Are All Revocable Trusts Eligible for a Step-up in Basis under the Modified Carryover Basis Rules?

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It looks like the political tax games in the Senate aren't going to end soon, and we'll be stuck with Internal Revenue Code Section 1022 and the modified carryover basis rules for most if not all of 2010. Senate Continues to Procrastinate Under Section 1022, which is effective only during 2010, the Executor or Personal Representative of an estate may increase the basis of certain assets up to $60,000 for nonresident aliens, and up to $1,300,000 for unmarried decedents who are not nonresident aliens.

Having already looked at Section 1022 and dealt with life estates (Why DOESN'T a Reserved Life Estate Get a Step-up in Basis under Internal Revenue Code Section 1022? and More about Whether Life Estates Are Eligible for a Step-up in Basis in 2010) and powers of appointment (Which Powers of Appointment Are Eligible for a Step-up in Basis in 2010 under the Modified Carryover Basis Rules?), I figured revocable trusts would be an easy topic, but it isn't, and the more I look at this statute the more illogical it appears.

To qualify for the step-up in basis under 2010 tax law, an asset must be considered to be owned by the decedent under Section 1022(d) and considered to be acquired from the decedent under Section 1022(e). Anything owned by a revocable trust established by the decedent would seem to be acquired from the decedent as a result of the decedent's death, but are those assets considered "owned" by the decedent? For some reason, Congress took pains to include "qualified revocable trusts" in Section 1022(d)(1)(B)(i) in the list of assets deemed owned by the decedent, and also in Section 1022(e)(2)(A) in the list of assets passing from the decedent. (A qualified revocable trust is simply a revocable trust that is elected to be treated as part of the decedent's estate for income tax purposes under Section 645(b)(1).) It seems that assets in all revocable trusts would qualify as an "inheritance" under Section 1022(e)(1), and also under Section 1022(e)(2)(B) where the decedent had reserved rights to "alter or amend," so why would Congress have specifically mentioned qualified revocable trusts? Is it possible that the specific inclusion of qualified revocable trusts in Section 1022(e)(2)(A) means that Congress didn't want other revocable trusts to be eligible for a step-up in basis?

The more logical conclusion is that Congress wanted Section 1022(e)(2)(B) to be a catch-all provision for trusts for purposes of the step-up, and that all revocable trusts are eligible for a step-up in basis. That conclusion leads to the further conclusion that Congress meant Section 1022(d)(1)(A) to be broadly interpreted, as qualified revocable trusts are mentioned in both Section 1022(d) and Secton 1022(e), and if Congress had meant the special rules in Section 1022(d) to be an exhaustive list, then there would have been no reason for Congress to have included other trusts in Section 1022(e)(2)(B).

To be conservative and assure the possibility of a step-up in basis for assets held in a revocable trust for someone who dies during 2010, it seems that the Executor or Personal Representative of the decedent's probate estate and the Trustee of the decedent's revocable trust should make the election under Section 645(b)(1) to treat the trust as a qualified revocable trust for income tax purposes. There is the possible risk that a failure to do so would result in no step-up, and the election provides a safe harbor for the step-up.

The same sloppy "thinking" in 2001 that caused this one-year tax law to take effect in 2010 is evident throughout Internal Revenue Code Section 1022. Who knows what other ideas Congress is working on that would affect estate planning; maybe we would all be better off if the Senate continues to procrastinate.