



BORROWING FOR POSTMORTEM LIQUIDITY, PART 2— A PRIMER ON IRC § 6166

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Part 1 of this article focused on liquidity planning for closely held businesses through the use of conventional borrowing, *Graegin* loans, and loans from the Internal Revenue Service (IRS) under § 6161 of the

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Internal Revenue Code of 1986 (IRC), as amended. Part 2 will focus on an estate's obtaining liquidity by "borrowing" funds from the IRS under IRC § 6166.

IRC § 6166 permits certain estates that consist largely of an interest in a closely held business to elect to take a "loan" from the federal government for the payment of estate taxes. Specifically, IRC § 6166(a) permits an estate of a U.S. citizen/resident decedent, in which more than 35% of its adjusted gross estate (as defined under IRC § 6166(b)(6)) consists of closely held business interests, to defer the payment of its estate taxes for a period of five years and thereafter to make payments in equal annual installments over an additional 10-year period. The maximum amount of the estate tax that can be deferred and paid in installments under IRC § 6166 is the amount that will bear the same ratio to the estate tax imposed

(reduced by credits against the tax) as the closely held business amount bears to the amount of the adjusted gross estate. The "closely held business amount" is the value of the interest in a closely held business that qualifies under IRC § 6166(a)(1). IRC § 6166(b)(5). The first installment under IRC § 6166 must be paid on or before the date not more than five years after the date fixed for payment of the estate tax. Succeeding installments are to be made no more than one year after each prior installment.

Guidelines for Determining What Qualifies as an Interest in Closely Held Business for IRC § 6166 Purposes

Under IRC § 6166(b)(1), a decedent is considered to have owned an interest in a closely held business, if, immediately before the decedent's death,

the decedent had (1) an interest as a proprietor in a trade or business carried on as a proprietorship; (2) an interest as a partner in a partnership carrying on a trade or business, if 20% or more of the total capital interest in such partnership is included in determining the gross estate of the decedent, or such partnership had 45 or fewer partners; or (3) stock in a corporation carrying on a trade or business if 20% or more in value of the voting stock of such corporation is included in determining the gross estate of the decedent, or such corporation had 45 or fewer shareholders. The owner requirement referred to in (2) and (3) above was increased from 15 to 45 by the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (the "2001 Act"), which is scheduled to sunset for estates of decedents dying after December 31, 2010. Therefore, absent the enactment of new legislation, the owner requirement of 45 or fewer partners or shareholders will revert to its pre-2001 Act level of 15 or fewer partners or shareholders beginning on January 1, 2011.

As indicated above, IRC § 6166(b)(1) requires that the closely held business must be a "trade or business." The IRS pointed out in PLR 9832009 that IRC § 6166 was enacted to permit the deferral of the payment of the federal estate tax when, if such tax had to be paid at one time, it would be necessary to sell assets used in a going business and thereby disrupt or destroy the business enterprise. The IRS further indicated that IRC § 6166 was not intended to protect continued management of income-producing properties or to permit deferral of tax merely because the payment of tax might require the sale of income-producing assets, except when they formed a part of an active enterprise producing business income rather than income solely from the ownership of property. PLR 9832009. The IRS concluded in Rev. Rul. 2006-34, 2006-1 C.B. 1172, that IRC § 6166 applies only to active trades or businesses of the decedent, partnership, LLC, or corporation, and not to "the mere management of investment assets."

In determining the value of a

closely held business amount for purposes of IRC § 6166, IRC § 6166(b)(9)(A) provides that the decedent's interest can include only those assets used in carrying on the trade or business. The closely held business amount cannot include the value of any portion of the interest that is attributable to passive assets held by the business. Generally, the term "passive asset" means any asset other than an asset used in carrying on a trade or business. IRC § 6166(b)(9)(B)(i). For example, the portion of a business bank account that can be shown to represent nonbusiness funds will not constitute part of the closely held business amount. Treas. Reg. § 20.6166A-2(c)(2). A passive asset also includes any stock in another corporation, unless the stock is treated as held by the decedent by reason of a holding company election under IRC § 6166(b)(8) and qualifies under IRC § 6166(a)(1) as exceeding 35% of the decedent's adjusted gross estate. IRC § 6166(b)(9)(B)(ii). If, however, (1) a corporation owns 20% or more in value of the voting stock of another corporation, or such other corporation has 45 or fewer shareholders, and (2) 80% or more of the value of the assets of each such corporation is attributable to assets used in carrying on a trade or business, then such corporations shall be treated as one corporation for purposes of determining whether stock should be treated as a passive asset. For purposes of applying subclause (2) to the corporation holding the stock of the other corporation, such stock shall not be taken into account. The 2001 Act increased the number of shareholders from 15 to 45; with the sunset of the 2001 Act the number of shareholders will revert to 15 for estates of decedents dying after December 31, 2010.

Rev. Rul. 2006-34 examined the circumstances in which ownership of real estate will fall under the definition of "interest in a closely held business" under IRC § 6166. Among other things, the IRS will look to the following factors to determine whether the ownership of real estate constitutes an active trade or business or the management of investment assets: (1) the amount of time the decedent, or agents or

employees of the decedent, partnership, LLC, or corporation devoted to the business; (2) whether an office was maintained for related business activities and whether such office kept regular business hours; (3) the extent to which the decedent, or agents or employees of the decedent, partnership, LLC, or corporation were actively involved in finding tenants and negotiating leases; (4) the extent to which the decedent, or agents or employees of the decedent, partnership, LLC, or corporation provided services at the property (for example, landscaping, snow removal, and so on) beyond merely furnishing the premises to a lessee; (5) the extent to which the decedent, or agents or employees of the decedent, partnership, LLC, or corporation made, arranged for, or supervised repairs to the premises (including repairs performed by independent contractors); and (6) the extent to which the decedent, or agents or employees of the decedent, partnership, LLC, or corporation handled tenant repair requests. Although none of the above factors are on their own dispositive of an interest in a closely held business for IRC § 6166 purposes, to the extent the decedent's use of independent contractors or a property management company reduces the involvement of the decedent (or agents or employees of the decedent, partnership, LLC, or corporation) to the level of merely holding the property for investment, the IRS will not allow the interest to qualify under IRC § 6166. For a more detailed discussion regarding the use of IRC § 6166 for an estate owning real estate, see Kimberly Leach Johnson & Amalia Levit Todryk, *Planning for the Payment of Estate Taxes for Illiquid Estates Owning Real Estate—The Code § 6166 Deferral*, Prob. & Prop., Mar./Apr. 2009, at 32.

If the interest in a closely held business is a farming business, then for purposes of this 35% requirement the interest includes an interest in residential buildings and related improvements on the farm occupied on a regular basis by the owner or lessee of the farm or by employees for purposes of operating or maintaining the farm. IRC § 6166(b)(3).

In determining whether a decedent held a sufficient interest in a closely held business to take advantage of IRC § 6166, the following attribution rules apply:

1. stock or a partnership interest that is community property of a husband and wife (or income from such), or is held by a husband and wife as joint tenants, tenants by the entirety, or tenants in common, is treated as owned by one shareholder or one partner, IRC § 6166(b)(2)(B) (the application of this rule can reduce the number of shareholders or partners to make it easier to achieve the 45 or fewer partners or shareholders requirements of IRC §§ 6166(b)(1)(B)(ii) and 6166(b)(1)(C)(ii));
2. property owned, directly or indirectly, by or for a corporation, partnership, estate, or trust is considered as being owned proportionately by or for its shareholders, partners, or beneficiaries, IRC § 6166(b)(2)(C) (for purposes of the preceding sentence, a person is treated as a beneficiary of any trust only if that person has a present interest in the trust); and
3. all stock and all partnership interests held by the decedent or by any member of his family, within the meaning of IRC § 267(c)(4), is treated as owned by the decedent. IRC § 267(c)(4) provides that the family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

In addition to the above rules for closely held business interests, IRC § 6166(b)(7) provides for a special election that allows deferral on less favorable terms for certain estates that own capital interests in a partnership and any nonreadily tradable stock, which does not otherwise qualify under IRC § 6166(a)(1); IRC § 6166(b)(8) provides for a special election that allows deferral on less favorable terms for certain estates that own stock in a holding company; and IRC § 6166(b)(10) provides for a special election that allows deferral on less favorable terms for certain estates that own stock in a qualifying lending or finance business. IRC § 6166(b)(10) was enacted as part of the 2001 Act and is now scheduled to sunset for estates of decedents dying after December 31, 2010.

Interest in two or more closely held businesses, 20% or more of the total value of each of which is included in determining the value of the decedent's gross estate,

can be treated as an interest in a single closely held business. IRC § 6166(c). For purposes of the 20% requirement, an interest in a closely held business that represents the surviving spouse's interest in property held by the decedent and the surviving spouse as community property or as joint tenants, tenants by the entirety, or tenants in common is treated as having been included in determining the value of the decedent's gross estate. *Id.*

Election

An election to extend payment of the estate tax under IRC § 6166(d) must be made not later than the time the estate tax return is required to be filed, including extensions of time granted for filing. If the election under IRC § 6166 is made at the time the estate tax return is filed, then the election applies to both the tax due and to certain deficiencies. Treas. Reg. § 20.6166-1(a). If the election is made after the estate tax return is filed, then up to the full amount of certain later deficiencies may be paid in installments, but no amount of the tax determined to be due in the return may be paid in such installments. *Id.*

Treas. Reg. § 20.6166-1(b) states that an election under IRC § 6166(a) is made by attaching a notice of election to the timely filed estate tax return. This notice must include the following information:

1. name and taxpayer identification number of the decedent;
2. amount of tax to be paid in installments (absent this information, there is a presumption that the election shall be for the maximum amount payable, to be paid in 10 equal installments beginning on a date that is five years after the date prescribed for payment of the estate tax on the estate tax return);
3. date of the first installment (an executor can defer the initial payment of tax, but not the interest, for up to five years from the date prescribed for payment of the estate tax on the estate tax return; the first installment of tax need not be on the annual anniversary

of the original due date for payment, but it must fall on the date in any month that corresponds to the day of the month determined on the estate tax return);

4. number of annual installments in which the tax is to be paid;
5. list of properties shown on the estate tax return that constitute the closely held business interests; and
6. the facts that contributed to the determination that the estate is eligible for payment of estate taxes in installments.

Rev. Proc. 79-55, 1979-2 C.B. 539, sets forth the procedure for processing elections made under IRC § 6166, which provides that the IRS is responsible for determining whether an IRC § 6166 election meets the applicable requirements. If the election meets the requirements, no notice that the requirements have been met will be sent to the estate. If the election is rejected, the estate will be notified, and the executor can request consideration by the Appeals Office. The appellate determination will be regarded as the IRS's final decision. While the election is under consideration in examination or appeals, an executor can request that the issue be referred to the National Office for technical advice on the grounds that a lack of uniformity exists for the disposition of the issue or the issue is so unusual or complex as to warrant review by the National Office.

Before 1997, the Tax Court did not have jurisdiction over the denial of an IRC § 6166 election. See *Estate of Meyer v. Commissioner*, 84 T.C. 560 (1985). The Taxpayer Relief Act of 1997 added IRC § 7479, which allows estates to seek a declaratory judgment from the Tax Court on whether an IRC § 6166 election has been made, or whether the extension of time for payment has ceased to apply. The Tax Court may not, however, issue a declaratory judgment unless the estate has exhausted all administrative remedies. IRC § 7479(b)(2). See Rev. Proc. 2005-33, 2005-1 C.B. 1231, for IRS guidance on exhausting remedies before seeking a declaratory judgment under IRC § 7479.

Surety Bond or Lien

The IRS can require the estate to furnish a bond, which will not exceed twice the amount for which the extension was granted, under IRC § 6165 or a special lien on IRC § 6166 lien property in favor of the United States under IRC § 6324A. See IRC §§ 6166(k)(1) and (k)(2). In 2002, the IRS implemented a policy requiring a surety bond or a special lien under IRC § 6324A as a prerequisite to making an election under IRC § 6166. IRS Notice 2007-90, 2007-46 I.R.B. 1003. In *Estate of Roski v. Commissioner*, 128 T.C. 113 (2007), the Tax Court held that the IRS could not universally require estates electing to defer tax payments under IRC § 6166 and that such a requirement must be determined on a case-by-case basis, depending on whether the estate is likely to fail to make payments after the expiration of the automatic federal estate tax lien under IRC § 6324(a). Notice 2007-90 addresses the interim IRS procedures for determining, on a case-by-case basis, whether a surety bond or special lien is required for estates that have made an election to defer payment of estate taxes under IRC § 6166.

Notice 2007-90 required the IRS to look at the following three factors to make the determination, based on information contained in the estate tax return, attachments to the return, information obtained during an audit, and other available information as further enumerated in the Notice. First, the IRS will consider the nature of the closely held business under which the election was made, as well as the nature of the business's assets, relevant market factors that may affect the business, financial history, and managerial experience of the business. Second, the IRS will consider the expected manner and ability of making annual tax and interest payments and the likelihood of making such payments. Third, the IRS will consider the business's history of compliance with federal tax requirements.

On August 4, 2009, the IRS issued IRS SBSE Mem. (SBSE-05-0609-010) "Updating Procedures for Processing Certain Estate Tax Cases Involving Deferred Installment Payments" (the "Memorandum") for IRS Director,

Advisory, Insolvency, and Quality Director, Campus Compliance Services to provide interim guidance detailing the procedures for processing estate tax returns that include an election under IRC § 6166. As of June 1, 2010, the guidance issued under Interim Guidance (SBSE-05-0609-010) was incorporated into the Internal Revenue Manual (IRM) at §§ 5.5.8.5, 4.25.1, and 4.25.2. The IRM provides direction about the process for determining whether a surety bond or special estate tax lien under IRC § 6324A is required. The initial decision about whether a surety bond or special estate tax lien is necessary will be made by Advisory. In its decision-making process, Advisory is first directed to request that the estate voluntarily provide a surety bond, or a special estate tax lien, to secure the deferred estate tax. If the estate declines to provide a surety bond or a special estate tax lien, Advisory must then review all information available to it, including any information that has been filed with the IRS (for example, the estate tax return and accompanying information, and any other filings that the decedent or the decedent's estate, trust, or closely held business has made with the IRS), information available by public record or on the Internet, and such other necessary information that Advisory requests after reviewing the above. In making its determination Advisory must review and analyze the factors set forth in Notice 2007-90 discussed above and any other pertinent material. The IRM provides further details on these factors as well as providing details regarding the procedures for protests and appeals by estates that have been required to provide a surety bond or special estate tax lien.

"2 Percent Portion"

If an election is made under IRC § 6166, then a special interest rate of 2% per year is imposed on the "2 percent portion" of the extended tax payments. See IRC § 6601(j). The "2 percent portion" is the lesser of (1) the amount of the tentative tax that would be determined under the rate schedule set forth in IRC § 2001(c) if the amount on which such tentative tax is to be computed were the

sum of \$1 million, adjusted for inflation (for 2011, \$1.36 million), and the applicable exclusion amount in effect under IRC § 2010(c), reduced by the applicable credit amount in effect under IRC § 2010(c), or (2) the amount of the tax extended under IRC § 6166. See IRC § 6601(j)(2) and (3). Any tax not subject to the special 2% rate is subject to a rate equal to 45% of the annual interest rate established under IRC § 6621. See IRC § 6601(j)(1). In light of this special 2% rate, however, the estate may not take a deduction on interest paid under IRC § 6166 for either estate or income tax purposes. See IRC § 2053(c)(1)(D). With each installment payment of tax under IRC § 6166, a proportionate amount of both the "2 percent portion" and the tax subject to the 45% tax rate is reduced. See IRC § 6601(j)(4).

Deficiencies

Under IRC § 6166(a) and Treas. Reg. § 20.6166-1(c)(1), if a deficiency is assessed and no election was made at the time the estate tax return was filed, an executor can elect to pay that amount of the deficiency attributable to the closely held business interest in installments, provided that the estate qualifies for the IRC § 6166 election under the final determination of estate taxes (or agreed to after an examination of the return). IRC § 6166(h). In that case, only the portion of the deficiency attributable to the closely held business interest may be paid in installments under IRC § 6166. IRC § 6166(a) and Treas. Reg. § 20.6166-1(c)(3). The notice of such an election must be submitted to the IRS office where the estate tax return was filed no more than 60 days after the issuance of notice and demand for payment of the deficiency, and it must contain the same information as the notice of election described above. IRC § 6166(a)(2) and Treas. Reg. § 20.6166(c)(1). In addition, the notice must be accompanied by payment in the amount of tax and accrued interest to the date for payment of which has already arrived, plus any amount of unpaid tax and interest not attributable to the closely held business interest and neither eligible for extension nor previously extended under any other section of the IRC. See Treas. Reg. § 20.6166-1(f). Computation of interest payable in installments under IRC § 6166 is governed by the terms of IRC §§ 6601(j) and 6621. *Id.*; Treas. Reg. § 20.6166-1(c)(1).

Under Treas. Reg. § 20.6166-1(c)(2), if the executor makes an IRC § 6166(a) election (excluding a protective election) simultaneously with the filing of the estate tax return and a deficiency is later assessed, then the amount of deficiency allocable to the closely held business interest (but not accrued interest thereon) will be divided equally among the installments under the IRC § 6166(a) election, and, to the extent the date for payment of any such installment has already passed, such allocable portion of deficiency shall be due and payable on notice and demand.

Protective Election

An executor can make a “protective election” to defer that portion of estate tax attributable to the closely held business interest remaining unpaid at the time the final amount of tax is determined and/or any deficiency attributable to the closely held business interest by filing a preliminary notice of election with the estate tax return. Treas. Reg. § 6166-1(d). No more than 60 days after the final determination of estate taxes (or agreed to after an examination of the return), a final notice must be filed including the information described above for an ordinary IRC § 6166(a) election. Id. This final notice is to be submitted at the IRS office where the estate tax return was filed and accompanied by payment in the amount of tax and accrued interest the date for payment of which has already arrived, plus any amount of unpaid tax and interest not attributable to the closely held business interest and neither eligible for extension nor previously extended under any other section of the IRC. Id. Such a deferral is contingent on the final amounts meeting the requirements of IRC § 6166. Rules governing extensions under a protective election are found in IRC §§ 6161 and 6163.

Proration of Deficiency to Installments

If an election is made under IRC § 6166(a) to pay any part of the estate tax in installments, and a deficiency has been assessed, the deficiency will (subject to the limitation provided by IRC § 6166(a)(2)) be prorated to the installments payable under IRC § 6166(a). IRC § 6166(e). The part of the deficiency prorated to any installment not yet due and payable will

be collected at the same time as, and as a part of, that installment. Id. The part of the deficiency so prorated to any installment already due and payable shall be paid on notice and demand from the Secretary. Id. This subsection, however, shall not apply if the deficiency is from negligence, intentional disregard of rules and regulations, or fraud with intent to evade tax. Id.

Time for Payment of Interest

If the time for payment of any amount of tax has been extended under IRC § 6166, then interest is payable under IRC § 6601 on any unpaid portion of such amount:

- *Interest for first five years.* During the first five years after the date fixed for payment of the estate tax in accordance with IRC § 6151(a) interest shall be paid annually. IRC §§ 6166(f)(1) and 6166(f)(4).
- *Interest for periods after first five years.* After the first five years, or any shorter period selected by the executor under IRC § 6166(a)(3), interest payable on any unpaid portion of that amount is to be paid annually at the same time as, and as a part of, each installment payment of the tax. IRC §§ 6166(f)(2) and 6166(f)(4).
- *Interest in the case of certain deficiencies.* In the case of a deficiency that has been assessed after the close of the first five-year period, or such shorter period selected by the executor under IRC § 6166(a)(3), interest attributable to such five-year period, or such shorter period, as the case may be, as well as any interest assigned after those periods must be paid on notice and demand from the Secretary. IRC §§ 6166(f)(3) and 6166(f)(4).

Acceleration of Payment

The extension of time for payment of estate taxes under IRC § 6166 terminates, and the unpaid portion of the tax payable in installments is required to be paid, on notice and demand from the Secretary if there is (1) a disposition of the decedent’s closely held business

interest or a withdrawal of funds from the business, (2) undistributed net income in the estate, or (3) a failure to make payment of principal or interest on any installment. IRC § 6166(g).

Disposition of Interest; Withdrawal of Funds from Business

1. If 50% or more of any portion of an interest in a closely held business is distributed, sold, exchanged, or otherwise disposed of, or 50% or more of the value of the closely held business interest is withdrawn from the trade or business in money and other property attributable to such an interest, the deferral is terminated and the payment of tax is accelerated. IRC § 6166(g)(1)(A). For purposes of determining the 50% withdrawal amount, a redemption that qualifies under IRC § 303 is not treated as a distribution or withdrawal if an amount equal to the IRC § 303 redemption distribution is paid on the remaining balance of the federal estate tax on or before the date fixed for the first installment of the deferred estate tax due after the IRC § 303 redemption distribution, or, if earlier, on the date that is one year from the date of the IRC § 303 redemption distribution. IRC § 6166(g)(1)(B). For purposes of any subsequent determination of a 50% withdrawal amount, the value of the closely held business interest is reduced by the value of the stock redeemed in the IRC § 303 redemption. Id.
2. Corporate reorganizations and tax-free exchanges under IRC §§ 368(a)(1)(D), 368(a)(1)(E), and 368(a)(1)(F) do not accelerate the payment of the deferred estate tax. IRC § 6166(g)(1)(C). Any stock received in such an exchange shall be treated as an interest qualifying under IRC § 6166(a)(1). Id.
3. The transfer of property of the decedent to a person entitled by reason of the decedent’s death to receive such property under the decedent’s will, intestate

succession, or a trust created by the decedent does not accelerate the payment of the deferred estate tax. IRC § 6166(g)(1)(D). In addition, subsequent transfers of the property by reason of the death of the person who received the property from the decedent do not trigger acceleration so long as each transfer is to a member of the family (within the meaning of IRC § 267(c)(4)) of the transferor in such transfer. Id.

Undistributed Income of Estate

If an election is made under IRC § 6166 and the estate has undistributed net income for any taxable year ending on or after the due date for the first installment, the executor must, on or before the date prescribed by law for filing the income tax return for such taxable year (including extensions thereof), pay an amount equal to such undistributed net income in liquidation of the unpaid portion of the tax payable in installments. IRC § 6166(g)(2).

Failure to Make Payment of Principal or Interest

If any payment of principal or interest is not paid on or before the date fixed for its payment (including any extension of time), the unpaid portion of the tax payable in installments must be paid on notice and demand from the Secretary. IRC § 6166(g)(3). No acceleration occurs, however, if the estate pays the delinquent amount (calculated without the benefit of the favorable 2% interest rate under IRC § 6601(j)) within six months of the date of notice and demand from the Secretary. Id. In addition, to avoid acceleration the estate must pay a penalty equal to 5% of the amount due for each month, or partial month, after notice and demand and before payment of the delinquent amount. Id.

Application to the GST Tax— Special Rule for Certain Direct Skips

To the extent that an interest in a closely held business is the subject of a direct skip (within the meaning of IRC § 2612(c)) occurring at the same time as and as a result of the decedent's death,

then for purposes of IRC § 6166(a) (1) any generation-skipping transfer (GST) tax imposed by IRC § 2601 on the transfer of such interest is treated as if it were additional estate tax imposed by IRC § 2001. IRC § 6166(i).

Application to the GST Tax— Rule for Taxable Terminations

In PLR 200939003, the IRS determined that IRC § 6166 could not be used to defer GST tax imposed on a taxable termination. See also PLR 9314050. The IRS focused on IRC §§ 2661 and 6166(i). IRC § 2661(2) provides that all of the IRC's procedure and administration provisions, which include IRC § 6166, apply to GST taxes occurring at the same time and as a result of the death of the individual insofar as applicable and not inconsistent with provisions of the IRC's GST tax provisions. As discussed above, IRC § 6166(i) provides that deferral under IRC § 6166 is available to certain direct skips. The IRS pointed out that, to meet IRC § 6166 requirements, the closely held business interest's value in the estate must exceed 35% of the decedent's *adjusted gross estate*, which amount is arrived at by reducing allowable estate administration expenses and claims against the estate allowable under IRC §§ 2053 and 2054, and the amount that may be deferred is determined based on the values of the business interest and the adjusted gross estate. In the case of the taxable termination, IRC § 2622 provides that the amount of the GST tax is dependent on the *taxable amount*, which is the property subject to taxable termination reduced by a deduction similar to the deduction allowed under IRC § 2053 for amounts attributable to the property to which the taxable termination occurred. Based on this analysis, the IRS concluded that IRC § 2661(2) does not provide a basis for an IRC § 6166 election on a taxable termination and IRC § 6166 is inconsistent and not otherwise applicable with the GST tax on a taxable termination. Therefore, the IRS determined that in the absence of a specific provision, IRC § 6166 does not provide a basis for an IRC § 6166 election on a taxable termination.

In further support of its decision, the

IRS also pointed to the legislative history for the enactment of GST tax provisions, including both IRC § 2661(2) and § 6166(i), in support of its position. The legislative history discussed the coordination among the GST, gift, and estate taxes and specifically referred to the IRC § 6166(i) rule that allows deferral of GST taxes on direct skips occurring on the death of an individual, but it did not mention GST taxes in any other context. The legislative history provided that

[t]he bill also includes several provisions coordinating the generation-skipping transfer tax with the gift and estate taxes. The Code provisions governing administration of the gift and estate taxes also apply to the amended generation-skipping transfer tax. Estate tax rules apply to generation-skipping transfers occurring as a result of death, and gift tax rules apply in other cases.

...

The special rules under which estate tax attributable to interests in certain closely held businesses may be paid in installments also apply to direct skips occurring as a result of death.

H.R. Rep. No. 426, 99th Cong., 1st Sess. 827–28 (Dec. 7, 1985), reprinted in 1986-3 C.B. (Vol. 2) 256 (emphasis added).

Conclusion

IRC § 6166 presents an alternative to the various methods for providing liquidity to an illiquid estate discussed in Part 1 of this article. As with the other methods, before making a decision about whether an IRC § 6166 election is appropriate, the estate's fiduciary should analyze each option available, as each can have different tax and business consequences. When the security and acceleration provisions are not acceptable to an estate, the fiduciary should look to other options. If none of the other options is available, however, an estate can use the benefits of IRC § 6166. ■