule for Estate Tax Returns

The American College of Trust and Estate Counsel ("ACTEC") hereby submits a proposal to amend Treasury Regulation Section 25.6081-1 to allow an extension of time for filing a gift tax return to be based on a showing of "good cause" in the same manner as now provided in Treasury Regulation Section 20.6081-1(c) for extensions to file estate tax returns. For gift tax returns the only extension now allowed is the automatic 6-month extension of time, which must be requested before the statutory deadline for filing the return. We submit that adding such a good cause exception to the gift tax regulation promotes the fair and equitable administration of the tax system, as such a provision does now for estate tax returns.

Treasury Regulation Section 20.6081-1(c) Concerning Estate Tax Returns

With respect to section 6081 of Internal Revenue Code,[1] which provides statutory guidance regarding extensions of time for filing tax returns, the Treasury Department has published fourteen Regulations (not including Temporary Regulations) with respect to various income tax returns for individuals and entities, as well as gift and estate tax returns. The associated estate tax regulation – Treasury Regulation Section 20.6081-1 – provides that, in addition to an automatic 6-month extension of time to file an estate tax return (the "Automatic Extension"), the Internal Revenue Service (the "Service") is granted the discretion to grant an extension of time to file if good and sufficient cause is shown (the "good cause exception"). In particular, this regulatory provision provides that an extension of time may be granted to an estate that did not request the Automatic Extension prior to the due date for the filing of the estate tax return, to an estate or person that is required to file forms other than an estate tax return, or to an executor who is abroad and is requesting an additional extension of time to file the estate tax return beyond the 6-month period granted under the Automatic Extension.[2] Except in the case of an executor that is abroad, the extension may not extend beyond the 6 months from the statutory filing date (i.e., not beyond 15 months from the decedent's date of death).

[1] Unless otherwise stated, references herein to "section(s)" or to "Code" are to the Internal Revenue Code of 1986, as amended. References herein to "§" are to relevant sections of the Treasury regulations.

[2] Treasury Regulation Section 20.6081-1(c) provides:

> (c) Extension for good cause shown. In its discretion, the Internal Revenue Service may, upon the showing of good and sufficient cause, grant an extension of time to file the return required by section 6018 in certain situations. *Such an extension may be granted to an estate that did not request an automatic extension of time to file Form 706 prior to the due date under paragraph (b) of this section,* to an estate or person that is required to file forms other than Form 706, or to an executor who is abroad and is requesting an additional extension of time to file Form 706 beyond the 6-month automatic extension. Unless the executor is abroad, the extension of time may not be for more than 6 months beyond the filing date prescribed in section 6075(a). To obtain such an extension, Form 4768 must be filed in accordance with the procedures under paragraph (a) of this section and must contain a detailed explanation of why it is impossible or impractical to file a reasonably complete return by the due date. Form 4768 should be filed sufficiently early to permit the Internal Revenue Service time to consider the matter and reply before what otherwise would be the due date of the return. Failure to file Form 4768 before that due date may indicate negligence and constitute sufficient cause for denial of the extension. If an estate did not request an automatic extension of time to file Form 706 under paragraph (b) of this section, Form 4768 must also contain an explanation showing good cause for not requesting the automatic extension. (emphasis added).

For example, in Notice 2012-21,[3] the Service used this authority to grant relief to certain estates shortly after the new portability system went into effect. It provided a streamlined means of relief for estates where the value did not exceed the estate tax filing threshold and the executor failed to file timely for the Automatic Extension within 9 months of the decedent's death. Under this Notice, if the estate followed the procedures of the Notice within 15 months of the decedent's date of death, the statutory due date would be extended by 6 months. In effect, in this situation, the Service recognized that portability constituted a completely new system. This constituted "good cause" for providing relief since executors could understandably be slow in recognizing the need to file estate tax returns solely for purposes of making the portability election. This Notice demonstrates the utility for both the Service and taxpayers in having the "good cause exception" of Treas. Reg. §20.6081-1(c).

Treasury Regulation Section 25.6081-1

For gift tax returns, Treasury Regulation Section 25.6081-1, does not provide a similar "good cause exception." This regulation is concerned solely with applying the Automatic Extension to gift tax return filings. In the gift tax setting, if a taxpayer fails to file to an Automatic Extension request prior to the statutory filing deadline, there is no recourse to obtain the additional 6 months extended filing period. Yet, just as in the situation illustrated by Notice 2012-21, there are circumstances that would justify adopting a "good cause exception" for gift tax returns.

For example, assume Taxpayer A establishes a lifetime QTIP trust in 2019, intending to make the gift tax QTIP election on a timely filed gift tax return. Gift tax QTIP elections must be made on timely filed gift tax returns, otherwise the election is foreclosed.[4] However, assume that neither the gift tax return nor an Automatic Extension is timely filed by the due date. Taxpayer A's tax return preparer realizes the omission on August 1, 2020, which would be within the 6-month extension period had one been requested. Under the current Treasury Regulations, and unlike the same situation with an estate tax return, no relief is possible for a late request for an extension of time to file the gift tax return.

The current COVID-19 pandemic is a good illustration of a "good cause" circumstance for Taxpayer A's predicament. While the IRS extended the filing deadline for taxpayers to file their 2019 gift tax returns until July 15, 2020, that may have not been sufficient time for all professionals and taxpayers to catch-up on needed returns under the conditions presented by the pandemic. Furthermore, the filing deadline was not extended for returns due April 15, 2021, and yet the continuing practice of remote working and the disruption caused by the pandemic may have caused some taxpayers to have not only missed the need to request an Automatic Extension but to be able to show "good cause" for having missed that requirement.

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[3] NOTICE 2012-21, 2012-10 I.R.B. 450 (3/5/2012) ("Section 20.6081-1(c) provides that the Service, in its discretion and upon the showing of good and sufficient cause, may grant an extension of time to file Form 706 to an estate that did not request an automatic extension of time to file Form 706 prior to the due date for Form 4768 prescribed in §20.6081-1(b). Such an extension cannot be for more than six months beyond the filing date prescribed in section 6075(a), unless the executor is abroad. Section 20.6081-1(c) further provides that, to obtain such an extension, Form 4768 must be filed in accordance with the procedures under §20.6081-1(a) and must contain a detailed explanation of why it is impossible or impractical to file a reasonably complete Form 706 by the due date, and an explanation showing good cause for not requesting the automatic extension.").

[4] "A great deal of caution is warranted in ensuring that a gift tax return is timely filed and the QTIP election is made because the Service has privately ruled that it does not have discretion to grant a request for an extension of time to make the QTIP election … the time for filing an inter vivos QTIP election is expressly prescribed by the statute in section 2523(f)(4), and the Service's authority to grant discretionary extensions applies only to requests for extensions of time fixed by Regulations or other published guidance (and not statutory rules)." Franklin, *Lifetime QTIPs—Why They Should Be Ubiquitous in Estate Planning*, ¶ 1600.02.A.1, 50th U. Miami Heckerling Inst. on Est. Plan (Lexis Nexis 2016).

Recommendation

ACTEC submits that the expansion of "good cause" relief to gift tax returns would well serve the fair and equitable administration of the tax system. This form of administrative grace would not prejudice the interests of proper tax administration because the taxpayer must still satisfy the requirement of providing "good and sufficient" cause, and it would be of tremendous benefit to taxpayers and return preparers.

Contact Information

The primary drafter of this proposal is Richard Franklin, who may be contacted at 202.857.3434 or at rfranklin@fkl-law.com.

A Proposal for a Revenue Ruling or Other Guidance to Address Powell and Similar Cases in Order to Avoid Double Inclusion in the Estate under Section 2036

Introduction

ACTEC proposes that guidance be issued, such as in a Revenue Ruling, to address a vexing problem under the estate tax when (1) assets are transferred during life are later included in the donor's gross estate at death under section 2036 and (2) the lifetime transfer was made in exchange for consideration (in some form, but not from a third party), the consideration that was received appears to also be included in the gross estate, raising the issue of double taxation.

As a notable example, in *Estate of Powell v. Commissioner*,[1] the United States Tax Court held that assets transferred by an individual during lifetime to a so-called family partnership were included in her gross estate under Section 2036(a)(2). Because the taxpayer held an interest in the partnership, that interest was included in her gross estate under Section 2033. To avoid the imposition of estate tax on both the partnership interest she owned at death and upon the value of the property she contributed to the partnership, the Tax Court used Section 2043 to reduce the value of what is included in Section 2036(a)(2). The concurring opinion in the decision also agreed that the assets contributed to the partnership were included in her gross estate. However, rather than applying Section 2043 to avoid the imposition of estate tax on both the partnership interest and the value of the property she can contributed to the partnership, it argued that only the property she contributed to the partnership should be included in Mrs. Powell's gross estate. The Tax Court also used Section 2043 to avoid such double estate taxation in the more recent case of *Estate of Moore v. Commissioner*.[2]

As explained in detail below, where no related consideration was provided by a third party in the lifetime transfer, the approach applied by the concurring opinion in *Estate of Powell* provides a superior approach that improves tax administration and predictability for both the Internal Revenue Service and taxpayers. The use of Section 2043 is not appropriate under circumstances such as in *Estate of Powell* because it leads to unnecessary complications in avoiding double taxation, as demonstrated in the later case of *Estate of Moore*.

The Opinions in *Powell*

The *Powell* case concerned a family limited partnership created when the taxpayer, Mrs. Powell, was incapacitated and just a week before she died. The transaction was implemented by one of her sons acting under a power of attorney executed by her.

After creating a limited partnership with himself as the general partner, the son used the power of attorney to contribute $10 million of his mother's marketable securities to the partnership in exchange for a 99% limited partnership interest. That same day, the son purportedly caused his mother to gift the 99% partnership interest.

The majority of the Tax Court held that the transfer of the $10 million in securities to the partnership was subject to a retained right of control under Section 2036(a)(2) and the entire portfolio was, therefore, includable in Mrs. Powell's gross estate. Further, because she purported to transfer the partnership interest by gift (to a charitable lead trust) within three years of death, the 99% partnership interest was also

[1] 148 T.C. 392 (2017).
[2] T.C. Memo 2020-40.

includable under Section 2035(a).

To prevent double inclusion (that is, estate tax on both the partnership units and the underlying partnership assets), a majority of the judges invoked Section 2043,[3] reducing the amount of the Section 2036 inclusion by the value of the limited partnership units the decedent had received in exchange for the securities. The concurring opinion, in contrast, rejected the application of Section 2043, arguing instead that the partnership units should be disregarded (that is, not included in the gross estate) once it was determined that the underlying partnership assets were to be included.

Problems Presented by Majority Opinion

Applying Section 2043, in a situation like *Powell* if not in other cases, introduces unnecessary complications. First, if the value of the partnership's assets increases or decreases after the partnership's formation and before the decedent's death, the amount of the net inclusion under Section 2036 will not be "correct." Second, even where there is no such fluctuation, there will be complications in calculating basis. Furthermore, as later shown in *Estate of Moore*, the facts can also involve disputes over the value of the partnership interests received, requiring complex alternative calculations, or disputes over issues how to take into account later gifts of the partnership interests made prior to death.

To illustrate the difficulties of a change in value, consider a contribution of $10 million in assets to a partnership where the decedent receives in exchange a partnership unit with an agreed upon value of $7 million. If there is no change in value between the date of transfer and the date of death, as in *Powell*, the application of Section 2043 produces the same result that the methodology adopted by the concurring opinion produces: net Section 2036 inclusion of $3 million (the value of the partnership's assets minus the value of the partnership units received by the decedent) and a Section 2033 inclusion of $7 million for the partnership units – for a total inclusion of $10 million. But if the partnership's assets were to double in value to $20 million as of the decedent's death, the majority's methodology becomes problematic, leading potentially to taxation of phantom value. The net Section 2036 inclusion would be $13 million (date of death value of $20 million reduced by a $7 million Section 2043 offset). Then the Section 2033 inclusion for the partnership units would presumably be $14 million, since the partnership's assets doubled in value, and the value of the partnership units would presumably double as well (from $7 million to $14 million).

Thus, the total estate tax inclusion, under the majority approach in *Powell* would be $27 million when, in fact, only $20 million of "real" assets exists at the time of death. In contrast, under the approach taken by the concurring opinion, the total gross estate inclusion would $20 million; that is, ignoring the partnership would cause only the $20 million in partnership assets to be includible in the gross estate. Given that the

[3] Section 2043(a), in effect, provides a limit to the amount included in an estate under Sections 2035 through 2038 and 2041. Section 2043(a) provides that the included amount under one of the enumerated sections is the excess of the fair market value at the date of death of the transferred property (in this case, the securities) over the value on the date of the lifetime transfer of the property received (the partnership interest). Section 2043(a) serves and is presumably intended to include in the gross estate the amount that would have been included if the lifetime transaction had not taken place. The included amount includes appreciation because it compares the date of death value to the date of transaction value and brings the excess back into the estate. Thus, the sections (that is, Sections 2035 through 2038 or 2041 plus Section 2043), in combination, capture the difference between the undiscounted date of death value of the property sold or exchanged in the transaction (the securities) and the discounted date of transfer value of the property received in exchange (the partnership interest)—that is, the combination captures the value of the appreciated retained interest.

approach taken in the concurring opinion reflects the reality of the assets transferred by the decedent, it should be the correct result as a matter of policy, and the majority's analysis would be incorrect. If, on the other hand, the value of the partnership assets were to decline before death, an incorrect result *favoring the estate* would occur, because less than the full value of the transferred assets would be subject to tax.

To illustrate the basis complications, consider the calculation of basis in the same hypothetical but on the assumption that no change in value occurs. It would seem that, after the decedent's death, the partnership units would have a basis of $7 million (the fair market value of the interest and the amount therefore of the Section 2033 inclusion– see Treas. Reg. 1.742-1(a)). And the partnership's assets would have a basis of $3 million (the amount of the net Section 2036 inclusion). If the partnership were to then sell its assets for $10 million and liquidate, the partnership would recognize $7 million in gain (amount realized of $10 million minus a basis of $3 million). The partner would have to recognize this gain and would be permitted to step up the basis in the partnership interest to $14 million on account of the $7 million in partnership gain. On liquidation, the partner would recognize a loss of $4 million (amount realized of $10 million; basis in the partnership interest of $14 million).

These results – $7 million in partnership gain on sale of its assets followed by $4 million loss on liquidation – are problematic given that, in the absence of the partnership, the portfolio could be sold for $10 million without any gain or loss. If, on the other hand, liquidation did not occur and the partnership continued to operate, its basis in its assets would be only $3 million. And unless Section 754 were amended (or changed by regulation or otherwise) to address this, the partnership's basis would remain understated.[4]

The court in *Estate of Moore v. Commissioner*, decided after *Estate of Powell* but similarly adopting Section 2043, introduced yet an additional complication. It concluded that, in applying Section 2043 in the context of a partnership, any consideration (such as partnership units) received by the decedent in exchange for the contribution to the partnership must be disregarded unless the consideration remains a part of the decedent's gross estate. Thus, the court appears to suggest that, if the decedent had made a gift of the units, the Section 2043 offset would need to be reduced. But this ignores the fact that any such gift would be taken into account – i.e., included in the tax base – as an adjusted taxable gift by the taxpayer.[5] There also would be tracking problems where the partnership units are sold before death to a third party and other assets purchased with the proceeds of such a sale. In short, the offset should not be reduced merely because the decedent had made a gift (or, for that matter, if the decedent had somehow consumed the units). And this additional complication suggested by *Estate of Moore* would not appear if the concurring opinion in *Estate of Powell* were followed.

In the course of analyzing the application of Section 2036, the Court in *Powell* found there was no non-tax

[4] The decedent's $10 million securities portfolio is subject to estate tax (net Section 2036 inclusion of $3 million and a Section 2033 inclusion of $7 million for the partnership interest). Yet the basis of the partnership's assets is presumably only $3 million. Under Section 754, a partnership may elect to adjust the basis of partnership property when property is distributed or when a partnership interest is transferred. The purpose of a Section 754 election is to reconcile (actually, to step up) the basis of a new partner (including anyone succeeding to the partnership interest at and by reason of the death of a partner) and the inside basis partnership's basis of its own assets. Even assuming a Section 754 election were made, it would only permit the partnership to increase basis by $4 million (by the amount of the basis of the partnership interest, or $7 million, over the partnership's basis in its assets, or $3 million). See section 743(b)(1). Thus, even with the Section 754 election, the partnership's basis in its own assets would only be $7 million – not the $10 million that was subject to estate tax.

[5] See Section 2001(b).

purpose for the transaction. Under an application of the sham doctrine,[6] the partnership would be ignored, the value of partnership assets would be included in the gross estate and all valuation discounts would be eliminated. But the courts have not used the sham doctrine to address this type of planning.[7] Instead, they have used Section 2036, which is not an easy fit.[8]

Under Section 2036, two concepts that would be irrelevant under the sham doctrine become critical. First, Section 2036 is rendered inapplicable if the transaction is bona fide sale or exchange for full and adequate consideration—which, as the courts have held, requires a showing of a significant and legitimate non-tax purpose. Second, if the estate cannot establish the applicability of the bona fide exception, it is relegated to an offset under Section 2043 for the consideration the decedent had received in the transaction. While the sham doctrine would result in ignoring the partnership and eliminating any valuation discount, the application of Sections 2036 and 2043 is more complicated in this context.

The part of the case that is problematic is the valuation of the included amounts in that the computation of the amount of inclusion under both Sections 2036(a)(2) and 2038(a) includes post-transaction appreciation (or depreciation) leading to double taxation (or non-taxation). The opinion divides the included interests metaphorically into a doughnut and a doughnut hole, the doughnut plus the doughnut hole making up a complete doughnut. However, the metaphor fails because the computation of the value of both the doughnut and the doughnut hole includes post-transaction appreciation or depreciation. This double-counting of the appreciation or depreciation leads to the result that the size of the doughnut plus the doughnut hole is greater (or lesser if the assets have depreciated) than the size of the complete doughnut. In *Estate of Powell*, because there had elapsed only a week between the transaction and the death, there was no appreciation or depreciation, and the result was satisfactory. However, had more time transpired, the result could have been flawed.[9]

A Proposed Solution

Under the concurring opinion in *Powell*, the entire lifetime transaction should be disregarded and the transferred property should be entirely included in the gross estate at its date of death value and the partnership units ignored for such purposes. This approach would avoid the complicated analysis that results from the application of Section 2043, i.e., the valuation of the retained interest under Section 2036(a) inclusion/Section 2043(a) offset that leads to illogical results which are unfair to either the taxpayer (doubling counting post transaction appreciation) or the Service (doubling counting of post transaction depreciation). The concurring opinion would result in tax on the value of the assets actually transferred.

The solution proposed here is not only the more practical one, but also the outcome that is the most "fair" to the taxpayer and to the government. And it is the most theoretically satisfying. We propose that Section 2043 should not apply where there is no consideration provided by a third party because the taxpayer's estate has received no additional assets or value in a transaction that is essentially with himself or herself. In cases where the consideration received in the transfer is from a third party, the estate is actually enlarged by the consideration received and Section 2043 should apply to exclude the additional value. (If the partnership interest received upon formation of the partnership is sold within three years of a partner's death

[6] See, generally, Gans, "Re-Examining the Sham Doctrine: When Should an Overpayment Be Reflected in Basis?," 30 BUFF. LAW REV. 95 (1981).
[7] See, e.g., *Strangi*, supra, 115 T.C. at 501 ("the majority also suggest that… the partnership should not be disregarded as a substantive sham," Beghe, J. dissenting).
[8] Gans & Blattmachr, "Family Limited Partnerships and Section 2036: Not Such a Good Fit," 42 ACTEC Law Jl. 253 (Winter 2017).
[9] A number of these matters is discussed in Id.

and the sale does not qualify for the bona fide exception under Section 2035, the amount of the Section 2035 inclusion would need to be reduced by the consideration received from the third party in the sale.[10])

Guidance to reach this result would be comparable to the treatment of assets transferred to a grantor retained annuity trust (GRAT) as described in Treas. Reg. 25.2702-3(b) when later included in the gross estate under Section 2036. If a taxpayer creates a GRAT to make payments to him or her for a period of years and to the grantor's estate if the grantor dies during the annuity payment term, all or a portion of the GRAT assets will be included in the grantor's gross estate under Section 2036(a) as described in Treas. Reg. 20.2036-1(c)(2), together with the annuity payments due the taxpayer's estate after death and included under Section 2033. As described below the regulations resolve the issue without resorting to Section 2043.

Another example of a transaction will illustrate why Section 2043 should not apply where no third party consideration is involved. If a taxpayer creates a trust and retains an income interest for a term of years that in fact extends beyond his or her life, the trust will be included in his or her gross estate under Section 2036(a)(1) but the unpaid income interest is not, as that would cause double inclusion of the unpaid income. Section 2043 plays no part in the analysis and yet the taxpayer traded the assets transferred to the trust in exchange for an income interest. A similar result should apply to a transfer of property that is included under Section 2036(a)(2). In either case, there is no "third party" consideration; rather, the property "received" is supplied by the taxpayer himself or herself and should not be included in the gross estate.

As suggested above in reference to a GRAT with a retained annuity interest, this is the same approach reflected in Treas. Reg. 20.2036-1(c). Section 2043 is not used and instead the analysis is limited to Sections 2036 and 2033. The regulation provides, in part:

> If this section applies to an interest retained by the decedent in a trust or otherwise and the terms of the trust or other governing instrument provide that, after the decedent's death, payments the decedent was receiving during life are to continue to be made to the decedent's estate for a specified period (as opposed to payments that were payable to the decedent prior to the decedent's death but were not actually paid until after the decedent's death), *such payments that become payable after the decedent's death are not includible in the decedent's gross estate under section 2033 because they are properly reflected in the value of the trust corpus included under this section*. (Emphasis added.)

The result so provided in the regulation reflects that Section 2036, in effect, places the decedent in the position he or she would have been in if the transfer had not been made. We propose that this logical conclusion should be extended to all non-third-party transactions in which the decedent has retained an interest.

Conclusion and Recommendation

[10] An additional question, for which there does not appear to be an answer, is how to calculate what the Section 2036 inclusion would have been had the decedent not sold the partnership units. In other words, under *United States v. Allen*, 293 F.2d 916 (10th Cir.), cert. denied, 368 U.S. 944 (1961), the corpus of a reserved life estate is not removed from a decedent's gross estate by a transfer at the value of the life estate in contemplation of death. (Note that Section 2035 has been amended several times since that case was decided and, in any case, other circuits might not adopt it in any case.) Hence, if *Allen* applies, a decedent who disposes of a Section 2036-type "string" within three years prior to death for consideration must receive an amount equal to what Section 2036 would have required to be included to avoid Section 2035 and not just the value of the "string." This raises yet another question: how much would the Section 2036 inclusion have been given the availability of the Section 2043 offset under *Powell*?

Although the Tax Court has eliminated any concern that both the underlying assets contributed to a partnership as well as the partnership interest itself may be subject to full estate tax, Section 2043 is at best a crude tool to avoid double taxation. And its application in *Powell* and *Moore* runs counter to the Section 2036 regulations because it provides for both the assets transferred to be included in Section 2036 as well as the interest received in exchange (such as a partnership interest) to be included under Section 2033. The better result would be simply to include only the assets transferred by the decedent in the pre-death transaction (e.g., to the partnership) where the taxpayer had retained such a power or interest (in the partnership) and to cause Section 2036 to apply.

Accordingly, we respectfully recommend that the Treasury Department and the Internal Revenue Service issue guidance, perhaps in the form of a revenue ruling, adopting the position taken in the concurring opinion in *Estate of Powell*.

Contact information

The primary drafters of this proposal are Jonathan Blattmachr, who may be contacted at 212.328.0300 or at jblattmachr@hotmail.com and Elizabeth Pierson, who may be contacted at 310.482.3544 or at elizabeth@gillpierson.com.