February 5, 2024

Ms. Laura C. Fields
Branch Chief, Branch 1
Office of Associate Chief Counsel (PSI)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Robert D. Alinsky
Branch Chief, Branch 3
Office of Associate Chief Counsel (PSI)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Request for Guidance on International Information Reporting for Domestic Grantor Trusts

Dear Ms. Fields and Mr. Alinsky:

On behalf of the American Institute of CPAs (AICPA), we are writing to request the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) provide guidance regarding international information reporting for domestic grantor trusts. Specifically, Treasury and the IRS should issue a Notice or Revenue Procedure to resolve uncertainty regarding the obligation of domestic grantor trusts to file Form 5471, *Information Return of U.S. Persons With Respect To Certain Foreign Corporations*, Form 8858, *Information Return of U.S. Persons With Respect To Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs)*, Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*, and Form 8992, *U.S. Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI)*. The Notice or Revenue Procedure would either i) clarify that grantor trusts are disregarded as entities separate from their owners for the purpose of filing Forms 5471, 8858, 8865 and 8992, or, in the alternative, ii) establish certain exemptions for domestic grantor trusts from filing these information returns.

Our recommendations will simplify filing for taxpayers and practitioners and will reduce the administrative burden on the IRS as well.

Overview

Domestic grantor trusts must file "grantor letters" (*i.e.,* a separate statement attached to Form 1041, *U.S. Income Tax Return for Estates and Trusts*) unless the trustee can avail itself of limited exceptions to filing in Treas. Reg. § 1.671-4(b).[1] Although grantor trusts are disregarded for federal income tax purposes pursuant to Rev. Rul. 85-13, domestic grantor trusts have been interpreted by the United States Tax Court ("Tax Court") to be U.S. persons under section 7701. The Tax Court's treatment of domestic grantor trusts as U.S. persons is arguably inconsistent with Rev. Rul. 85-13 and has created uncertainty as to the obligation of domestic grantor trusts to file certain international information returns. If the Tax Court's interpretation is correct, neither the current regulations nor the form instructions specifically exempt domestic grantor trusts from

[1] Unless otherwise indicated, all references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

1455 Pennsylvania Ave. NW, Washington, DC 20004-1081
T: +1 202.737.6600 F: +1 202.638.4512
aicpaglobal.com | cimaglobal.com | aicpa.org | cgma.org

filing Form 5471, Form 8858, Form 8865, and Form 8992. In certain cases, the deemed U.S. owner can file the information return on behalf of the grantor trust, but this exception to filing does not always apply.

In light of this uncertainty, a number of taxpayers have conservatively filed the above international information returns with their grantor letters. The approach of having domestic grantor trusts file these information returns in addition to the U.S. owners of such trusts also filing the same information returns creates redundancy in reporting requirements rather than providing additional information that may be of use to the government. Treating domestic grantor trusts as entities for the purpose of filing these information returns is also inconsistent with the principle of the global intangible low-taxed income (GILTI) regime in which computations are to be aggregated at the U.S. shareholder level rather than at the level of domestic pass-through entities which own shares of controlled foreign corporations (CFCs).

Recommendations

- Treasury and the IRS should issue a Notice or Revenue Procedure to either:

    - Clarify that grantor trusts are disregarded as entities separate from their owners for the purpose of filing Forms 5471, 8858, 8865 and 8992 (thus precluding any obligation of domestic grantor trusts to file these forms), *or, in the alternative*,

    - Provide a general rule that domestic trusts that are ordinary trusts under Treas. Reg. § 301.7701-4(a) and fully grantor to U.S. person(s) are exempt from filing Forms 5471, 8858, 8865 and 8992. Under this general rule, these information returns would instead be filed by the deemed U.S. owner(s) of the trust rather than the trust itself. If this latter approach is taken, the Revenue Procedure or Notice should provide that, in the case of a domestic grantor trust that is either an investment trust under Treas. Reg. § 301.7701-4(c) or a liquidating trust under Treas. Reg. § 301.7701-4(d), the trust can file Forms 5471, 8858, and 8865 on behalf of the deemed U.S. owner(s) of those trusts, with no further statement required be attached to the returns of the deemed U.S. owner(s). Any U.S. owners of these investment or liquidating trusts who are U.S. shareholders of CFCs owned by these trusts would be required to file Form 8992 rather than the trust.

- Treasury and the IRS should use as an example for the above forms Treas. Reg. §1.6038D-6(d)(3), which specifically exempts grantor trusts from filing Form 8938, *Statement of Specified Foreign Financial Assets*. Pursuant to the regulations under section 6038D, an individual deemed owner reports on the individual's Form 1040, *U.S. Individual Income Tax Return*; no Form 1041, *U.S. Income Tax Return for Estates and Trusts*, for a grantor trust needs to include the submission of the Form 8938.

Analysis

Under section 6012 and Treas. Reg. § 1.671-4(a), the trustee of a domestic grantor trust must file a "grantor letter" if the trust has any taxable income or gross income of $600 or more. In certain circumstances, the trustee can avail itself of one of three optional methods for reporting grantor trust information as described in Treas. Reg. § 1.671-4(b) rather than filing Form 1041 and the attached statement. However, Treas. Reg. § 1.671-4(b)(6)(ii) provides that "a trust that has its situs or any of its assets located outside the United States" is precluded from using the optional reporting methods. Based upon a lack of clarity as to the meaning of this provision, grantor trusts with interests in foreign corporations, partnerships or disregarded entities may be ineligible to use the optional reporting methods and therefore must file grantor letters.

Revenue Ruling 85-13 treats grantor trusts as disregarded for federal income tax purposes. Nevertheless, in *Textron Inc. v. Commissioner* ("*Textron*"),[2] the Tax Court held that a domestic grantor trust met the definition of a U.S. person. As discussed below, if the Tax Court's interpretation is correct, the regulations and form instructions do not specifically exempt domestic grantor trusts from filing Forms 5471, 8858, 8865 and 8992. The differing treatment of domestic grantor trusts under *Textron* and Rev. Rul. 85-13 has thus created uncertainty as to the obligation of domestic grantor trusts to file certain international information returns.

Based upon this uncertainty, a number of taxpayers have conservatively filed the above international information returns with their grantor letters. The approach of having domestic grantor trusts file these information returns in addition to the U.S. owners of such trusts also filing the same information returns has the effect of increasing the compliance burden on taxpayers without adding any value to the IRS in the administration of the federal income tax system.

Also, if the *Textron* decision is correct, taxpayers may be exposed to penalties for failure to file these forms either because they have reasonably interpreted Rev. Rul. 85-13 as being dispositive of this issue or they have been unaware of the potential obligation of grantor trusts to file these information returns. Thus, action is warranted to resolve this uncertainty and reduce the compliance burden on taxpayers.

The following paragraphs summarize the requirements of domestic grantor trusts to file Forms 5471, 8858, 8865 and 8992 assuming, arguendo, that such trusts are treated as U.S. persons under section 7701.[3]

Form 5471

Form 5471 can be required in a number of circumstances, including when a U.S. person acquires a 10 percent or more interest in a foreign corporation, owns more than 50 percent of a foreign

[2] 117 T.C. 67 (2001).
[3] The obligation of domestic grantor trusts to file Forms 5471, 8858, and 8865 is summarized by Jon D. Feldhammer, Benjamin Koodrich and Nick A. Frey in "Domestic Grantor Trusts: Clarity for Offshore Entity Filings," *Tax Notes Today*, March 21, 2023.

corporation (by total combined voting power or by value), or is a U.S. shareholder of a CFC who owns stock of the foreign corporation on the last day of the year in which the corporation is a CFC. One person may file Form 5471 and the applicable schedules for other persons who have the same filing requirements.[4] However, the persons for whom Form 5471 is filed generally must still include a statement with their return identifying the foreign corporation and the taxpayer who satisfied the filing requirement on their behalf.[5]

For this purpose, the regulations and form instructions generally incorporate the definition of a U.S. person under section 7701(a)(30), which includes domestic trusts.[6] No distinction is made between grantor and non-grantor trusts.

Although Rev. Rul. 85-13 treats grantor trusts as disregarded, *Textron* would suggest that a domestic grantor trust can have a subpart F inclusion. Nevertheless, *Textron* was decided many years before GILTI was added to the Internal Revenue Code. At that time, there was no difference in the ultimate tax liability of the deemed owner of the trust whether the subpart F inclusion was reported by the deemed owner directly or was reported by the grantor trust and flowed to the grantor under the grantor trust rules. That is not necessarily the case with GILTI.

If GILTI information is aggregated at the grantor trust level and a GILTI inclusion is then passed to the grantor under the grantor trust rules, there could be a material difference in the tax liability of the grantor relative to what it would be if the grantor owned the shares of the CFC directly. Treasury and the IRS have stated a principle that all GILTI information should be aggregated at the U.S. shareholder level rather than at the level of domestic pass-through entities which own shares of CFCs.[7]

Thus, considering the statutory changes since *Textron* was decided, it would be more appropriate for any subpart F or GILTI inclusion to be reported by the U.S. grantor rather than the grantor trust.

Form 8858

Form 8858 can be required in a number of circumstances, including when a U.S. person is a tax owner of a foreign disregarded entity, is a Category 4 or 5 filer of Form 5471 for a CFC that is a tax owner of a foreign disregarded entity or operates a foreign branch, or is a Category 1 or 2 filer of Form 8865 for a controlled foreign partnership (CFP) that is a tax owner of a foreign disregarded entity or operates a foreign branch. For this purpose, the tax owner of a foreign disregarded entity is the person that is treated as owning the assets and liabilities of the foreign disregarded entity for purposes of U.S. income tax law.

[4] Treasury Reg. § 1.6038-2(j)(1) and Treas.Reg. § 1.6046-1(e).
[5] Treasury Reg. § 1.6038-2(j)(3), and Treas.Reg. § 1.6046-1(e)(5).
[6] Treasury Reg. § 1.6038-2(d), and Treas.Reg. § 1.6046-1(f)(3).
[7] 83 Fed. Reg. 51079 (Oct. 10, 2018) and 84 Fed. Reg. 29315-29316 (June 21, 2019).

The instructions for Form 8858 define a U.S. person for this purpose as including any domestic trust. No distinction is made between grantor and non-grantor trusts. Given that grantor trusts are treated as disregarded for federal income tax purposes, a domestic grantor trust is arguably not a tax owner of a foreign disregarded entity. However, as discussed above, a domestic grantor trust can apparently be a Category 4 or 5 filer of Form 5471 or a Category 1 or 2 filer of Form 8865, so a domestic grantor trust can thus have an obligation to file Form 8858 for foreign disregarded entities or foreign branches that are owned or operated by those CFCs or CFPs.

In the case of Category 4 or 5 filers of Form 5471 or Category 1 filers of Form 8865 who are also required to file Form 8858, one person may file Form 8858 and Schedule M (Form 8858), if applicable, for other persons who have the same filing requirements with respect to both Form 8858 and Form 5471 or Form 8865. This information may be included with or attached to, and filed in the same manner as, the multiple filer information provided with respect to the CFC or the CFP. However, this would generally require the taxpayer for whom Form 8858 is filed to include a statement with their return identifying the foreign disregarded entity or foreign branch and the taxpayer who satisfied the filing requirement on their behalf.

Form 8865

Form 8865 can be required in a number of circumstances, including when a U.S. person controls a foreign partnership, makes capital contributions to a foreign partnership of more than $100,000, or has an acquisition or disposition of a 10 percent or greater direct interest in a foreign partnership.

For this purpose, the regulations and form instructions generally incorporate the definition of a U.S. person under section 7701(a)(30), which includes domestic trusts.[8] No distinction is made between grantor and non-grantor trusts. Thus, a literal reading of the regulations would suggest that a domestic grantor trust can have an obligation to file Form 8865.

Nevertheless, the activities of the grantor trust can be imputed to the deemed owner of the trust for the purpose of determining an obligation to file Form 8865. Categories 1-3 of Form 8865 incorporate the section 267(c) attribution rules,[9] and the IRS has informally stated that grantor trusts are disregarded as entities separate from their owners for the purpose of applying section 267.[10] Accordingly, there can be redundant filing obligations between the grantor trust and the deemed owner of the trust.

Unfortunately, the ability of a taxpayer to file Form 8865 on behalf of another taxpayer is limited. As it currently stands, only Category 1 filers can file on behalf of each other.[11] In practice, the most common Forms 8865 are Category 3 filings reporting cash contributions to foreign partnerships exceeding $100,000.

[8] Treasury Reg. §§ 1.6038-3(b)(6), 1.6038B-2(i)(7) and 1.6046A-1(b)(5).
[9] Section 6038(e)(3)(B) and Treas. Reg. § 1.6038-3(b)(4).
[10] Chief Counsel Advice 201343021.
[11] Treasury Reg. § 1.6038-3(c)(1)).

Form 8992

Each United States person who is a U.S. shareholder (as defined in section 951(b)) of any CFC must make an annual return on Form 8992 for each U.S. shareholder inclusion year.[12]

For this purpose, the regulations generally incorporate the definition of a U.S. person under section 7701(a)(30), which includes domestic trusts.[13] No distinction is made between grantor and non-grantor trusts.

Thus, a literal reading of the regulations would suggest that a grantor trust that meets the definition of a U.S. shareholder is technically required to file Form 8992. There is not an option for another taxpayer (*e.g.*, the deemed U.S. owner of the grantor trust) to file Form 8992 on behalf of the grantor trust.

Having a grantor trust aggregate CFC information on Form 8992 and pass a GILTI inclusion amount to its deemed owner is inconsistent with the aforementioned principle of the GILTI regime in which computations are to be aggregated at the U.S. shareholder level rather than at the level of domestic pass-through entities which own shares of CFCs. Accordingly, it would be more appropriate for any GILTI inclusion to be reported by the U.S. grantor rather than the grantor trust.

The following paragraphs summarize the proposed alternatives for a Notice or Revenue Procedure.

First Alternative – Clarify the Disregarded Treatment of Grantor Trusts

A simple approach to resolving this uncertainty would be to clarify by Notice or Revenue Procedure that grantor trusts are disregarded as entities separate from their owners for the purpose of filing Forms 5471, 8858, 8865 and 8992. This would have the effect of precluding any obligation of domestic grantor trusts to file these forms. Such an outcome would be consistent with the principles of Rev. Rul. 85-13. For example, the IRS has stated informally that Rev. Rul. 85-13 results in grantor trusts being disregarded as entities separate from their owners for all federal income tax purposes.[14]

In this regard, it is also noteworthy that the former proposed regulations under section 951A included an example[15] that treated the U.S. citizen grantor of a fully grantor trust (rather than the trust itself) as owning section 958(a) stock of a CFC and thus having a GILTI inclusion amount. Although an example to this effect was not included in the final regulations, it underscores that grantor trusts could reasonably be interpreted as disregarded as entities separate from their owners for the purpose of filing the aforementioned information returns.

[12] Treasury Reg. § 1.6038-5(a)).
[13] Treasury Reg. § 1.6038-2(d).
[14] Chief Counsel Advice 201343021.
[15] Proposed Reg. § 1.951A-5(g), Ex. 5 at 83 Fed. Reg. 51103.

Second Alternative – Create Exemptions from Filing

If the above alternative is not adopted, another possible approach would be to establish certain exemptions for domestic grantor trusts from filing the above information returns. The following paragraphs discuss the proposed treatment of domestic ordinary trusts, investment trusts and liquidating trusts under this alternative.

Treatment of Domestic Ordinary Trusts under the Second Alternative

Treasury Reg. § 301.7701-4(a) defines an ordinary trust as an arrangement created either by a will or by an *inter vivos* declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. Ordinary trusts are commonly seen in estate planning and often have a limited number of grantors. Frequently, an ordinary trust will have just one grantor.

Based upon the limited number of grantors of ordinary trusts, it would be more efficient to have the deemed U.S. owner(s) of a domestic ordinary trust file any required Forms 5471, 8858, 8865 and 8992 rather than the trust itself. This approach would eliminate redundancy with respect to those foreign information reporting obligations, and it would also prevent a potential distortive effect in the calculation of any GILTI inclusion that could arise if the grantor trust were to aggregate GILTI information and pass a GILTI inclusion to the grantor under the grantor trust rules.

Treatment of Domestic Investment Trusts and Liquidating Trusts under the Second Alternative

Investment trusts issue certificates to investors in exchange for capital contributions to "facilitate direct investment in the assets held by the trust."[16] The interests of the certificate holders may be "substantially equivalent to undivided interests" in the trust assets.[17] Investment trusts can be treated as grantor trusts for federal income tax purposes,[18] and when that is the case, investment trusts by their nature frequently have many deemed owners.

Treasury Reg. § 301.7701-4(d) provides that certain organizations that are commonly known as liquidating trusts are also treated as trusts for purposes of the Internal Revenue Code. An organization will be considered a liquidating trust if it is organized for the primary purpose of liquidating and distributing the assets transferred to it, and if its activities are all reasonably necessary to, and consistent with, the accomplishment of that purpose. Liquidating trusts can be treated as grantor trusts for federal income tax purposes,[19] and when that is the case, they often have numerous deemed owners.

[16] Treasury Reg. § 301.7701-4(c)(2), Ex. 4.
[17] Treasury Reg. § 301.7701-4(c)(2), Ex. 2.
[18] Revenue Ruling 2004-86, 2004-2 C.B. 191.
[19] Revenue Ruling 75-379, 1975-2 C.B. 505.

Considering the significant number of deemed owners, it would be more efficient for a domestic grantor trust that is either an investment trust under Treas. Reg. § 301.7701-4(c)[20] or a liquidating trust under Treas. Reg. § 301.7701-4(d) to file Forms 5471, 8858, and 8865 on behalf of the deemed U.S. owner(s) of those trusts, rather than having the deemed owner(s) of the trust file those forms. Based upon the filing of these forms by the trust, no further statement should be required to be attached to the return(s) of the deemed U.S. owner(s). This proposal is akin to the approach that has already been taken under Treas. Reg. § 1.1298-1(b)(3)(i) for certain domestic liquidating trusts and widely held fixed investment trusts with respect to filing Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*, for passive foreign investment companies. If the domestic investment trust or liquidating trust owns interests in CFCs, the trust would be responsible for providing separate Schedules I of Form 5471 to each deemed grantor who is a Category 4, 5a or 5b filer of Form 5471.

Consistent with the principle that GILTI information should be aggregated at the U.S. shareholder level rather than at the level of domestic pass-through entities, it would be appropriate for any U.S. owners of these investment or liquidating trusts who are U.S. shareholders of CFCs owned by these trusts to file Form 8992 (as applicable) rather than the trust itself. The trust would be responsible for providing the U.S. owners with the information needed to prepare Form 8992 for any CFCs owned by the trust.

Regulatory Authority

The relevant statutes (sections 6038(a)(1), 6038B(a), 6046(b) and 6046A(a)) all state that the obligation to provide this information is as the Secretary of the Treasury prescribes. Thus, Treasury and the IRS have the regulatory authority to make the proposed modification. The modification of the above filing requirements could be accomplished by Notice (as with Notice 2018-13) or Revenue Procedure (as with Rev. Proc. 2019-40).

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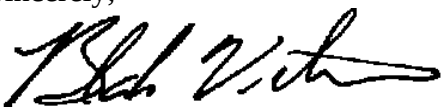
The AICPA is the world's largest member association representing the CPA profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of our recommendations and welcome the opportunity to discuss our comments. If you have any questions, please contact Irene Estrada, Chair, AICPA Trust, Estate, and Gift Tax Technical Resource Panel, at (703) 628-5243 or Irene.C.Estrada@pwc.com;

[20] For this purpose, we are excluding widely held fixed investment trusts, which are subject to different reporting procedures pursuant to Treas. Reg. § 1.671-5 than are imposed upon other grantor investment trusts pursuant to Treas. Reg. § 1.671-4.

Eileen Sherr, AICPA Director – Tax Policy & Advocacy, at (202) 434-9256 or Eileen.Sherr@aicpa-cima.com; or me at (830) 372-9692 or bvickers@alamo-group.com.

Sincerely,



Blake Vickers, CPA
Chair, AICPA Tax Executive Committee

cc: Ms. Catherine Hughes, Estate and Gift Tax Attorney-Advisor, Office of Tax Legislative Counsel, Office of Tax Policy, Department of the Treasury
Ms. Lisa Piehl, Program Manager, Estate and Gift Tax Policy, SE:S:E:HQ:SP:E&GTP, IRS
Mr. John Sweeney, Special Counsel, Associate Chief Counsel (International), IRS
Ms. Lara A. Banjanin, Senior Counsel, Branch 1, Associate Chief Counsel (International), IRS
Ms. Tracy M. Villecco, Senior Counsel, Branch 1, Associate Chief Counsel (International), IRS
Ms. Karlene Lesho, Branch Chief, Branch 4, Associate Chief Counsel (PSI), IRS
Mr. Daniel Gespass, Senior Technician Reviewer, Branch 4, Associate Chief Counsel (PSI), IRS