

Part III - Administrative, Procedural, and Miscellaneous

Split-Interest Trust Distributions to Private Foundations: Distributable Amount

Notice 2004-36

PURPOSE

This notice provides guidance to private foundations on the treatment of certain distributions received from split-interest trusts described in §4947(a)(2) of the Internal Revenue Code of 1986, as amended, in light of the courts' decisions in Ann Jackson Family Foundation v. Commissioner, 97 T.C. 534 (1991), aff'd, 15 F.3d 917 (9th Cir. 1994).

BACKGROUND

Section 4942(a) imposes a tax on the amount of undistributed income of a private foundation for any taxable year that is not distributed by the first day of the second taxable year following such taxable year. Section 4942(c) defines undistributed income as the amount by which the distributable amount for the taxable year exceeds the qualifying distributions made out of the distributable amount. Section 4942(d) defines distributable amount as the minimum investment return (plus certain refunds of amounts previously taken into account as qualifying distributions), reduced by the taxes imposed on the private foundation under subtitle A and section 4940. Treas. Reg. § 53.4942(a)-2(b)(2), provides that the distributable amount of a private foundation shall be increased by the income portion of distributions from trusts described in section 4947(a)(2) with respect to amounts placed into trust after March 26, 1969. In Ann Jackson Family Foundation, the Tax Court held that Treas. Reg. § 53.4942(a)-2(b)(2) was invalid to the extent the regulation requires including in the private foundation's distributable amount for the year the full amount of the income portion of distributions from split-interest trusts. The court determined that the language of section 4942 did not support this interpretative regulation.

PROPOSED ACTION

The Treasury Department and the Internal Revenue Service intend to propose regulations modifying the regulations under section 4942 in a manner consistent with the holdings of the Tax Court and the Ninth Circuit in Ann Jackson Family Foundation. Until further guidance is promulgated, private foundations should compute the distributable amount under section 4942(d) without regard to Treas. Reg. § 53.4942(a)-2(b)(2).

CURRENT RETURN PROCESSING

For current tax returns, any private foundation to which this notice applies should mark "Filed pursuant to Notice 2004-36" on the front page of its Form 990-PF, Return of

Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation. If a Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code, is filed, Schedule B (Initial Tax on Undistributed Income) should be computed disregarding distributions received from section 4947(a)(2) trusts. Returns should be completed in accordance with this notice pending corresponding changes to Form 990-PF and Form 4720 and the accompanying instructions.

Form 990-PF requires information with respect to not only the current tax year, but also prior tax years, particularly Parts XI and XIII. Private foundations may wish to complete these Parts as if prior year returns had been completed in accordance with this Notice rather than the Form instructions. Private foundations may include a schedule to show how the information provided on such return varies from prior year returns as filed. It is not necessary for a private foundation to file amended returns for prior years, but it will be expected to retain the supporting information and computations for the changes that would have been reflected had amended returns been filed.

REFUND PROCESSING

For years in which the statute of limitations has not expired and for which a refund of section 4942 taxes paid is sought, the private foundation must file an amended Form 990-PF and an amended Form 4720 for that year with a schedule showing the corrected amount of section 4942 liability pursuant to this Notice. The private foundation should mark the front page of the amended return (or returns) "Filed pursuant to Notice 2004-36."

COMMENTS

The Service welcomes comments and suggestions relating to the amendment of the regulations on distributions from split-interest trusts to private foundations. Written comments should be submitted by August 9, 2004, to CC:PA:LPD:RU (Notice 2004-36), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m., Monday through Friday to CC:PA:LPD:RU (Notice 2004-35), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave. NW, Washington D.C. Alternatively, comments may be submitted electronically via e-mail to the following address: Notice.Comments@irs.counsel.treas.gov. All comments will be available for public inspection.

DRAFTING INFORMATION:

The principal author of this notice is Ronald B. Weinstock of the Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Mr. Weinstock at (202) 622-3094 or contact Oksana O. Xenos of the Office of the Commissioner (Tax Exempt and Government Entities) at 202-283-9469 (not a toll-free number).