ING Trusts Remain Alive and Well Despite New PLR

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Private Letter Ruling **201642019** (released October 14, 2016) revoked a prior favorable PLR on an increasingly popular estate planning technique, often referred to as the "**ING trust**" (described in further detail below). This article discusses the newly released PLR and provides a brief history of the previous rulings by the IRS on this subject.

Although the new ruling may indicate that this technique will receive additional scrutiny by the IRS in the future, it appears that the trust at issue in the newly released ruling is distinguishable from other trusts that were the subject of favorable rulings in this area. Accordingly, the ING trust **may continue to be** a popular estate planning technique, despite this new unfavorable ruling.

The estate and gift tax rules are said to be in *pari materia* with each other. In other words, they should be viewed as **consistent** with each other.

And to a large degree they are: at least as a general matter, a lifetime transfer that is incomplete (and, therefore, not subject to gift tax) is included in the transferor's gross estate at death. However, certain transfers that are complete for gift tax purposes may nonetheless be included in the grantor's gross estate for estate tax purposes.

See, e.g, Section 2036(a).

The **income tax** rules are not viewed as being in pari materia with the **estate** and **gift tax** rules.

To some degree, however, the "grantor trust" rules (under which a trust's income and corresponding deductions and credits against income tax are attributed to the grantor for income tax purposes under Section 671) are similar to the estate and gift tax rules. For example, the retention of the income from a trust created during lifetime will cause the trust to be included in the gross estate of the trust's grantor for estate tax purposes, and will cause the trust to be a grantor trust for income tax purposes.

Nevertheless, the IRS has consistently ruled, since at least 2002, that a trust may be structured so that transfers to the trust are not completed gifts, but the trust is also not a grantor trust.

These rulings have been in the form of private letter rulings which, although they are not precedent, are sufficiently numerous and consistent to indicate the IRS has resolved the matter. The trusts that are the subject of these ruling are often referred to as "**incomplete non-grantor trusts**," or "**ING trusts**."

See, e.g., PLR 200247013 and PLR 200247014.

Rulings

In 2007, the IRS **stopped** issuing these rulings on the so-called ING trusts.

This change in policy was not because the IRS changed its view that the transfers to such trusts were incomplete, or that the trusts were not grantor trusts. Rather, the IRS announced that it was reconsidering the aforementioned ING trust rulings due to a concern that they were potentially inconsistent with Revenue Rulings 76-503 and 77-158. See IRS Release 2007-127.

The trusts that were the subject of the ING trust rulings sought to achieve incomplete gift status, without triggering grantor trust status, in part by providing that trust distributions would be made by a "Distribution Committee" or "Power of Appointment Committee," consisting of the grantor and other beneficiaries of the trust. In the aforementioned ING trust rulings, the IRS had determined that the committee members did not hold general powers of appointment under Code Sections 2041 and 2514, because their powers were exercisable only with the consent of a person having a substantial adverse interest in the property subject to the power, or because they were exercisable only with the consent of the grantor who created the power.

See Code Sections 2041(b)(1)(C)(i) and (ii); and 2514(c)(3)(A) and (B).

In the 2007 announcement, the IRS stated that the ING trust rulings mentioned above might not be consistent with the holdings in Revenue Rulings 76-503 and 77-158, which, according to the IRS, "indicate that because the committee members are replaced if they resign or die, they would be treated as possessing general powers of appointment over the trust corpus."

The IRS has not subsequently announced an official position on these matters. However, in 2013, the IRS again began issuing favorable private letter rulings on ING trusts, ruling that transfers to a trust could be incomplete for gift tax purposes, but the trust would not be a grantor trust.

See, e.g., PLR 201310002.

The Service has since issued several of these rulings. For additional background on these matters, your attention is invited to Blattmachr & Lipkind, "Fundamentals of DING Type Trusts: No Gift Not a Grantor Trust," *Probate Practice Reporter*, Vol. 26, No. 4, April 2014.

However, newly issued PLR 201642019 revokes a portion of one of the favorable post-2012 ING trust rulings referenced above.

The IRS has determined that the Ruling 1 of PLR 140408-13 (that the trust was not a grantor trust) is incorrect because the trust at issue therein provided that if there were no members of the Distribution or Power of Appointment Committee serving other than the grantor, the assets in the trust would revert to the grantor. Under Section 673, a trust is a grantor trust if the trust property will revert to the grantor, unless a restricted actuarial test is met with respect to the reversionary interest. The IRS determined that the grantor of the trust at issue in PLR 140408-13 held a reversionary interest that did not meet the actuarial test, and, accordingly, that the grantor should be treated as the owner of the entire trust for income tax purposes.

It does seem, based on the description of the trust that is the basis for PLR 140408-13, and now PLR 201642019, that reversion to the grantor could occur, making the trust a grantor trust under Section 673. However, based on the description of the trust in those rulings, it is possible to distinguish that trust from the trusts that were the subject of the other favorable post-2012 rulings.

The trusts in the remaining favorable rulings were structured such that there always will be at least two people who comprise the Distribution or Power of Appointment Committee controlling the distribution of the property from the trust during the grantor's lifetime, and further provided that if there are not at least two members of the committee, no distributions are to be made from the trust during the grantor's lifetime.

Each member of the committee is adverse from the other, thereby preventing grantor trust status from arising on account of the power of control, and preventing the members of the committee from being treated as holding a general power of appointment. Hence, if a trust follows the structure set forth in all the other favorable rulings issued since 2013 (e.g., PLR 201310002), it appears that the trust would **not** be a grantor trust.

A word of caution may be in order

Taxpayers have sought these rulings because the taxpayer/grantor could incur significant gift tax (or use a significant portion of his or her gift tax exemption) if the transfers to the trust are determined to be completed gifts. At a minimum, it seems the trust should recite that it is the grantor's intent that no transfer to the trust be complete for Federal gift tax purposes, and that the instrument must be construed to achieve that end, even if the grantor's other intention (that the trust be a non-grantor trust) cannot be met.

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