6/27/16 – IRS Public Hearing on 1014(f) and 6035 Proposed Regulations.

Hello. My name is Gregg Simon, and I am a partner of the Chicago law firm of Much Shelist. I am an ACTEC Fellow and the chair of the ACTEC task force that submitted comments on the 1014(f) and 6035 Proposed Regulations. The following is not a summary of the ACTEC comments, as I know that they will be reviewed in detain in connection with finalizing the regulations, but items that oral discussion will enhance, and, while important, I will not discusses the questions of whether various provisions of the regulations fall within the statutory authority, nor repeat what Ron said on behalf of ACTEC.

1. With regard to the Exceptions to reporting requirements. Three of the exceptions deal with situations where 1014(a) does not change basis:

(A) Cash. There is confusion over what falls within the term "cash." Particularly whether:

(i) cash includes (a) bank accounts; (b) money market accounts (while targeted to $1, the value can change), (c) funds in brokerage accounts, (d) Certificates of Deposit. The cash exception should apply to all of these.

(ii) life insurance (as paid in cash, should be part of the cash exception, or alternatively a separate exception, as no basis);

(iii) What about promissory Notes and Accounts Receivable (at least if valued at face value on the estate tax return), clarification is needed if they fall under the cash exception;

(iv) similarly Federal, State and other governmental tax refunds, and other refunds, are the "cash?"

(v) als whether accounts denominated in a foreign currency fall under this exception

(B) IRD. When an asset that is generally IRD has a basis component (e.g., IRAs/401K plans, annuities and installment notes), what is to be reported? This is problematic particularly if the estate tax return only reports the aggregate value, not broken down to IRD and non IRD.

Roth IRAs/401(k)s are not items of IRD and thus would not fall under this IRD exception, but assets in a Roth IRA or 401(k) are not taxable to the beneficiary when distributed. An exception should be made for Roth IRAs as well.

(C) Sale Exception. (i) The Sale Exception should apply not just where there is gain or loss recognized but also to sales where the sales price equals basis (zero gain). The final regulations should except from the reporting requirements any property that is sold, exchanged, or otherwise disposed of (and not distributed by an executor or trustee to a beneficiary in a manner that does not cause gain recognition) in a transaction that constitutes a sale or exchange that is *reportable* for income tax purposes (or that would be *reportable* if the gain or loss were not zero).

(ii) The sale exception should apply when estate assets are used to fund a pecuniary bequest, as under the *Keenan* case gain or loss is recognized by the estate on such funding, or when a §643(e)(3) election is made for the estate to recognize gain when assets are distributed in kind to a beneficiary. The wording in the Proposed Regulation "(and therefore not distributable to a beneficiary" would lead one to believe reporting is required in such event.

(iii) Also, if a bond matures before being distributed to a beneficiary, it should fall under this type of exception.

(D) Tangible Personal Property. Unlike the other exceptions, this one deals with administrative convenience.

(i) the Proposed Regs provide an exception for TPP for which an appraisal is not required under Reg §20.2031-6(b), which only requires appraisals for items having a "marked artistic or intrinsic value of a total in excess of $3,000."

This de minimus rule is 50+ years old and should be updated either for the 6035 final regulations alone, or in connection with the 2031 regulations.

(ii) There also appears to be uncertainty if this exception applies to individual items or groupings.

(iii) The §20.2031-6 regulations also allow for grouping of PE items. Thus, there may not be a detailed item by item list with the 706, and such PE may pass to several beneficiaries, and the beneficiaries may not agree as to how to allocate the aggregate value among the various items that they each receive. The executor should be allowed to use any reasonable method to apportion the reported value among the beneficiaries.

2. One of the main areas of confusion is the treatment of distributions to trusts and trust beneficiaries –particularly with regard to pour-over Wills and Revocable Trusts (whether the Trust is fully funded, partially funded or unfunded as of the Decedent's death there should be consistent treatment). §1.6035-1(c)(2) states that "[i]f the beneficiary is a trust ... the executor must furnish the [Schedule A] to the trustee ... of the trust..., rather than to the beneficiaries...." However, when there is no probate estate and a fully funded trust it appears that the Schedule A can be given to the ultimate beneficiary not just to the Trustee.

In an unfunded Trust the executor would be distributing assets to the Trustee and it would make sense to give the Schedule A to the Trustee. However, in the case of a fully or partially funded trust it may make sense for the executor to provide the Schedule A directly to the ultimate beneficiary (particularly when there is no probate executor and the Trustee is the "statutory executor"). This is how reporting is done on a 706: Beneficiaries of the Trust (such as Martial Truss and

Bypass Trusts) are reported, not just he Revocable Trust itself. ACTEC believes that permitting the executor to report to *either* the trustee or the beneficiaries of a trust directly will accomplish the intended goals of the proposed regulations in an efficient and effective manner.

3. Supplemental Reporting. In the Proposed Regs, Treasury and the IRS acknowledge the varied circumstances under which a value may be finally determined (a) IRS acceptance of return as filed, (b) IRS providing the value with the estate not contesting, (c) IRS audit with agreement of the parties, (d) court determination), with the supplemental filing being due 30 days after the occurrence of the enumerated event. Clarification is needed to more clearly identify the *exact* date on which that final value is determined.

(1) when the value of an asset is determined by an agreement with the IRS ACTEC believe the date such valuation is considered final be defined as the date on which the taxpayer and the IRS have agreed upon *and execute a Form 890 or similar binding agreement*.

(2) In addition, if the value of an asset is determined by a court, additional guidance is needed with respect to determining when a court's determination is "final." We suggests clarifying "final" mean not the date the court renders a decision, but the date when the *time for* ***appealing*** *the court ruling, whether an order, judgment or decision, has expired*, and if an appeal is taken the day the appellate judgment is entered (or the case settled) and the time for appealing the judgment has expired.

4. The last broad area I will discuss is Undetermined, uncooperative and missing beneficiaries.

Beneficiaries That Cannot Be Located. When a beneficiary cannot be located, the Proposed Regs §1.6035-1(c)(4) provide that an executor must use reasonable due diligence to identify and locate all beneficiaries and, if the executor is unable to identify and locate a beneficiary by the due date of the Form 8971, then the executor is required to report that on the Form 8971 and explain the efforts taken to locate the beneficiary. ACTEC believes that clarification is needed as to what due diligence is, and an executor should be treated as having exercised due diligence in identifying and locating beneficiaries if the executor follows a local custom, rule, or protocol to search for unknown and unlocated heirs. (As this may very state by state, we do not believe that it is appropriate to prescribe specific steps that every estate must take to locate an unknown or unlocated beneficiary

Beneficiary Is Not Determined. Also not unfrequently the actual identity of a beneficiary cannot be determined. This can arise by reason of a will or trust contest, litigation over a beneficiary designation or even litigation over who a decedent's heirs are. This is different than the case for which the beneficiary is identified but the assets the beneficiary is to receive is undetermined. Guidance is needed on how and when to report assets to which the ultimate or even the presumptive beneficiary is unknown.

Uncooperative. Finally, not infrequently beneficiaries are uncooperative (will not furnish TINs). The executor has no authority to compel the disclosure. The beneficiary may be a trust created upon the decedent's date of death and the trustee of such trust may not yet have been appointed/accepted, and no TIN may yet have been obtained. or the beneficiary may not have a TIN (as when he or she is not a U.S. citizen). The Instructions state that a form with an answer of "unknown" or similar language will not be a complete return. In the case of a TIN, the Instructions provide that errors or omissions related to a TIN are never inconsequential. What should an executor do if after due diligence he or she cannot get an EIN. Can the executor request such from the IRS so can comply? Will the IRS furnish it (after all there are privacy issues the IRS must deal with before releasing somene's SSN to another.

We believe that similar to when a beneficiary cannot be located that when an executor, after reasonable due diligence, cannot obtain the TIN or address for a beneficiary the executor should be allowed to answer "unknown" (similar to what he 706 instructions provide: "If the TIN is unknown, or the individual has no number, please indicate 'unknown' or 'none.'"

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