

New IRS Interim Guidance Brings Light to *Knight*

By Michael G. Schwartz

Michael G. Schwartz summarizes the statutory and judicial background leading up to the recent Supreme Court decision in the *M.J. Knight* case and discusses issues remaining and industry impacts.

In its recent decision, *M.J. Knight*,¹ the U.S. Supreme Court held that investment advisory fees paid by a trustee to an outside investment advisor are only deductible to the extent such fees exceed two percent of the trust's adjusted gross income (AGI). The Supreme Court's unanimous decision establishes a new national standard with respect to the application of the two-percent AGI limitation to trusts and estates, and resolves a closely followed split in authorities among the appellate circuits.

In adopting a middle-of-the road approach, the decision leaves some unresolved issues, and the IRS has quickly responded with newly issued interim guidance and promises of more to come. There is also speculation that additional legislative action will be required in this area to address perceived shortcomings in the IRS approach.

The purpose of this article is to summarize the statutory and judicial background leading up to the Supreme Court's decision in *Knight*, review the Court's well-reasoned opinion, discuss the newly issued IRS interim guidance, and discuss expected changes on the horizon.

Statutory History

The Tax Reform Act of 1986² (TRA) blew in a wind of significant change in many areas of the Internal Revenue Code ("the Code"). One area of change

involved the treatment of miscellaneous itemized deductions incurred by various types of taxpayers. Until the enactment of TRA, taxpayers who itemized deductions on their income tax returns faced a labyrinth of rules in determining whether various business expenses, investment expenses and other miscellaneous expenses were deductible under the federal tax laws. The pre-TRA laws required extensive recordkeeping by taxpayers to substantiate relatively small expenditures, and the small amounts in question presented significant administrative and enforcement challenges for the IRS.³

In order to address these concerns, and with the additional consequence of increasing federal tax revenues, Congress passed TRA, which was signed into law by President Reagan on October 22, 1986. As part of TRA, new Code Sec. 67 was enacted to provide that miscellaneous itemized deductions incurred by a taxpayer for any tax year are only allowed to the extent the aggregate of such deductions exceeds 2 percent of the taxpayer's adjusted gross income (the "Two-Percent Floor Rules").

TRA also contained new provisions applying the Two-Percent Floor Rules to trusts and estates. Newly enacted Code Sec. 67(e) was included to provide that trusts and estates are generally treated similarly to individuals with respect to the Two-Percent Floor Rules. However, Code Sec. 67(e) contained one notable exception for trusts and estates. The new statutory language provides that with respect to trusts and estates, the Two-Percent Floor Rules do not apply if such costs were paid or incurred in connection with the administration of an estate or trust *and would not have been incurred if the property were not held in such trust or estate* (emphasis added).

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This awkward language was added relatively late in the legislative process and without much published history or reasoning.⁴ However, it is these mere 17 words that have caused the consternation resulting in the *Knight* line of cases.

The specific issue that became the subject of litigation following the enactment of Code Sec. 67(e) is whether investment advisory fees incurred by a trust or estate and paid to an outside investment advisor may be deducted dollar-for-dollar against taxable income, or alternately are subject to the Two-Percent Floor Rules. For a small amount of investment advisory fees, the actual tax consequences may be relatively nominal. However, for larger trusts and estates with significant adjusted gross income, the adverse tax consequences of having to apply the Two-Percent Floor Rules can be considerable. Additionally, as discussed below, the rules adopted with respect to investment advisory fees also apply with respect to other miscellaneous deductions. Consequently, the stakes are high.

Precursors to *Knight*

***W.J. O'Neill, Jr.*⁵**

Code Sec. 67(e) first became effective for tax years beginning on or after January 1, 1997. It was not long before trustees, focusing on the language in Code Sec. 67(e), began taking tax reporting positions that various trust expenses fell within the new exception to the Two-Percent Floor Rules and were consequently fully deductible.[®]

Although there were presumably many IRS audits which focused on this issue, the first case to make its way through the Tax and Appeals Court process was the *O'Neill* case in the Sixth Circuit. In this case, the taxpayer was an Ohio trust, which held assets in excess of \$4.5 million. In order to oversee investment of the trust assets, the trustee hired an outside investment advisory firm. In 1997, the first year Code Sec. 67 was in effect, the trustee paid the outside investment advisor \$15,374 in investment advisory fees and deducted such fees dollar-for-dollar against the trust's income. The IRS's position on audit was that pursuant to Code Sec. 67(e), such investment advisory fees were only deductible to the extent such fees exceeded two percent of the trust's adjusted gross income. The tax in issue was \$3,534.

The parties were in agreement that pursuant to the language of Code Sec. 67(e), the issue was whether the investment advisory fees were expenditures that would not have been incurred if the property were not held in trust.

The trustee's argument was that under Ohio law, the trustee was not only required to invest the trust assets in a productive manner, but also to do so in a manner that met the statutorily mandated prudent investor test. Thus, the trustee took the position that it had a fiduciary duty to seek outside investment advice in order to meet the statutorily mandated requirements. Because such requirements would not have been imposed except for the fact that the assets were held in trust, the trustee's position was that it clearly met the exception to the Two-Percent Floor Rules contained in Code Sec. 67(e).

The Tax Court, on the other hand, believed the intent of the language contained in Code Sec. 67(e) was to except from the Two-Percent Floor Rules only those costs that are unique to the administration of an estate or trust. For example, the Court described fees paid to a trustee and trust accounting fees mandated by law or the trust agreement as unique to the administration of a trust or estate. Based on this reasoning, the Tax Court ruled against the taxpayer's position on the basis that individual investors routinely incur costs for investment advice as an integral part of their investment activities. Consequently, the Tax Court felt it could not be argued that such costs are somehow unique to the administration of an estate or trust simply because a fiduciary might feel compelled to incur such expenses in order to meet the prudent person standards imposed by state law.⁶

The Taxpayer appealed the Tax Court's decision to the Sixth Circuit Court of Appeals, and the Appeals Court reversed the Tax Court. The Sixth Circuit ruled that the investment advisory fees were necessary to the continued growth of the Trust and were caused by the statutorily imposed fiduciary duties of the trustee.⁷ Consequently, since the expenses for the investment management advice would not have been incurred if the property had not been held in trust, such expenses met the statutory requirement and were fully deductible against the trust's adjusted gross income.

This new standard was universally welcomed by taxpayers, but the victory proved to be short-lived.

***Mellon Bank, N.A.*⁸ and *J.H. Scott*⁹**

Although taxpayers in the Sixth Circuit breathed a sigh of relief following the *O'Neill* decision, taxpayers in other appellate circuits soon discovered the IRS had not given up the fight. The years 2001 and 2003 saw the issuance of two decisions in other appellate circuits where the courts took vastly different facts from the Sixth Circuit approach.

Similar to the *O'Neill* case, both the *Mellon Bank* and *Scott* cases involved the employment of outside investment companies by trustees to oversee and handle the investment of trust assets. However, unlike *O'Neill*, the taxpayers lost in both instances.

In the *Mellon Bank* case, the trustee oversaw thirteen trusts for the benefit of the Mellon family and deducted the investment advisory fees dollar-for-dollar against the income of each trust. In its search to determine what the proper test should be when deciding whether a trust expenditure is subject to the Two-Percent Floor Rules, the Federal Circuit Court noted that the legislative intent of Code Sec. 67(e) is to equate the taxation of trusts with the taxation of individuals, limit the ability of sophisticated taxpayers to use trusts or other complex arrangements to lower their tax burden compared to similarly situated individuals, and to minimize the impact of the tax code on economic decision making. Consequently, in making its determination whether the trustee's payment of the investment advice and management fees were subject to the Two-Percent Floor Rules, the Court in *Mellon Bank, N.A.* held that only those trust-related administrative expenses that are unique to the administration of a trust *and not customarily incurred* outside of trusts are subject to the Two-Percent Floor Rules (emphasis added). Because the Court found the fees paid by the trustee were the type of investment management fees that are commonly incurred by individuals outside of a trust context, and because such fees are subject to the Two-Percent Floor Rules when incurred by individuals, the Court held the expenses in question incurred inside a trust context are similarly subject to the Two-Percent Floor Rules.¹⁰

In the *Scott* case, there were three co-trustees, none of which were professional money managers, investment advisers, or otherwise engaged in a principal occupation within the financial services industry. Similar to the *O'Neill* and *Mellon Bank* cases, the trustees hired an outside investment advisory firm to oversee and handle investment of the trust assets. And similar to both cases, the trustee deducted the fees directly from the trust's income without taking into account the Two-Percent Floor Rules.

The Fourth Circuit Court carefully considered the Sixth Circuit's reasoning in the *O'Neill* case and the Federal Circuit's reasoning in the *Mellon Bank* case, and ultimately found the reasoning in the *Mellon Bank* case persuasive. Consequently, the Fourth Circuit found in favor of the IRS on the issue, holding that all trust expenses that are of the type commonly incurred by individuals with respect to the trust prop-

erty are subject to the Two-Percent Floor Rules.¹¹

This "commonly incurred" standard was obviously less taxpayer-friendly than the approach adopted by the Sixth Circuit in *O'Neill*. However, if taxpayers thought they had seen the worst of it, they were mistaken.

W.L. Rudkin Trust¹²

The Second Circuit was soon faced with the same issue and had to decide whether fees paid by a trustee to an outside investment advisor were subject to the Two-Percent Floor Rules. With the benefit of having three other appellate circuits look at this issue in carefully written opinions, one might think the Second Circuit would easily dispatch the case by adopting one of the two standards already decided upon. But such was not to be, as the Second Circuit decided to go its own way and adopt an even stricter view of the Two-Percent Floor Rules.

In deciding the *Rudkin* case, the Second Circuit examined the "commonly incurred" standard adopted in the *Mellon Bank* and *Scott* cases and concluded such standard was simply inconsistent with the statutory language contained in Code Sec. 67(e). Additionally, after examining the Sixth Circuit's reasoning in *O'Neill*, the Second Circuit concluded that the fact that a trustee has a fiduciary duty in handling trust assets is not sufficient to move investment advisory fees beyond the ambit of the Two-Percent Floor Rules.

Instead, the Second Circuit adopted a completely different standard. Although the language of Code Sec. 67(e) excepts from the Two-Percent Floor Rules those expenses that *would not* have been incurred if the property were not held in such trust or estate, the Second Circuit held that the only type of trust investment advisory fees that fall outside the scope of the Two-Percent Floor Rules are those fees that *could not* have been incurred if the property were held by an individual (emphasis added). This more stringent "could not" standard was even harder for a trustee to meet than the standards applied in the other Circuits.

The momentum was definitely moving away from taxpayers, and the various standards made it difficult for trustees to know what position to take on their tax returns, particularly if they did not file in a jurisdiction where the matter had been litigated. Guidance from on high was needed.

Knight¹³

With such a diverse split of authorities among the various circuits, and with a relatively significant

amount of tax dollars at issue, it was not surprising the U.S. Supreme Court granted certiorari to hear the appeal of the *Rudkin* decision. Although the decision was referenced under the *Rudkin* name at the appellate level, the case was picked up in the U.S. Supreme Court under the name of the trustee, and the case is now usually referred to as the *Knight* case.

The Supreme Court heard oral arguments in the latter part of 2007, and the Court issued its unanimous opinion on January 16, 2008. In reaching its decision, the Court took a detailed look at each of the three alternate approaches adopted by the underlying appellate circuits with respect to whether investment advisory fees incurred by a trustee are subject to the Two-Percent Floor Rules.

First, the Court examined the “could not” standard adopted by the Second Circuit in the underlying *Rudkin* case, but found it unacceptable that the appellate court changed the statutory “would not” language to “could not.” The Supreme Court stated that such revision flies in the face of the statutory language, and that if Congress had intended to use the strongly worded “could not” standard, it presumably would have:

The provision at issue asks whether the costs ‘would not have been incurred if the property were not held’ in trust, ... not, as the Court of Appeals would have it, whether the costs ‘could not have been incurred’ in such a case.”¹⁴

Consequently, the Court dispatched with the Second Circuit’s “could not” test. The Supreme Court next turned its focus to the test adopted by the Sixth Circuit test in the *O’Neill* case, which would generally permit trustees to deduct the payment of any investment advisory fees without application of the Two-Percent Floor Rules. The Sixth Circuit’s rationale was that trustees are essentially required to seek investment advice under most applicable state laws because they are fiduciaries with a legally mandated obligation to invest the trust assets in proper fashion.

The Supreme Court rejected the Sixth Circuit approach for two reasons. First, the Supreme Court pointed out that all expenses incurred by a Trustee are arguably required under state fiduciary laws, because otherwise, there would be no reason for the trust to incur the expense in the first place. Such a statutory interpretation would render the Two-Percent Floor Rules inapplicable to all trust and estate expenses, a result inconsistent with the existence of Code Sec. 67(e).

Second, the Court reasoned the Sixth Circuit’s test was inaccurate in its focus on the prudent investor rule as a basis for excepting trust advisory fees from the Two-Percent Floor Rules. The Sixth Circuit had felt the prudent investor rules impose a special obligation on a trustee that requires investment in a manner that is materially different from the way an individual invests. However, the Supreme Court pointed out that the prudent investor standard specifically measures the trustee’s investment decisions against how a prudent individual would invest, not how a prudent trustee would invest. Thus, the investment obligations under the prudent investor rule do not impose obligations on a trustee which are different from an individual-based focus.

Having rejected the Second Circuit and Sixth Circuit tests, the Court turned its attention to the “commonly or customarily incurred” standard adopted in the Federal and Fourth Circuits in the *Mellon Bank* and *Scott* cases. Such standard examines whether the expense is the type of expense that would have been commonly or customarily incurred by an individual with respect to the property in question, and if so, whether such expense would be subject to the Two-Percent Floor Rules if reported by an individual taxpayer.

The Supreme Court unanimously agreed that this test is consistent with the statutory language and the appropriate measure of whether an expense incurred by a trust or estate is subject to the Two-Percent Floor Rules:

The question whether a trust-related expense is fully deductible turns on a prediction about what would happen if a fact were changed—specifically, if the property were held by an individual rather than by a trust. In the context of making such a prediction, the word ‘would’ is best read as ‘express[ing] concepts such as custom, habit, natural disposition, or probability.’¹⁵

Thus, we now have a standard to apply when deciding whether an itemized deduction is subject to the Two-Percent Floor Rules. However, some issues on the application of this standard still remain.

IRS Proposed Regulations

Interestingly, one month after the U.S. Supreme Court agreed to hear arguments in the *Knight* case, but well before the Court’s January decision, the IRS issued proposed regulations that adopted a position even

more onerous than the “could not” standard embraced in the *Rudkin* case.¹⁶

Under the proposed regulations, taxpayers are directed to look at the type of product or service rendered to the trust or estate, rather than the characterization of the cost of that product or service. The only expenses that escape the ambit of the Two-Percent Floor Rules are those that could not have been incurred by an individual with respect to the property in question and are unique to administration of a trust or estate.

The proposed regulations provide some examples of expenses that meet this test, including expenses relating to fiduciary accountings, required judicial filings, fiduciary income tax returns, estate tax returns, distributions and communications to beneficiaries, will or trust contests or constructions, and fiduciary bonds.

The proposed regulations also provide examples of costs that do not meet the required threshold, including expenses relating to the custody and management of property, advice on investing for total return, preparation of gift tax returns, defense of claims of the grantor or decedent, and the purchase, sale, maintenance, repair, insurance, or management of property not used in a trade or business.

Notably, in addition to adopting the “could not” test, the proposed regulations also require a new approach to fiduciary fees, commonly referred to as “unbundling.” Under the proposed regulations, trustees who charge a unitary fee for a bundle of trust services are required to unbundle such fees. For example, if a trustee is charging an annual fee for a variety of trust services, which is based on a percentage of the assets under management, the trustee would be required to allocate such fee among the various services it provides so it can be determined which portion of the fee is subject to the Two-Percent Floor Rules.

The IRS invited written comments to the proposed regulations, and a public hearing was held in this regard on November 14, 2007. The proposed regulations have not yet been finalized.

Recent IRS Pronouncement on Unbundling of Trustee Fees and Open Issues

The *Knight* case has resulted in a clear ruling as the standard to apply when determining whether specific trust or estate expenses are subject to the Two-Percent

Floor Rules under Code Sec. 67(e). However, areas of uncertainty still exist. For example, the narrow issue in the *Knight* case, as well as the underlying appellate cases, involved the application of the Two-Percent Floor Rules to the payment of outside investment advisory fees. However, the standard adopted by the Supreme Court is much broader and applies to all itemized deductions incurred by a trust or estate under Code Sec. 67(e). In addition to investment advisory fees, this also includes attorney fees, accounting fees, trustee fees and tax return preparation fees.

The IRS publishes annual tax data that provides insight into the scope of the issue.¹⁷ For example, in 2006, there were 1,289,708 income tax returns filed for complex trusts with the following reporting positions:

Gross income	\$75,563,840
Fiduciary fees	\$ 2,124,627
Attorney, accountant and return preparer fees	\$ 1,082,818
Miscellaneous deductions	\$ 1,030,509

Thus, although the dollars in issue in the *Knight* case were relatively nominal, the impact of the holding is far-reaching.

Additionally, while the decision in the *Knight* case has resolved the question as to which standard applies to trusts and estates when determining whether an expense is subject to the Two-Percent Floor Rules, there are still several unanswered questions that trustees, taxpayers and practitioners are still grappling with and anticipating.

Three primary unresolved areas include whether the IRS has the authority to require the unbundling of unitary trustee fees, whether there are still special categories of itemized deductions that are not subject to the Two-Percent Floor Rules, and how the IRS and Congress will respond to the Supreme Court’s decision in the *Knight* case.

Unbundling of Trustee Fees

The Scope of the Issue

All of the appellate decisions discussed above involved the hiring by the trustee of an outside investment advisor. However, in many cases, the trustee is a corporate fiduciary that charges a unitary fee based on a percentage of the value of the assets owned by

the trust. No outside charges for investment advice are incurred; rather, investment services are included as part of the unitary fee.

This method of compensating corporate fiduciaries is a common and wide-spread industry practice. Such unitary fees are not typically allocated among administration, investment services, tax return preparation, and the like. Rather, all such services are commonly wrapped together under one fee structure.

During the course of the *Mellon Bank* case, the taxpayer criticized the government's position because it would foreseeably require a trustee to unbundle such unitary trustee fees and allocate them among various services in order to determine the portion subject to the Two-Percent Floor Rules. Despite the additional logistical issues unbundling would entail, the Court was not deterred. Instead, the Federal Claims Court merely indicated this was an issue more appropriately addressed by Congress rather than courts.¹⁸

The IRS must have picked up on this line of thought, because when the proposed regulations under Code Sec. 67 were issued (discussed above), the regulations contained an affirmative obligation to unbundle such fees. However, the proposed regulations offered little guidance in carrying out this mandate.

This proposed requirement to unbundle trustee fees has led to a variety of questions and concerns. One initial question is whether the IRS has the authority to require such course of action, given that the statute makes no mention of this unbundling concept.

In the *Knight* case, the Supreme Court seemed to invite the finalization of interpretive regulations under Code Sec. 67(e) to assist taxpayers with compliance under the statute. However, the Supreme Court never specifically mentioned whether such authority extended as far as requiring the affirmative unbundling of trustee fees.

It can also be anticipated that corporate trustees will begin lobbying Congress to enact a less intrusive alternative than required unbundling. The established practice within the professional fiduciary community is not to unbundle services, and a requirement to do so would result in a significant change in the way the industry does business.

Notice 2008-32¹⁹

The IRS recently issued interim guidance to address an immediate and practical concern with respect to the proposed unbundling requirement. Specifically, trustees who are currently in the process of preparing

fiduciary income tax returns for 2007 need to know how to deal with unitary fiduciary fees that have not been allocated among different service areas. While the proposed regulations require unbundling, there is no recommended way to deal with unbundled fees that have not been allocated among the various services included within such a fee structure. Additionally, the regulations are still only in proposed form, and it is unclear whether such a large change in industry practices will be adopted in the final regulations, and if so, what the final rules will look like.

In order to provide guidance and comfort to fiduciaries during the current tax season, Notice 2008-32 provides interim guidance directing that for any tax year beginning prior to January 1, 2008, taxpayers are not required to determine the portion of a bundled fiduciary fee that is subject to the Two-Percent Floor Rules. Instead, taxpayers are permitted to deduct the full amount of such fees. However, this rule does not apply to payments by fiduciaries to third parties for expense subject to the Two-Percent Floor Rules.

In the Notice, the IRS also indicates it is giving high priority to finalizing the proposed regulations under Code Sec. 67, and that such regulations are anticipated to contain one or more safe harbors relating to the allocation of fees and expenses between those costs subject to the Two-Percent Floor Rules and those that are not. To this end, the IRS extended the comment period for the proposed regulations until May 27, 2008. Additional comments and responses are anticipated.

Special Fees Not Subject to Two-Percent Floor Rules

By limiting the application of the Two-Percent Floor Rules to expenses that are customary and common for individuals to incur with respect to the property in issue, the Supreme Court intentionally left the door open to deduct fees that are truly unique to the subject property. For example, the Supreme Court indicated trust-related investment advisory fees may be fully deductible if an investment advisor imposes a special additional charge applicable only to fiduciary accounts. Additionally, the Two-Percent Floor Rules may not apply to trust expenses incurred in connection with a trust requiring an unusual investment objective or a specialized balancing of interests of the beneficiaries.

In the event the requirement to unbundle fees is finalized, it will be interesting to see how the industry adapts to the new rules. To the extent fiduciaries justifiably allocate a portion of fees pursuant to this "special fee" exception, direct dollar-for-dollar deductions remain viable.

IRS and Congressional Response

The decision in the *Knight* case also raises some issues that presumably must be addressed by the IRS and Congress. As discussed above, the original proposed regulations under Code Sec. 67(e) were primarily based on the Second Circuit's reasoning in the *Rudkin* case. However, this reasoning in *Rudkin* was specifically rejected by the Supreme Court. Even the public hearings by the IRS on the proposed regulations were held prior to the issuance of the Supreme Court's opinion in the *Knight* case, so it is unclear what approach the IRS will now take with respect to finalizing the regulations.

The only official IRS response so far was the issuance of Notice 2008-32, discussed above, dealing with the requirement of fiduciaries to unbundle their fees. This Notice presumes the final regulations will still require such unbundling, and such requirement appears consistent with the reasoning in the *Mellon Bank* and *Scott* cases. However, the comment period on the regulations was also extended until May 27, 2008, so we will not have answers until later this year, at the earliest.

There also remain two primary issues that may require further congressional action to fully address. First, given the direction being pursued by the IRS with respect to the unbundling issue, it remains to be seen what the outcome will be once these fiduciaries get their anticipated lobbying efforts in motion.

Second, it has been pointed out that even if unbundling is required, there are relatively easy ways to avoid such rules. For example, a fiduciary could use a securities broker rather than a fee-based investment advisor since brokerage commissions are directly added to tax basis or deducted from realized taxable gain on a dollar-for-dollar basis.²⁰ Alternately, a fiduciary could invest in mutual funds since any investment advisory fees incurred by a mutual fund are subtracted before distributing taxable income to fund owners. Whether these are distinctions

with a difference remains to be seen, however, such alternatives are likely to lead to a continued review of these rules in the congressional arena.

Conclusion

The Supreme Court's decision in the *Knight* case finally resolved the split of authorities in the appellate circuits with respect to the question of which trust and estate fees are subject to the Two-Percent Floor Rules. In adopting its decision, the Supreme Court recognized it was adopting a fact-specific test that will require additional guidance from the IRS and Congress. Despite the Court's observation that future inquiries may prove difficult, the test adopted by the Court is relatively straightforward. However, because the IRS' approach to the decision will require an industry-wide change in the way fees are accounted for, it is unclear how the industry will adapt and what other changes we might expect.

ENDNOTES

- ¹ *M.J. Knight*, SCT, 2008-1 USTC ¶50,132, 128 S Ct 782.
- ² The Tax Relief Act of 1986 (P.L. 99-514).
- ³ H.R. REP. NO. 99-426 (1985).
- ⁴ H.R. REP. NO. 99-841 (1986).
- ⁵ *W.J. O'Neill, Jr.*, CA-6, 93-1 USTC ¶50,332, 994 F2d 302.
- ⁶ *O'Neill*, 98 TC 227, Dec. 48,038 (1992).
- ⁷ *Supra* note 5.
- ⁸ *Mellon Bank, N.A.*, CA-FC, 2001-2 USTC ¶50,621, 265 F3d 1275.
- ⁹ *J.H. Scott*, CA-4, 2003-1 USTC ¶50,428, 328 F3d 132.
- ¹⁰ *Supra* note 8.
- ¹¹ *Supra* note 9.
- ¹² *W.L. Rudkin*, CA-2, 2006-2 USTC ¶50,569, 467 F3d 149 (2006).
- ¹³ *Supra* note 1.
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ Proposed Reg. §1.67-4.
- ¹⁷ SOI Tax Stats—Income from Trusts and Estates, www.irs.gov/taxstats/indtaxstats/.
- ¹⁸ *Supra* note 8.
- ¹⁹ Notice 2008-32, IRB 2008-11, Feb. 27, 2008.
- ²⁰ See *A.B. Spreckles*, SCT, 42-1 USTC ¶9345, 315 US 626.

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