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Re: Comments re Repeal of I.R.C. Section 682

Dear Ladies and Gentlemen,

The American College of Trust and Estate Counsel (“ACTEC”) is pleased to submit the following comments regarding the effective date provisions applicable to the repeal of I.R.C. Section 682. Notice 2018-37 states the Department of the Treasury and the Internal Revenue Service intend to issue regulations providing clarification of the application of the

effective date provisions regarding the repeal of I.R.C. Section 682, which was enacted on December 22, 2017 by P.L. 115-97 (the “2017 Act”).

The effective date provisions for the repeal of I.R.C. Section 682 under the 2017 Act are as follows:

Section 11051(b)(1)(B) and (C) of the [2017] Act prospectively repeal §§ 71 and 682, and § 11051(b)(4)(A) makes conforming amendments to § 7701(a)(17).

Section 11051(c) of the Act provides that the amendments made by § 11051 shall apply to: (1) any divorce or separation instrument (as defined in former § 71(b)(2)) executed after December 31, 2018; and (2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by such section apply to such modification.

Section 3 of Notice 2018-37 provides:

The regulations will provide that § 682, as in effect prior to December 22, 2017, will continue to apply with regard to trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument (as defined in § 71(b)(2)) executed on or before December 31, 2018, unless such instrument is modified after that date and the modification provides that the changes made by § 11051 of the Act apply to the modification.

ACTEC believes that the effective date provision of the 2017 Act applicable to the repeal of I.R.C. Section 682 unfairly applies the repeal to trusts that were irrevocable on the date the 2017 Act was enacted for those grantors whose divorce or separation instruments were not executed until after that date. Changes in the Code applicable to irrevocable trusts have traditionally been applied on a prospective basis. For example, the application of the spousal unity rule under I.R.C. Section 672(e), which was enacted as part of the Tax Reform Act of 1986, was limited “to transfers in trust made after March 1, 1986.” A similar prospective effective date was used for the generation-skipping transfer tax in 1986. The generation-skipping transfer tax is not applicable to transfers from trusts that were irrevocable before September 26, 1985, except to the extent that the transfers are attributable to additions to the trust corpus occurring after September 26, 1985.

There is good reason for protecting existing irrevocable trusts and their grantors from changes in the tax law. The grantor of a trust relies on the tax law in effect when the trust is funded and created. The grantor of an irrevocable trust generally cannot make changes to the trust instrument in response to changes in the law occurring after the trust’s creation. Prospective application of tax law changes is intended “to protect those taxpayers who, on the basis of pre-existing rules, made arrangements from which they could not reasonably escape and which, in retrospect, had become singularly undesirable.” *Estate of Gerson v. Commissioner*, 507 F. 3d 435 (6th Cir. 2007).

Prospective application is particularly appropriate to the repeal of I.R.C. Section 682. A grantor who created a trust for the benefit of his or her spouse before the repeal of I.R.C. Section 682 likely would not have done so had the grantor expected to continue to be taxed on trust income after divorce.

We recommend that a technical amendment to the effective date provision of Section 11051(c) of the 2017 Act provide that I.R.C. Section 682 continue to apply to the income of trusts that were irrevocable on December 22, 2017, to the extent that such income is not attributable to corpus contributed to the trust by any donor after December 22, 2017.

If you or your staff would like to discuss the recommendations, please contact Beth Shapiro Kaufman, Chair of the ACTEC Washington Affairs Committee, at (202) 862-5062 or bkaufman@capdale.com; or Deborah McKinnon, ACTEC Executive Director, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,

A handwritten signature in black ink that reads "Charles D. Fox IV". The signature is written in a cursive style with a horizontal line underneath the name.

Charles D. Fox IV
President