

2020 Supplement
to
Federal Income Taxation of Trusts and Estates:
Cases, Problems, and Materials
(Fourth Edition)

Mark L. Ascher
Robert T. Danforth

Copyright © 2020 Mark L. Ascher, Robert T. Danforth

All Rights Reserved

PREFACE

This supplement deals with developments we would have included in the casebook, had it gone to press in January 2020.

Anyone who uses the casebook in class may reproduce this supplement for distribution to his or her students at no cost.

Mark L. Ascher
Austin, Texas

Robert T. Danforth
Lexington, Virginia

February 16, 2020

Page 89. At the end of the Illustrative Material, add:

In Notice 2018-61, 2018-31 I.R.B. 278, the Service announced its intention to issue regulations clarifying the effect of section 67(g) on “the deductibility of certain expenses described in section 67(b) and (e) and § 1.67-4 . . . that are incurred by estates and non-grantor trusts.” In the Notice, the Service indicated that it believes that section 67(g) does not apply to expenses described in section 67(e)(1). In contrast, the Service stated that section 67(g) applies to any expense “commonly or customarily . . . incurred by an individual (including the appropriate portion of a bundled fee).” In other words, the position of the Service seems to be that section 67(g) suspends, and thus disallows in their entirety, only those expenses that before 2018 would have been subject to the 2-percent floor. *See generally* Boyle & Blattmachr, *The Tax Act of 2017 Impacts Itemized Deductions and the Pass-Through of Excess Deductions*, Prob. Prac. Rep., Feb. 2018, at 1; Peterson et al., *Deductibility of Trust Expenses Under the Tax Cuts and Jobs Act*, Tr. & Est., May 2018, at 38.

Page 104, note 4. Rev. Proc. 2018-3 (cited in the first paragraph) has been superseded. Rev. Proc. 2020-3, 2020-1 I.R.B. 131, 137, is to identical effect.

Page 187. At the end of section (d) of note 1, add:

In Notice 2018-37, 2018-18 I.R.B. 521, the Service announced its intention to issue regulations clarifying the application of the effective date provisions concerning the repeal of section 682. The Service indicated that the regulations will provide that section 682 will continue to apply as to trust income payable to a former spouse who was divorced or legally separated under a divorce or separation instrument executed on or before December 31, 2018, unless the instrument is modified after that date to provide that the changes of the 2017 Act apply.

Page 207. As to the second Illustrative Material entry:

This material is based on a problem that appeared in Professor Schmolka’s teaching materials for this course at the N.Y.U. graduate tax program in the early 1980’s.

Our analysis assumes that no portion of the trustee’s fee is attributable to investment advice. Under the regulations, therefore, none of the \$9,000 that remains after the application of section 265 is subject to section 67. In the absence of this assumption, the portion of the fee attributable to investment advice would, of course, be subject to section 67.

On a different topic, during the period 2018 to 2025, when section 67(g) suspends *all* miscellaneous itemized deductions, including *all* those for investment advice, it is arguable that the net tax-exempt interest in the hands of the beneficiaries should be \$9,000, rather than \$8,000. Section 643(a)(5) requires reduction of tax-exempt interest by only those amounts that “would be

deductible in respect of disbursements allocable to such interest but for the provisions of section 265.” Under section 67(g), the \$1,000 expense for investment advice directly allocable to the production of tax-exempt interest would not be deductible.

Page 260, note 3. Rev. Proc. 2018-3 (cited in the first paragraph) has been superseded. Rev. Proc. 2020-3, 2020-1 I.R.B. 131, 137, is to identical effect.

Page 273. At the end of note 2, add:

In Notice 2018-61, 2018-31 I.R.B. 278, the Service announced its intention to issue regulations clarifying the effect of section 67(g) on a beneficiary’s ability to deduct, under section 642(h), upon termination of a trust or estate, expenses also described in section 67(e). *See generally* Boyle & Blattmachr, *The Tax Act of 2017 Impacts Itemized Deductions and the Pass-Through of Excess Deductions*, Prob. Prac. Rep., Feb. 2018, at 1.

Page 273, note 4. *Harrell v. Commissioner* has been affirmed. 765 Fed. Appx. 501 (2d Cir. 2019).

Page 397. After note 10, add:

11. *Deduction for qualified business income.* For taxable years 2018 to 2025, trusts and estates can qualify for a deduction under §199A on account of their “qualified business income.” I.R.C. §199A(a), (f)(1)(B). But when Subpart E treats the grantor of a trust as owner of part or all of the trust, the grantor computes the grantor’s own deduction under §199A as if the grantor “directly conducted the activities of the trust” with respect to the portion the grantor is treated as owning. Treas. Reg. §1.199A-6(d)(2).

Page 413. Replace the Regulation assignment with:

Regulations:

Sections 1.641(a)-0(c), 1.643(f)-1

Page 440. Before the second-last paragraph of note 1, add:

In 2019, thirty-five years after enactment of section 643(f), the government issued Treas. Reg. § 1.643(f)-1, which, unfortunately, does little more than restate the words of the statute.

Page 568. In lieu of the second paragraph of note 2 insert:

Section 67(b)(7) excepts the section 691(c) deduction from the operation of section 67.

Page 568, note 3. *Harrell v. Commissioner* has been affirmed. 765 Fed. Appx. 501 (2d Cir. 2019).

Page 568. At the end of note 3 add:

Though an estate tax return has been filed, there is similarly no deduction if the items of income in respect of a decedent did not generate an estate tax. *See Schermer v. Commissioner*, 117 T.C.M. (CCH) 1136 (2019).